REPORTS OF INTERNATIONAL ARBITRAL AWARDS

RECUEIL DES SENTENCES ARBITRALES

Mixed Claims Commission (United States v. Germany) constituted under the Agreement of August 10, 1922, extended by Agreement of December 31, 1928

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

Decisions, Part Two

WATERMAN A. TAFT *ET AL.*
(UNITED STATES) *v.* GERMANY

(August 31, 1926, pp. 801-806.)

EVIDENCE: CIRCUMSTANTIAL EVIDENCE, REBUTTAL THROUGH DIARIES OF GERMAN SUBMARINES. — WAR: "SINKING WITHOUT TRACE". Loss of American vessel after departure on April 5, 1918, from New York to Campana, Argentina. *Held* that there is no evidence that vessel was destroyed through act of war. Evidence: see *supra*; alleged German practice of "sinking without trace" *held* not to deprive submarine diaries of evidential value: practice not established.

PARKER, *Umpire,* rendered the decision of the Commission.

This case is before the Umpire for decision on a certificate of disagreement of the National Commissioners.

The claimants on whose behalf it is put forward are and have been on all dates material herein American nationals. A recovery is sought against Germany for the value of the *Avon*, an iron sailing vessel of 1,573 gross tons, of American registry, which sailed from New York April 5, 1918, in charge of an experienced master with a crew of 19, carrying a cargo of about 2,000 tons of kerosene in tins and bound for Campana, Argentina. Diligent inquiries to discover any one who had seen or heard of the *Avon* since she got well under way out of New York have been barren of results. She was without auxiliary power; she had no wireless apparatus, which would have enabled her to send out distress signals in the event of fire or other disaster.

The claimants' effort is to establish by affirmative evidence a strong probability that the *Avon* was destroyed by a German submarine operating in the vicinity of the Azores or of the Cape Verde Islands. To that end, they have satisfactorily proven (1) that the *Avon*, although 34 years old, was staunch, well-found, and seaworthy, (2) that she was navigated by a competent and experienced master and manned by a capable and adequate crew, and (3) from reliable records, painstakingly compiled from reports of ships which were at the material times in waters contiguous to the course the *Avon* would almost certainly have taken, that on such course she would have encountered no storms or heavy winds. It is agreed that on this course the *Avon* could have encountered no minefields planted by either group of belligerents. This course has been carefully plotted in connection with the known operations of certain German submarines off the west coast of Africa and in the vicinity of the Azores, the Canary Islands, and the Cape Verde Islands, and also off the east coast of the United States, and it is urged that one of these submarines could have encountered the *Avon*, whose route lay through the western portion of the "barred zone" around both the Azores and the Cape Verde Islands, and that as these submarines were in those waters for the purpose of destroying enemy shipping the conclusion is justified that the *Avon* encountered and was destroyed by one of them. While this evidence is far from conclusive, it is under the

circumstances the best evidence within the claimants' reach and is entitled to be considered and weighed as tending to establish their contention.

In litigation between marine insurers and war-risk insurers where the facts were somewhat similar to the case here presented, the English courts have held (1) that notwithstanding the absence of evidence of unseaworthiness or unusual storms there was a presumption, even in time of war, that the loss was due to an ordinary marine peril, yet (2) that while the marine insurer must rebut this presumption it could do so by circumstantial evidence tending to establish that the loss was only consistent with some sudden overwhelming catastrophe not reasonably attributable to the ordinary perils of the sea and that the course of the missing vessel exposed her to the perils of war.[1] These cases, however, were all decided during the war at a time when reports from enemy sources of enemy action were not available and in the absence of all testimony from such sources negativing the conclusions drawn by the courts of destruction through enemy action.

To rebut the conclusions which the claimants would draw from the circumstantial evidence put forward by them, the German Agent has established by affirmative evidence that the only instruments of war which Germany or her allies at any time had in the waters off the west coast of Africa, in the vicinities of the barred zones around the Azores and the Cape Verde Islands, and off the east coast of the United States were seven transformed commercial submarine cruisers, designated U-151 to -157 inclusive. A full disclosure has been made to the Commission by the German Agent of the activities of each of these cruisers covering the period in which, according to the claimants' contention, the *Avon* might have encountered German submarines; and it is clearly established that only three of them were anywhere near the course asserted by claimants as that laid by the *Avon*. These three were designated U-151, U-153, and U-154 respectively. The war diaries of the first two have been produced accounting for their every movement, day by day and hour by hour, with the name of every ship sighted or encountered and the result of each encounter. Not only is the *Avon* not mentioned but it is affirmatively shown that neither of these cruisers could have encountered the *Avon* if she sailed a course approximating that laid down for her by the claimants.

The German cruiser U-154 was sunk off the southwest coast of Portugal by a torpedo from a British submarine on May 11, 1918. Her war diary cannot be produced by the German Agent because it was lost with her. However, it affirmatively appears from the war diary of the U-153 and from other sources that the two cruisers U-153 and U-154 were closely cooperating and were in daily contact during the entire time when, according to the claimants' contention, the *Avon* might have been encountered and sunk. The war diary of the U-153 reflects with considerable detail the daily activities of the U-154 during all of this period. The commanders of the two submersibles visited each other on their respective ships and together formulated plans and exchanged information and experiences. The war diary of the commander of the U-153 affirmatively establishes the fact that the U-154 not only did not report having sighted any ship fitting the description of the *Avon* but that she could not have

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[1] The British and Burmese Steam Navigation Company (Limited) and others *v.* The Liverpool and London War Risks Insurance Association and The British and Foreign Marine Insurance Company (Limited), K. B. Div., December 11, 1917, 34 L. T. R. 140; The Euterpe Steamship Company (Limited) *v.* The North of England Protecting and Indemnity Association (Limited), K. B. Div., July 25, 1917, 33 L. T. R. 540; Macbeth and Co. (Limited) *v.* King, K. B. Div., June 6, 1916, 32 L. T. R. 581.

encountered the *Avon* if the latter followed anything approximating the course laid for her by the claimants.

By these full disclosures, coupled with the statement made by the German Agent that the German Government has no information whatsoever concerning the *Avon* or of the destruction of any ship fitting her description during the period when she was probably lost, the circumstantial evidence relied upon by the claimants to establish destruction by a German submarine has been fully met and rebutted.

The claimants very earnestly contend that the war diaries of the German submarine cruisers, purporting accurately to reflect the contemporaneous record of their activities, are not entitled to credit in view of the alleged practice of German commanders to "sink without trace" —that is, not only to sink without warning, but wilfully to destroy not only vessels and their cargoes but their entire crews in such manner as to leave no physical trace or human witnesses and to make no record thereof. The German Government, through the German Agent, emphatically denies that such a practice was ever authorized or countenanced or ever in fact obtained. The claimants' counsel rely on the Luxburg letters and produce no other evidence to support this allegation. Not only does this record fail to establish this allegation but the evidence strongly indicates that had one of her submarines encountered and sunk the *Avon*, a vessel of one of her enemies, Germany would have been quick to advertise the fact rather than to suppress it. During this period of the war Germany was not only at great pains to make accurate records of all belligerent vessels destroyed by her but through her powerful wireless station at Nauen and otherwise to advertise to her own and her allied forces and to the world her successes in prosecuting her unrestricted submarine warfare, and far from understating she had every incentive for enlarging on the tonnage sunk.

The extensive record filed herein contains data and information with respect to the activities of the German submarine cruisers here dealt with assembled from all available sources by the Navy Department of the United States. These records in the main confirm those submitted by the German Agent. After referring to the movements of the only three German submarines which were anywhere near the Azores or the Cape Verde Islands on the dates material to the loss of the *Avon*, the United States Navy Department, over the signature of the Secretary of the Navy, referring to the loss of the *Avon* wrote, "it will be seen from the submarines' positions shown that there was little, if any, likelihood of this ship [the *Avon*] encountering any of the three German submarines whose positions are plotted."

In February, 1919, the claimants collected $102,500, the aggregate amount of all marine insurance, on the hull of the *Avon*, for "disbursements (only)" and for "disbursements and/or ship owner's liability". In connection with these payments, it assigned to the extent of $22,500 its interest in war-risk insurance written by one of the marine insurance companies, this being the amount of the marine insurance paid by this particular insurer. The total amount of war-risk insurance on the *Avon* was $150,000. The statement is made under oath by a representative of the claimants that in making these settlements with the marine insurance companies the "rights to sue later for the war risk insurance were reserved", that is, to the extent of $127,500, the amount remaining after deducting $22,500 war-risk insurance assigned. This transaction is explained by the statement "It was a question of taking $102,500 cash or suing to get $150,000 under the war risk policies." It is also explained that the marine insurers were anxious to retain the goodwill and the business of the claimants which influenced them in making settlements. No effort has been made by the claimants to enforce from the war-risk insurers the payment

of any amount. If the *Avon* was sunk by a German submarine or by other act of war, the claimants were not entitled to receive the $102,500 which they have received from marine insurers but were entitled to the full payment of $150,000 from the war-risk insurers. While the Umpire's conclusion has been reached independently of these transactions, still the insurance settlements made, as well as those which have not been made, are significant as in some measure reflecting the conclusions of the interested parties in weighing the probabilities of the cause of the loss of the *Avon* in the absence of positive evidence of such cause.

The record indicates that all available evidence tending however remotely to establish the loss of the *Avon* through an act of war has been diligently assembled and presented by able counsel. Weighing the evidence as a whole the Umpire finds that the claimants have failed to discharge the burden resting upon them to prove that the *Avon* was lost through an act of war.

Wherefore the Commission decrees that under the Treaty of Berlin of August 25, 1921, and in accordance with its terms the Government of Germany is not obligated to pay to the Government of the United States any amount on behalf of Waterman A. Taft and others, claimants herein.

Done at Washington August 31, 1926.

Edwin B. PARKER
Umpire.

ROBERT DAVIE TRUDGETT

(UNITED STATES) *v.* GERMANY

(August 31, 1926, pp. 818-822; Certificate of Disagreement by the National Commissioners, May 14, 1926, pp. 806-818.)

DAMAGES: PERSONAL INJURIES, PERSONAL PROPERTY TAKEN AND NOT RETURNED, LOST EARNINGS. — WAR: TREATMENT OF PRISONERS OF WAR, RESPONSIBILITY UNDER GENERAL INTERNATIONAL LAW, TREATY OF BERLIN, MEANING OF " CRUELTY, VIOLENCE, MALTREATMENT ". Claim for personal injuries (temporarily impaired health through confinement) suffered by American captain of captured and sunk vessel from June 16, 1917, when taken aboard German auxiliary cruiser, until February 25, 1918, when landed at Kiel, Germany, and for loss of personal property. *Held* that Commission not concerned with legality or illegality under general international law of claimant's capture, confinement and detention: Germany liable under Treaty of Berlin, claimant's seizure and imprisonment being acts of " violence " (Part VIII, Section I, Annex I, para. 2, Treaty of Versailles, carried into Treaty of Berlin). *Held* also that Germany not liable for loss of claimant's earnings. Damages allowed for personal injuries, personal property.

Certificate of Disagreement by the National Commissioners

The American Commissioner and the German Commissioner have been unable to agree as to the liability of Germany in the claim of Robert Davie Trudgett, Docket No. 4890, for damages on account of his treatment by German authorities while held as a prisoner, and also as to the value of personal property taken from him during his imprisonment, their respective Opinions being as follows:

OPINION OF MR. ANDERSON, THE AMERICAN COMMISSIONER

This is a claim on behalf of Robert Davie Trudgett for damages on account of his treatment by the German authorities while held as a prisoner, and for the value of personal property taken from him during his imprisonment, and also for loss of salary which he was prevented from earning during the time of his captivity.

As to the portion of the claim which comprises the loss of prospective earnings, the National Commissioners both agree that under the decisions hitherto rendered by this Commission Germany is not obligated under the Treaty of Berlin to make compensation for that portion of the claim.

The facts upon which the claim arises are briefly as follows:

The claimant, an American citizen, was on the 24th day of May, 1917, the master of the schooner *Winslow*, a vessel of American registry. On the day mentioned the *Winslow* sailed from Sydney, Australia, bound for Apia, Samoa, with a cargo consisting of 250 tons of coal, 1500 firebricks, and 100 cases of gasoline.

On June 16, 1917, when the schooner *Winslow* was about 10 miles off the coast of Raoul Island, Kermadec Group, in the Pacific Ocean, in latitude about 29 degrees south and longitude about 179 degrees west, she was captured by the German armed raider *Wolf*. The claimant and the crew of the *Winslow* were thereupon transferred to the *Wolf*, and the *Winslow* was taken to Raoul Island, where she was destroyed after the cargo was taken off.

The *Wolf* was a war vessel of about 5,000 tons displacement, with a crew of about 350 men.

The claimant and the cook of the *Winslow*, who was a Japanese subject, were treated as prisoners of war, and the claimant was placed in hold No. 4 between-decks with other prisoners of war already on the *Wolf*. The rest of the crew of the *Winslow*, who were all Scandinavians and of neutral nationality, were placed with other neutral prisoners in a special part of the deck with the crew of the *Wolf*.

No. 3 hold of the *Wolf* was at that time filled with mines and thereafter the *Wolf* proceeded to lay mines in Cook Strait, Bass Strait, and off Singapore. The place where the claimant was confined on the *Wolf* was very crowded and badly ventilated and whenever any other vessel was sighted the hatches were battened down, thus practically shutting off all ventilation.

During the latter part of August, 1917, the *Wolf* anchored in a harbor in the Dutch East Indies, within the territorial waters of the Kingdom of Netherlands, and remained there for a period of three weeks for the purpose of cleaning her bottom and stripping a captured British steamer, the *Matanuga*. During all the time that the *Wolf* was in said neutral territorial limits the claimant was kept under guard below decks except for a little while during the middle of the day.

Later the *Wolf* proceeded to the Arctic Ocean and during the months of December, 1917, and January, 1918, was off Iceland and Greenland. During all of this cruise the claimant was confined in the same quarters and permitted on deck only at intervals.

From the time of the capture of the *Winslow* in June, 1917, for a period of about eight months the claimant was given very little, if any, fresh food and was kept in a half-starved condition on account of the scarcity and poor quality of the food furnished. During this period there were approximately 400 captives on the *Wolf* in addition to its crew of 350 men, and by reason of the poor food furnished to the prisoners and the manner in which they were confined, scurvy broke out among them.

The *Wolf* entered German waters on the 17th of February, 1918, and remained there for the period of a week before any fresh food was given to the claimant. At the end of that week the claimant was taken ashore and sent to the German military camp at Karlsruhe, and later to the military camp at Heidelberg, and on May 1, 1918, to the military camp at Villingen, and on November 1, 1918, to Switzerland, and then was placed in the quarantine camp at Alleroy where he remained until December 14, 1918, when he proceeded to Brest, France, and from there was transported back to the United States.

The facts above stated are found in the sworn statements submitted by the claimant and they are not challenged or contradicted in any important particular by the evidence submitted by the German Agent. It is true that in the report submitted under date of July 14, 1924, by Captain Nerger, who was in command of the *Wolf* during this period, it is stated that the *Wolf's* " stern middle decks were high, roomy and well ventilated ", but he also says that " When during the last part of the voyage the prisoners (earlier than our own crew although the latter had been at sea from three to twelve months longer than the different groups of prisoners) were beginning to suffer from scurvy, I withdrew the small residue of fresh food still on board the H. M. S. *Wolf* entirely from our own crew and had it reserved for those prisoners who were ill or in danger of becoming ill." It thus appears that scurvy broke out first among the prisoners and from three to twelve months more quickly than among the crew, and from this it is reasonable to conclude that the breaking out of scurvy among the prisoners was due to the combined effect of the lack of fresh food and the reduced power of physical resistance to disease among them resulting from the confined and unhealthy condition under which they were obliged to live during the eight months cruise of the *Wolf*.

Captain Trudgett does not allege that he himself was attacked by scurvy, but he does show by a doctor's certificate dated August 26, 1919, that upon his arrival in New York in January, 1919, he submitted himself to medical care, that his general health was poor at that time, and that six months later he was still in the need of medical attention.

Among the provisions of the Treaty of Versailles which are incorporated in the Treaty of Berlin, Germany is required and undertakes to make compensation, under Article 232, " 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 aggressions " by sea ", among others, " and in general all damages as defined in Annex I hereto."

Annex I provides that —

" Compensation may be claimed from Germany under Article 232 above in respect of the total damage under the following categories:

* * * * * * *

" (2) Damage caused by Germany or her allies to civilian victims of acts of cruelty, violence or maltreatment (including injuries to life or health as a consequence *of imprisonment*, deportation, internment or evacuation, *of exposure at sea* or of being forced to labour), wherever arising, and to the surviving dependents of such victims.

* * * * * * *

" (4) Damage caused by any kind of maltreatment of prisoners of war."

In this case the civilian status of the claimant is beyond question, so that in his case category (2) is applicable as well as category (4).

If the claimant had been subjected during imprisonment on land to the same treatment to which he was subjected during his imprisonment at sea that

would unquestionably have constituted maltreatment within the meaning of that term as used in the provisions above-quoted.

The only excuse given by Captain Nerger in his statement above-mentioned for submitting the claimant to such treatment is that "Nautical military reasons forbade the landing of the detained persons before February 25, 1918 at Kiel." It appears nevertheless that in the latter part of August, 1917, the *Wolf* lay for a period of three weeks in a harbor in the territorial waters of the Kingdom of Netherlands in the Dutch East Indies. There certainly were no nautical military reasons which forbade the landing of the claimant at that time and at that place or at some other place in neutral territory, and there was no justification for the action of the captain in placing and detaining on a warship of only 5,000 tons some 300 or 400 prisoners in addition to a crew of 350 men, and carrying them for an eight months' voyage from tropical to arctic regions under conditions which any competent naval officer must have known were bound to produce physical suffering and disease.

Confining the claimant as a prisoner on a warship for an eight months' raiding cruise under the conditions which have been established in this case was not demanded by any existing military necessity and in any event was a departure from the recognized requirements of decent and humane treatment of prisoners, as defined in the 1899 Hague Convention II which was in force when this capture was made, and by Article XXIV of the Treaty of July 11, 1799, between the United States and Prussia, as revived by Article XII of the Treaty of May 1, 1828, and subsequently accepted by the German Government as binding upon the Empire. Furthermore by the Agreement of November 11, 1918, between the Governments of the United States and Germany concerning prisoners of war humane treatment is explicitly recognized and defined as the required standard for treatment of prisoners.

It follows, therefore, that any treatment of prisoners which violates the standards so declared must be characterized as maltreatment within the meaning of that term as used in the above-quoted extracts from the subsequent Treaties of Versailles and Berlin.

Captain Trudgett was already over fifty years of age at the beginning of his imprisonment on the *Wolf*, and even though the evidence on his behalf does not show that his maltreatment resulted in any permanent ailment or physical disability, nevertheless such specific evidence is not required to bring the case within the terms of the Treaty provisions. Germany is required to make compensation for any damage which has even caused by such maltreatment and it has been sufficiently shown in this case that the claimant suffered treatment of a character which at his age inevitably had the effect of impairing his health and reducing his vitality, thus not only reducing his capacity for earning a living and for enjoying the remaining years of his life, but also tending to shorten his life-expectation period.

In the opinion of the American Commissioner the amount of $1,500, which is claimed for the damage thus caused, is fully justified and should be awarded to the claimant with interest thereon from the 1st of November, 1923.

The claimant has presented in detail under oath the items and value of the personal property which was taken from him while he was a prisoner, which value he fixes at $419.00.

The National Commissioners agree that this personal property, in the circumstances of this case, does not come within the classification of "naval and military works or materials" for the loss of which a claim cannot be made. It is objected, however, on the part of Germany that among the documents submitted is a receipt from the German authorities for railway freight for personal luggage from Kiel to Karlsruhe amounting to marks 18.15, and it is inferred

from this that the claimant must have had some personal property when he left the *Wolf*. The point of this objection is that in the claimant's affidavit he alleges that all of his property was confiscated by the officers in charge of the *Wolf*, and if the statement ended there the objection might be tenable. The claimant's affidavit goes on to state, however, that this property was never returned and was totally lost to him, and a fair interpretation of the statement taken as a whole is that it was not returned to him when he left Germany at the end of his imprisonment and was totally lost for that reason.

The American Commissioner is of the opinion, therefore, that the entire amount of $419.00 claimed for the value of personal property lost should be awarded, with interest thereon from November 11, 1918.

Chandler P. ANDERSON

Opinion of Dr. Kiesselbach, the German Commissioner

The present claimant, the master of the American merchant schooner *Winslow*, is alleged to have sustained damages as the result of treatment to which he was subjected while a prisoner of war aboard the German cruiser H. M. S. *Wolf*. Claim is also made for the value of personal property alleged to have been taken from him at the time of his capture and for loss of earnings during the period of his detention. The National Commissioners are agreed that there can be no recovery for this last item of damage under Administrative Decision No. VII.

The claimant was made a prisoner of war on June 16, 1917, at the time of the capture and destruction of the *Winslow* by the *Wolf* off Raoul Island in the Pacific Ocean. He was detained aboard the *Wolf* eight months, until the end of her cruise at Kiel, in February, 1918, where he was discharged and taken to the prison camp at Karlsruhe. He was liberated and sent to Switzerland November 1, 1918, whence he later returned to his home in the United States.

The claimant's allegations as to mistreatment are confined to the period of his detention aboard the cruiser *Wolf*. These allegations have to do with the poor ventilation of the quarters assigned to him, the deficiency of fresh food, and the conditions resulting from the number of prisoners aboard the *Wolf*. It is further alleged that the result was to impair the claimant's health.

The claimant, in Exhibit VIII, specifically states that he was not subjected to abuse and rests his whole case upon the allegation that his health was impaired through lack of food, fresh and other kinds, and to the condition and kind of living and sleeping quarters furnished.

Viewed objectively, the claimant's contention is found to be in fact merely that detention on board the cruiser *Wolf* was a hardship in itself. It appears through the evidence that the claimant was treated with every consideration possible in the circumstances and at least as well as the crew of the *Wolf*. In the matter of food, the commander of the *Wolf*, Captain Nerger, states (Exhibit 5 annexed to the German Agent's Reply, paragraph 7) that "The food was for all persons named under No. 4 [that is, *all* prisoners] at least equal to that of our own crew * * *. The captains [of whom claimant was one] received frequently additional rations". The fact that "during the last part of the voyage" both prisoners and crew began to suffer from scurvy, due, no doubt, to deficiency of fresh green foods in the diet, is itself without point since the claimant did not suffer from the disease. It is Captain Nerger's testimony that "When during the last part of the voyage the prisoners * * * were beginning to suffer from scurvy, I withdrew the small residue of fresh food still on board the H. M. S. *Wolf* entirely from our own crew and had it reserved for those prisoners who were ill or in danger of becoming ill" — that is, the prisoners

were given the preference over the crew of the *Wolf* although it is clear from the testimony that the crew were also suffering from scurvy.

As to the quarters provided for the claimant aboard the *Wolf*, they were situated in the stern middle deck of the vessel, and had the same equipment as the crew quarters on the same deck forward in the bow (paragraph 5 of exhibit last cited), except for the lack of heating equipment. This deficiency was supplied by the installation of a good heating equipment before the *Wolf* left the warmer regions. In the same way, partitions were erected whereby the captains who were prisoners of war could have special quarters for themselves (*ibidem*, paragraph 4 c).

There is a conflict of testimony as to the ventilation of the prisoners' quarters. The commander of the *Wolf* testifies that the prisoners' quarters on the stern middle deck were " high, roomy and well ventilated " (*ibidem*, paragraph 5), while the claimant contends that they were very close and badly ventilated. In a later statement (Exhibit 8) he contented himself with the allegation that the ventilation was " not good."

Claimant's statement that the quarters furnished him were crowded may be true in so far as the space available on a raider of about 5,000 tons displacement with a naval crew of 350 men and with captives to the number of about 400 certainly was not abundant. But since only nationals of enemy states were considered as prisoners of war and since only such were lodged together in the stern middle deck of the *Wolf*, and since for instance in the case of the *Winslow* only two of the whole crew — the claimant and the Japanese cook — were of enemy nationality (Exhibit 3), the number of men located there can not have been excessive. This is corroborated by the fact that according to Commander Nerger's statement it was possible to provide special partitions for the captains, to which group claimant belonged.

As to the confinement of the claimant below decks when other vessels were approaching, this action was dictated by considerations of military necessity and was also in accord with international law. The Hague Convention of 1907, in Article V, recognizes that prisoners may be confined as an indispensable measure of safety while the circumstances which necessitates the measure continue to exist. The commander's action was obviously dictated by the desire to avoid mutiny or to prevent a warning to other craft. That it was from no desire to cause discomfort or hardship is shown by the fact that the *Wolf's* crew was frequently under the same restrictions at such times (the exhibit 5 mentioned above).

Like reasons dictated the action of the commander of the *Wolf* in restricting the prisoners to below decks under guard while in neutral waters in order to prevent their escape. International law recognizes that a prisoner may be " confined with such rigour as is necessary for his safe custody " (Hall's International Law, 7th Edition, page 428).

Moreover, it is clear from the evidence that at all other times the claimant was permitted on deck. Captain Nerger states that " The prisoners were always permitted to be on deck in the open air, unless there existed compulsory reasons against it, as for instance, if other vessels were approaching " (aforesaid Exhibit 5, paragraph 6). Claimant's original testimony (Exhibit 4) is substantially in accord with this version of the facts, for he restricts his allegation as to confinement below decks to the statement that he was so confined " whenever there was anything in sight from said raider ".

It is apparent from the testimony that the treatment of the claimant aboard the *Wolf* was in accord with the rules of international law, which require that prisoners of war should not be singled out and made to bear burdens not

imposed upon the forces of the captor — in other words, the test is like treatment of prisoners and troops.

This principle is recognized by all leading writers upon international law (see, for instance, Hyde's International Law, volume II, page 538) and is found embodied in Article 7 of the Hague Convention of 1907 already mentioned.

Further, by implication the validity of this rule is recognized in the decision of the Umpire in the claim of George L. Hawley, Docket No. 1322, where the Umpire said:

> " As an evidence of maltreatment emphasis is laid by the claimant on the use of paper bandages by the German hospital authorities in dressing his wounds, but there is no evidence that any other bandages were available, and it appears from the records in other cases before this Commission that German authorities were forced to use paper bandages in the dressing of wounds of German soldiers."

The ruling recognized that a hardship which arose from necessity and which was borne alike by the captured and the captors would not constitute " maltreatment ".

It is argued that the claimant would have been spared the discomfort incidental to his detention aboard the cruiser *Wolf* had he been released in a neutral port, and the American Commissioner sees " no nautical military reasons which forbade the landing of the claimant at that time and at that place or at some other place in neutral territory " and states that there was no justification for the action of the captain in placing and detaining on a warship of only 5,000 tons some 300 or 400 prisoners in addition to a crew of 350 men. The American Commissioner does not accept the explanation of the raider's commander that " Nautical military reasons forbade the landing of the detained persons before February 25, 1918 at Kiel." Now, it cannot be denied that in August, 1917, when the raider stopped in Dutch waters for three weeks, and in the winter of 1917-1918 the Allied Powers were the masters of the seas. If, therefore, the *Wolf*, being a *merchantman* with the character of a war vessel and with a naval crew and having an outward appearance which did not show her military and naval character, after a trip of many months in tropical waters was to be repaired and readjusted (by " cleaning her bottom and stripping the British steamer ", as claimant expresses it — Exhibit 2) in order to continue her perilous voyage, the only protection she had in the Dutch port and the only chance she got to escape through the British-controlled North Sea was to keep absolute secrecy. Thus it is self-evident that under all circumstances the only thing the commander was not allowed to do if he intended to fulfill his military and naval task was to release the captives on board the *Wolf*. The confining of the claimant on the warship during the stay in neutral waters was therefore, though a hardship, demanded by military necessity, certainly not a maltreatment.

There remains the question whether under the provisions of the Treaty of Versailles as cited by the American Commissioner Germany would be liable for an injury to life or health as a consequence of *imprisonment* or of *exposure at sea* even in the absence of maltreatment.

I do not think that the treatment of claimant by Germany could ever be brought under the term of " exposure at sea ", but I agree that it can be brought under the term of imprisonment.

But to apply the provisions of paragraph 2 of the Annex I following Article 244 it does not suffice that a person suffered an injury to life or health as a consequence of imprisonment, etc., but the injury to the imprisoned, deported, or interned person must be caused by an act of cruelty, violence, or maltreat-

ment. If it had been the intention of the framers of the Treaty to make Germany *generally* liable for injuries to life or health in the specific cases enumerated in paragraph 2, they would have said so in a general way and not by way of parenthesis to a provision establishing Germany's liability for acts of cruelty, violence, or maltreatment. The leading idea was to make Germany's liability for acts of cruelty, violence, or maltreatment in a specific sense as broad as possible: *wherever arising*. And to make this intention clear and certain they described the " wherever arising " — *id est*, of acts of cruelty, violence, or maltreatment — by expressly stating that they intended to include the consequence of such *acts*, if resulting in injuries to life or health, and *if* being a consequence of imprisonment, deportation, etc.

My conclusion therefore is that under the provisions of said Annex I in the absence of maltreatment the mere fact of the existence of an injury to health as a consequence of imprisonment, etc., does not establish Germany's liability.

Moreover I can not admit that claimant has suffered such injury to his health for which he would be entitled to claim compensation.

It is already noted that claimant himself was not attacked by scurvy.

In Exhibit 4 (answer to question 63) claimant says " The condition of my health at the present time [i. e., August 26, 1919] as the result of the experiences stated is fairly good." And the only medical affidavit submitted, executed the same day, is as follows:

" That Robert Davie Trudgett has been under my professional care since January 22, 1919; that he has an enlargement of the right epididymis, which is quite sensitive and painful at times; that his general health was poor at the time of his first visit to me."

This evidence makes no attempt to connect claimant's alleged ill health with his experiences aboard the *Wolf*; nor is there any evidence as to the nature of the malady or the pathological condition from which the claimant is alleged to be suffering other than a brief reference to a purely local condition not uncommon among men of claimant's years. Moreover, the medical examination in question was made eleven months after the claimant left the *Wolf*. There is no allegation that claimant required medical attention in the German prison camps during the nine months which he spent therein immediately following his discharge from the *Wolf*.

In answer to question 17 of the State Department's questionnaire (Exhibit 4) as to residence, he states that he was engaged in going to sea in United States merchant ships from *November 30, 1918*, to *June 26, 1919*, with San Francisco as his home port and Alameda, California, as his residence, and that he was returning from Germany to San Francisco from November 30, 1918, to January 15, 1919. This evidence, taken in connection with his statement that he worked his passage from France back to the United States in an American vessel, shows that upon his arrival at San Francisco he immediately found employment at his regular trade. This evidence is material on the condition of claimant's health at that time.

It seems a fair conclusion from the evidence that no impairment of the claimant's health has been shown.

The claim for loss of property is not disputed as to the amount of $185, the value of the claimant's sextant and marine glasses. The contention, however, that all his personal property was taken from him does not seem to be sustained by the evidence. The evidence submitted contains a " Quittung ", a receipt, for " Gepäckfracht " or excess baggage for personal use from Kiel to Karlsruhe, amounting to marks 18.15. The receipt is held out by claimant as being for *railway fare* from Kiel to Karlsruhe. As claimant was landed at Kiel and from

there was, according to his own statement, transferred directly to Karlsruhe and as the amount of marks 18.15 for freight on personal luggage indicates that claimant must have possessed a rather considerable amount of personal luggage, since the rate for passenger baggage is rather low, it is certain that the claimant was not stripped of " all his personal property " since leaving the *Wolf*. Such personal property as was taken from him by the commander of the *Wolf* was taken as prize because of its nautical nature. According to Captain Nerger's testimony, such property was turned over to the Imperial Dockyard at Kiel and a valuation there placed upon the sextant of marks 25, while the marine glasses were sold at auction for marks 130.

In view of the fact that it thus appears from the German records that the sextant and marine glasses were the only property seized and inasmuch as the claimant's testimony that he was stripped of all his personal property is shown by the above receipt to be inaccurate, the award for personal property should be limited to the amount of $185, the value placed upon the sextant and the marine glasses by the claimant.

This claim should therefore be dismissed except as to the claim for the sextant and marine glasses.

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 14, 1926.

Chandler P. ANDERSON
American Commissioner

W. KIESSELBACH
German Commissioner

Decision

PARKER, *Umpire*, rendered the decision of the Commission.

This case is before the Umpire for decision on a certificate of disagreement of the National Commissioners accompanied by their respective opinions. So far as necessary to a decision of this case the facts are as follows:

The American merchant schooner *Winslow* was captured and sunk by the German auxiliary cruiser *Wolf* on June 16, 1917. The claimant, an American national, who was master of the *Winslow*, and then 50 years of age, was taken and held a prisoner on board the *Wolf* from that date until on or about February 25, 1918, when he was landed at Kiel and sent at once to a German prison camp. He was held as a civilian prisoner of war in German prison camps, at Karlsruhe, Heidelberg, and Villingen successively, until November 30, when he was sent to Switzerland and placed in the quarantine camp at Alleroy, where he remained until December 14, 1918, when, on instructions of the military authorities he reported to the United States Consul at Brest, from which port he returned to the United States, arriving in New York January 8, 1919.

During the more than eight months' imprisonment of the claimant on board the *Wolf*, that vessel, in pursuit of its operations of laying mines and capturing enemy craft, cruised through the tropics, to the arctic regions, and back to Germany, under circumstances entailing numerous hardships both to its captives and to the members of its own crew. The quarters which the claimant was compelled to occupy with other prisoners of his rank and station were

necessarily cramped and frequently the ventilation was bad. The food was restricted in variety and quantity and most of the time no fresh or green foods were supplied. As a consequence a number of the prisoners and a part of the crew became ill from scurvy, although it does not appear from the record that the claimant suffered from this malady. It does appear, however, that as a result of claimant's confinement on the *Wolf* he suffered great discomfort and inconvenience and his health was temporarily but not permanently impaired and his vitality substantially reduced. There is no suggestion that claimant suffered from any indignities or abuse, physical or otherwise, or that he was wilfully subjected to any discomforts. On the contrary, it appears that he was lodged and fed approximately as well as the members of the crew of the *Wolf*, although when nearing a port or a ship he and the other prisoners were confined to their cramped and ill-ventilated quarters to prevent their communicating with the outside world. This Germany seeks to justify as rendered necessary by the very nature of the daring military operations of the *Wolf*, to the success of which secrecy of whereabouts, operations, and purpose was essential. Likewise the failure earlier to land claimant at either a neutral or a German port, the German Agent maintains, was justified by considerations of secrecy and nautical military strategy.

No complaint is made of the treatment of claimant on being landed at Kiel and thereafter held a prisoner. The claim for impairment of health is predicated wholly on his capture, confinement, and detention on the *Wolf* and the treatment there accorded him. It will not be profitable here to consider the legality or illegality as tested by rules of international law of such capture, confinement, and detention [1]. As this Commission has frequently held, Germany's liability in claims presented here is determined not by rules of international law but by the terms of the Treaty of Berlin irrespective of the legality or illegality of the act complained of.

Assuming without deciding that under the laws of war the considerations relied on by the German Agent justified the treatment accorded to claimant by Germany, nevertheless they do not enter as factors in determining whether or not such damages are embraced within those categories for which Germany is obligated to make compensation by the terms of the Treaty of Berlin, or the extent of the damage, if any, suffered by claimant as a consequence of such treatment. That Treaty provides (paragraph 2 of Annex I to Section I of Part VIII — Reparation — of the Treaty of Versailles, carried into the Treaty of Berlin) that Germany shall compensate for

" Damage caused by Germany or her allies to civilian victims of acts of cruelty, violence or maltreatment (including injuries to life or health as a consequence of

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[1] It is interesting to note in passing that during the Franco-Prussian War Count Bismarck vigorously denied that sailors found in merchant vessels can be made prisoners of war (see Hall's International Law, 7th edition, page 426, note). The generally accepted rule at that time seems to have been that sailors on board an enemy's merchant ship may be taken as prisoners of war because of their fitness for immediate use on ships of war. The claimant Trudgett was a noncombatant past fifty years of age and hardly available for military duty. It is not necessary here to decide how far that rule had, at the time of claimant's capture and enforced confinement, been modified, especially by Article 6 of the Hague Convention XI of 1907, which was formally ratified by most of the nations engaged in the World War, including Germany, which provides:

> " The captain, officers, and members of the crew [of a captured enemy merchant ship], when nationals of the enemy state, are not made prisoners of war, on condition that they make a formal promise in writing not to undertake, while hostilities last, any service connected with the operations of the war. "

imprisonment, deportation, internment or evacuation, of exposure at sea or of being forced to labour), wherever arising, and to the surviving dependents of such victims."

Does the claim here put forward fall within this provision? The Umpire decides that it does. This provision requires Germany to compensate for damage caused to civilian victims by Germany or her allies through acts of cruelty, violence, or maltreatment wherever arising. The terms " cruelty," " violence," and " maltreatment " are general. Ordinarily they connote the exercise of force by a human agency, frequently but not necessarily in such manner as to inflict injury through physical contact. However, violence may consist of the exercise of force, without physical contact, in such manner as to produce fear, terror, apprehension, or restraint. Realizing that the use of these general terms might give rise to controversy with respect to their scope and meaning, the draftsmen of the Treaty, without undertaking to enumerate all " acts of cruelty, violence or maltreatment " embraced within this category, and being careful not to exclude those not enumerated, expressly provided that damages to civilians caused by acts of cruelty, violence, or maltreatment should *include* " injuries to life or health as a consequence of " (*a*) imprisonment, (*b*) deportation, (*c*) internment or evacuation, (*d*) exposure at sea, or (*e*) being forced to labor. It may well be that Germany's act of imprisoning the claimant did not constitute either " maltreatment " or " cruelty " within the meaning of the provision quoted, but his seizure and imprisonment by Germany were certainly acts of violence. Any doubt which might have existed with respect to the impairment of claimant's health, directly attributable to those acts of violence, being embraced within this category is removed by the express provision that " injuries to life or health as a consequence of imprisonment " are included in " Damage caused by Germany * * * to civilian victims of acts of cruelty, violence or maltreatment " [2]. Here is an express enumeration of particulars embraced within the preceding general terms without, however, limiting the generality of such terms or excluding acts of the same nature not enumerated.

The claimant, a civilian American national, through acts of violence was seized and long imprisoned by Germany. As a consequence of such acts he suffered a temporary impairment of health. Injuries to the health of a civilian as a consequence of imprisonment are expressly included in the damages for which Germany must compensate. The claim therefore falls within the category above quoted fixing Germany's liability.

The claimant has not sought to exaggerate the hardships suffered by him or their consequence to his health or the amount of his damage as measured by pecuniary standards. The Umpire agrees with the American Commissioner that on this particular count an award should be made in favor of the claimant for the full amount claimed, namely, $1,500.

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[2] The British Reparation Claim against Germany under a schedule dealing with " injury to persons or injury to health of civilians " includes an item of 2,454 " internment " cases with damages aggregating £687,120. The Umpire prefers to believe that the British Government in presenting this claim construed paragraph 2 of Annex I to Section I of the Reparation provisions (Part VIII) of the Treaty quoted above as construed in this opinion rather than in accordance with the contention of the German Agent and the opinion of the German Commissioner herein. From the latter construction it would result that the British Reparation Claim embraces a large item for damages alleged to have been suffered by 2,454 interned British civilian victims of acts of Germany involving moral turpitude, acts wilful and malicious in their nature and impairing the health of the victims.

On the record presented the Umpire further finds that the personal property surrendered by the claimant to the agents of Germany and not returned to him was of the value of $419, the full amount claimed, for which Germany is liable.

As pointed out in the opinions of the National Commissioners, Germany is not liable under the Treaty to pay the other amount claimed herein, for the loss of claimant's earnings from the time of his capture to the date of return to his home.

Applying the rules announced in previous decisions of the Commission to the facts as disclosed by this record, the Commission decrees that under the Treaty of Berlin of August 25, 1921, and in accordance with its terms the Government of Germany is obligated to pay to the Government of the United States on behalf of Robert Davie Trudgett the sum of one thousand five hundred dollars ($1,500.00) with interest thereon at the rate of five per cent per annum from November 1, 1923, and the further sum of four hundred nineteen dollars ($419.00) with interest thereon at the rate of five per cent per annum from November 11, 1918.

Done at Washington August 31, 1926.

Edwin B. PARKER
Umpire

HARRISS, IRBY & VOSE (UNITED STATES) *v.* GERMANY

(August 31, 1926, pp. 822-827.)

SEA WARFARE: DESTRUCTION OF VESSEL BY MINE. — WAR: RESPONSIBILITY UNDER GENRAL INTERNATIONAL LAW, TREATY OF BERLIN; NEGLIGENCE. — DAMAGE: RULE OF PROXIMATE CAUSE. — DAMAGES: MARKET VALUE. — PROCEDURE: CONFIRMATION BY NATIONAL COMMISSIONERS OF AGREEMENT BETWEEN AGENTS. — EVIDENCE: REPORT BY GERMAN NAVAL OFFICER, TESTIMONY OF CAPTAIN, PILOT; PROBABILITIES. Destruction of vessel on February 19, 1915, by floating German mines. *Held* that there is no evidence that claimants or their agents did not exercise care of reasonably prudent man and that, therefore, Germany's act in planting mines was proximate cause of loss. *Held* also that Commission not concerned with legality or illegality of planting mines under general international law: Germany liable under Treaty of Berlin. Agreement between Agents on fair market-value of vessel confirmed by National Commissioners. Evidence: see *supra*.

PARKER, *Umpire*, rendered the decision of the Commission.

This case is before the Umpire for decision on a certificate of disagreement of the National Commissioners.

It is put forward by the United States on behalf of Harriss, Irby & Vose, claimants, a copartnership which in December, 1914, was and ever since has been composed of American nationals. An award is sought for the value of the American Steamship *Evelyn*, alleged to have been destroyed off the Dutch coast on February 19, 1915, by contact with a submerged mine planted by Germany. The *Evelyn* was an iron steamship, 32 years old at the time of loss, of 2,800 deadweight tons registered at the port of New York. She was in excellent condition and had a classification of *100 A-1 Lloyd's Register. The Agents of the United States and of Germany have agreed, confirmed by the National Commissioners, that the fair market value of this ship at the date of loss was $210,000. At that time her owners carried war-risk insurance on her to the amount of $100,000 which was collected in full, deducting which from the agreed market value leaves a net loss to the claimants of $110,000.

Germany's liability is denied by the German Agent because as alleged by him (1) it is not established that the mine which destroyed the *Evelyn* was planted by Germany and (2) the planting of the mine was not the proximate cause of the loss, which he alleges was proximately caused by the intervening negligence of the claimants and/or the master and/or the pilot of the vessel.

Much testimony has been introduced and much speculation indulged in by both Agents with respect to the exact location of the *Evelyn* when sunk and the nationality of the mine or mines which worked her destruction.

Without undertaking to review this testimony in detail, the facts as disclosed by the record are briefly these:

(1) From the report of Lieutenant-Commander v. Wallenberg of the German Navy of February 23, 1915, it appears that Captain Smith, master of the *Evelyn*, was very young but skillful.

(2) This was Captain Smith's first voyage on the *Evelyn*. Before sailing from New York on January 29, 1915, with a cargo of cotton for Bremen, he made inquiries from his owner's chartering agents and others and was advised by a master of one of the Savannah Line steamers who had just returned from a trip to Germany that he had taken the course via the coast of Holland in safety.

(3) Captain Smith also sought information as to the course at the office of the German Consul in New York, who sent him to some shipping agents where he was shown a copy of instructions issued by the German Admiralty on November 4, 1914, which prescribed that " All merchant ships bound for the Eider, Elbe, Weser and Jade must first steer towards Listertief-buoy. Ships bound for the Ems must steer directly toward the Ems." and that " Ships, to insure their own safety, are obliged, after leaving the Listertief-buoy, to be piloted." A previous notice gave the " approximate position of the Listertief-buoy " as 55° 3-3/4′ N. and 8° 17-1/2′ E.

(4) Captain Smith testifies that he was shown and had no instructions as to what route to follow to Listertief. He says he knew there were two routes, one up the east coast of England and via the Nase of Norway, and the other via the coast of Holland. He concluded to make inquiries from time to time and get all the information and advice he could from every available source; and testifies that he had no reason to believe that the instructions of the German Admiralty were permanent but considered that conditions might change by the time he reached the English Channel.

(5) He made careful inquiry of the British boarding officer at the Downs in the English Channel, where he arrived on February 15, and was shown two routes, one up the coast of England via Farn Island, the other across the Channel to the coast of Holland. The British boarding officer declined to recommend either as the safer course but did state that most American vessels bound for Germany had gone via Holland.

(6) Captain Smith made inquiries of the masters of steamers which were in the Downs at the time bound for Germany and all of them were taking the Holland route. He states that he considered that he could get the latest and most authentic information at Rotterdam with respect to the safest route to Bremen and could there obtain a Dutch pilot to take him if not to Bremen at least to the German line. He had in mind the provisions of the German Admiralty instructions of November 4 to the effect that ships bound for the Ems must steer directly toward the Ems and considered that he would be safe off the Dutch coast as far as the German boundary line.

(7) At Rotterdam, where he arrived February 15, he made inquiries of persons in the steamship business and secured a Dutch pilot who held himself out as an experienced North Sea pilot. This pilot laid a course along the Dutch coast to Bremen and stated that several other ships had taken this route

in safety. Captain Smith determined to rely on the judgment of this pilot as far as the trip along the Dutch coast was concerned, the pilot assuring him that they were almost certain to pick up a German patrol boat off the German coast and could obtain from it definite instructions about reaching Bremen. In the light of the information he had procured from various sources he concluded that the notice to steer for Listertief-buoy was for the purpose of there securing pilots, and as he had secured what he believed to be a competent pilot he did not believe it necessary to go so far north only to lay a course due south to the mouth of the Weser.

(8) The Dutch pilot testified that he told Captain Smith that Listertief-buoy was only the steering point for ships from the north, that is, for ships taking the alternative route which Captain Smith did not take, up the east coast of England and via the Nase of Norway, but that it was not necessary for ships taking the route along the coast of Holland to go up to Listertief and then down again to the mouth of the Weser.

(9) At 4:05 a. m. on February 19, when the *Evelyn* was still off the Dutch coast and some miles west of a prolongation of the German-Dutch boundary line and the mouth of the Ems, she struck a floating mine. Captain Smith was in the pilothouse at the time, having been up all night. He at once caused the boats to be lowered and all members of the crew to take their places therein. He was just leaving with the owner's money, ship papers, and some blankets, being the last to leave the ship, when at 4:20 the second explosion came. The first explosion was right ahead, the second on the starboard side.

(10) The ship settled and shortly thereafter sank. This was in latitude 53° 50′ N. longitude 6° 20′ E. or about ten miles E. N. E. of the position of Borkum Lightship.

(11) The evidence strongly indicates and the Umpire finds that the *Evelyn* was destroyed by floating mines which had been torn loose from their anchorage by storms or other mishaps or from rust. The heavy storms of January and the first part of February had caused mines to be torn from their moorings.

(12) There is much confusion in the record concerning a British minefield lying a short distance north of the point where the *Evelyn* was sunk and also a German barrage lying immediately south of this point. It now appears, however, that the British mines were not planted until long after February, 1915, and the German barrage was not planted until about October 1, 1915. Manifestly the destruction of the *Evelyn* cannot be attributed to either of these minefields.

(13) Sometime prior to the loss of the *Evelyn* the German Admiralty had planted and there then existed an extensive barrage beginning at a point west of Helgoland and extending in a general southerly and southwesterly direction toward but not reaching the mouth of the Ems. This minefield was nearer than any other to the point where the *Evelyn* was destroyed. The strong probabilities are and the Umpire finds that the mines which destroyed the *Evelyn* were floating German mines that had been torn loose from their moorings.

(14) It will serve no useful purpose to detail the evidence offered by the German Agent in support of his contention that the claimants were guilty of negligence in placing in command of the *Evelyn* an inexperienced master; that the master was guilty of negligence in disregarding warnings given by Germany to the shipping world and failing to follow the route prescribed by Germany in entering the German port to which the *Evelyn* was destined and in employing at Rotterdam an inexperienced pilot; that the pilot was guilty of negligence; and that the negligence of the claimants and their agents was the intervening and proximate cause of the destruction of the ship rather than the planting of the mine or mines. There is evidence tending to support these contentions.

It seems probable that had the *Evelyn* set her course along the east coast of Great Britain and the Nase of Norway and thence via Listertief to the mouth of the Weser she would have arrived in safety. Or it may well be that had she laid a true course for Listertief of 51° from Terschelling Lightship off the Dutch coast she would have reached there in safety, and after there taking on a German pilot have landed her cargo at Bremen by this roundabout course. Certain it is that it was to the interest of Germany that the *Evelyn* and her cargo should reach her destination. Viewing the acts of the claimants and their agents in retrospect, it is easy to point out measures which they might have taken, and which they failed to take, to insure greater safety in the navigation of the ship. But for obvious reasons it was extremely difficult at that time to procure dependable information with respect to shipping conditions. There is evidence in this record suggesting that the master of the *Evelyn* was wilfully misinformed and sent into a zone of danger by the enemies of Germany. Be this as it may, the master, after making diligent inquiry from time to time, was compelled to act upon his own judgment and responsibility. The Umpire finds that the evidence falls short of establishing the contention that under all the circumstances and conditions existing at the time the claimants and their agents failed to exercise that care which a reasonably prudent man similarly situated would have exercised in manning and navigating the ship.

Therefore the Umpire holds that Germany's act in planting the mine or mines which he finds destroyed the *Evelyn* was the proximate cause of her loss.

The question discussed by counsel dealing with the legality of the act of Germany in planting mines off the Dutch coast and beyond the limits of her territorial waters is not material here. As this Commission has frequently held, Germany's liability is determined by the provisions of the Treaty of Berlin rather than by the legality or illegality of her acts as measured by rules of international law.

Based on the foregoing findings of fact and the agreement of the Agents of the United States and of Germany, confirmed by the National Commissioners, with respect to the fair market value of the Streamship *Evelyn*, 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 Harriss, Irby & Vose, the claimants herein, the sum of one hundred ten thousand dollars ($110,000.00) with interest thereon at the rate of five per cent per annum from February 19, 1915.

Done at Washington August 31, 1926.

Edwin B. PARKER
Umpire

WALKER, ARMSTRONG & COMPANY
(UNITED STATES) *v.* GERMANY

(August 31, 1926, pp. 827-832.)

SEA WARFARE: DESTRUCTION OF VESSEL BY MINE. — WAR: NEGLIGENCE. — DAMAGE: RULE OF PROXIMATE CAUSE. — DAMAGES: MARKET VALUE. — PROCEDURE: CONFIRMATION BY NATIONAL COMMISSIONERS OF AGREEMENT BETWEEN AGENTS. Destruction of vessel on February 22, 1915, by submerged German mine. *Held* that there is no evidence that claimants or their agents did not exercise care of ordinarily prudent man and that,

therefore, Germany's act in planting mines was proximate cause of loss. Agreement between Agents on fair market value of vessel confirmed by National Commissioners.

(Text of decision omitted.)

GANS STEAMSHIP LINE (UNITED STATES) *v.* GERMANY

(August 31, 1926, pp. 832-836.)

EXPROPRIATION OF VESSELS: CHARTERER'S INTEREST IN VESSELS, SOVEREIGN POWER OF EXPROPRIATION. — DAMAGE: CAUSED IN PROSECUTION OF WAR; EXCEPTIONAL WAR MEASURES, MEASURES OF TRANSFER. Sixteen German vessels chartered by claimant between October 26, 1915 and December 18, 1916, to be delivered to her after conclusion of peace, but expropriated by Germany for transfer in property to Allies free from encumbrances etc. as required by Treaty of Versailles, Part VIII, Section I, Annex III, as carried into Treaty of Berlin. Claim for value of charterer's interest in vessels. *Held* that seizure and deprivation of claimant's rights do not fall within terms of Treaty of Berlin: (1) no damage caused in the prosecution of war (reference made to Administrative Decision No. I, see Vol. VII, p. 21): interest in vessels, in any case subject to Germany's sovereign power of expropriation, expropriated in pursuance of terms of peace dictated by victorious powers; (2) no exceptional war measures or measures of transfer (Treaty of Versailles, Part X, Section IV, Annex, para. 3).

PARKER, *Umpire*, rendered the decision of the Commission.

This case is before the Umpire for decision on a certificate of disagreement of the National Commissioners.

An award in the sum of $6,821,813.74 is sought on behalf of the claimant, Gans Steamship Line, an American corporation, being the alleged value of its interest as charterer in sixteen steamships, all owned by German nationals at the time the charters were entered into. The case presented by the claimant, briefly stated, is this:

(1) Between October 26, 1915, and December 18, 1916, during the period of American neutrality, the claimant entered into charter-parties with the German owners of sixteen German ships varying from a one-way voyage charter from the United States to Europe to twelve-month time charters, to run from the date of delivery of each vessel thereunder.

(2) In varying forms of expression the charters provided for delivery " after peace has been concluded and trading for German ships is free in all waters ", or " after official conclusion of peace ", or " after officially declared conclusion of peace ", or " after general conclusion of peace ", or similar expression.

(3) At the time the charters were fixed the vessels were tied up at different ports, among them Hamburg, Luebeck, Antwerp, Bergen, Bilbao, Cadiz, and Barcelona, and one was building at Stettin, another at Luebeck.

(4) Annex III to Section I of the Reparation Provisions (Part VIII) of the Treaty of Versailles required that " The German Government, on behalf of themselves and so as to bind all other persons interested, cede to the Allied and Associated Governments the property in all the German merchant ships ", described so as to include those on which claimant's charters were fixed. By

the same annex it was provided that " the German Government will: (*a*) Deliver to the Reparation Commission in respect of each vessel a bill of sale or other document of title evidencing the transfer to the Commission of the entire property in the vessel, free from all encumbrances, charges and liens of all kinds, as the Commission may require ".

(5) To fulfill these obligations the German National Assembly on August 31, 1919, enacted a law providing machinery for the acquisition through expropriation by the German Government of the ships which Germany was required to deliver to the Allied and Associated Powers through the Reparation Commission.

(6) The memorial filed on behalf of the claimant alleges that " Heretofore and on various dates during the year 1919 all right, title and interest, including the rights therein of claimant, to these steamers were seized by the German Government acting under the obligations assumed by said Government in the Versailles Treaty, Part VIII, Annex III, Section I, and claimant was deprived of said rights therein by said action."

The defenses put forward by the German Agent are: (1) that the allegations of the memorial do not bring the claim within the Treaty of Berlin; (2) that the claimant suffered no loss or damage; and (3) that a substantial part of the stock of the claimant corporation, at the times the charters were entered into and at all material times since, has been owned by German nationals and to this extent the claim is not impressed with American nationality.

The first only of these defenses will be considered. The allegation quoted in the preceding paragraph numbered (6) is the only ground upon which a recovery is sought against Germany and sharply presents the sole question certified to the Umpire, viz.: Do the acts of Germany complained of fall within the terms of the Treaty of Berlin?

The Umpire decides that they do not.

The financial obligation of Germany to the United States on behalf of its nationals arising under that Treaty with respect to so-called reparation claims were defined by this Commission in its Administrative Decision No. I.[1] Such claims are restricted to damages suffered by American nationals caused by Germany or her agents (or in certain categories by her allies or by any belligerent) in the prosecution of the war, or, as expressed in Article 231 of the Treaty of Versailles, such " loss and damage to which the Allied and Associated Governments and their nationals have been subjected as a consequence of the war imposed upon them by the aggression of Germany and her allies."

Manifestly Germany's acts, of which claimant complains, far from being acts of aggression, were acts of submission; far from being acts committed in the prosecution of the war, were acts performed to carry into effect the terms of peace imposed upon her by the victorious powers.

Assuming for the purposes of this opinion that the claimant had an interest in the ships which were expropriated by Germany and delivered to the Allied Powers through the Reparation Commission in pursuance of the provisions of the Treaty of Versailles, nevertheless that interest was when acquired and continued to be an interest in German ships subject to the sovereign power of expropriation by Germany in accordance with her laws. Germany not only acted within her sovereign power and in strict accordance with her laws but those very laws were enacted in pursuance of the terms of peace dictated by the victorious powers. It is not within the competency of this Commission to adjudicate the right if any to demand compensation which this claimant may have arising under the German statute of August 31, 1919, as applied by

[1] Decisions and Opinions, pages 1-3. (*Note by the Secretariat,* Vol. VII, pp. 21-22).

Germany in German territory, which demand must be governed by German municipal law, administered by German domestic tribunals, which are clothed with the exclusive power to administer justice within German territory where, as in this case, this sovereign power has not been expressly surrendered to an international tribunal or other agency.

But is it urged that if this is not a reparation claim as defined in Administrative Decision No. I it nevertheless falls within a category expressly excepted from that decision but embraced within the Treaty, namely, " claims arising out of the application of either exceptional war measures or measures of transfer as defined in paragraph 3 of the Annex to Section IV of Part X of the Treaty of Versailles." This contention is rejected.

Germany was required by Article 297 (*a*) of the Treaty immediately to discontinue and stay all exceptional war measures and measures of transfer with respect to the property, rights, and interests of nationals of the Allied or Associated Powers, and all such measures taken by Germany or the German authorities subsequent to November 11, 1918, were declared void (see 2nd clause of paragraph 1 of the annex last cited). So much of the Treaty definitions of these measures as are prospective in their scope apply to the Allied and Associated Powers but not not to Germany. But Annex III to Section I of part VIII of this same Treaty, in pursuance of which the acts of Germany here complained of were taken, compelled " The German Government, on behalf of themselves and so as to bind all other persons interested," to cede to the Allied Powers the German ships chartered by claimant. Reading these provisions together, it is manifest that the measures taken by Germany and here complained of were not exceptional war measures or measures of transfer, as those terms are defined in the Treaty which expressly stripped Germany of the power to take such measures subsequent to November 11, 1918. As heretofore pointed out, they were measures looking toward peace, not measures of war.

But it is urged that Article 304 of the Treaty of Versailles (carried by reference into the Treaty of Berlin) clearly confers jurisdiction on this Commission to adjudicate this claim. The particular provision of that article relied on reads:

" In addition, all questions, whatsoever their nature, relating to contracts concluded before the coming into force of the present Treaty between nationals of the Allied and Associated Powers and German nationals shall be decided by the Mixed Arbitral Tribunal."

The relevancy of this provision as applied to this case is not apparent. It is unnecessary here to determine whether this provision is restricted to claims arising between nationals of the Allied and Associated Powers and German nationals which are within the competency of the Mixed Arbitral Tribunals constituted under the Treaty of Versailles or whether it also embraces claims against the German Government. It will be noted in passing that many of the provisions of the Treaty of Versailles with respect to contracts concluded between former enemies (section V of Part X) have no application to the United States or its nationals (see Article 299 (*c*)).

This claim is put forward on behalf of an American national against the German Government. The agreement between the United States and Germany in pursuance of which this Commission is constituted confers jurisdiction on it to adjudicate all claims falling within those terms of the Treaty of Berlin which define the pecuniary obligations of Germany to the United States and its nationals. The only question here presented is, Under the Treaty of Berlin is Germany obligated to compensate this claimant for the damages which it alleges it sustained? This Commission has jurisdiction to decide this question and, if answered in the affirmative, to assess the damage. A negative answer

has already been given. Hence it follows that the demand, if any, not based on any provision of that Treaty, which claimant may have against Germany or anyone else does not fall within the jurisdiction of this Commission.

Wherefore the Commission decrees that under the Treaty of Berlin of August 25, 1921, and in accordance with its terms the Government of Germany is not obligated to pay to the Government of the United States any amount on behalf of the claimant herein on account of the acts herein complained of.

Done at Washington August 31, 1926.

Edwin B. PARKER
Umpire

S. STANWOOD MENKEN, ADMINISTRATOR OF THE ESTATE OF ALICE E. TESSON, DECEASED, AND OTHERS (UNITED STATES) *v.* GERMANY

ANDREW C. McGOWIN, ADMINISTRATOR OF THE ESTATE OF FRANK B. TESSON, DECEASED, AND OTHERS (UNITED STATES) *v.* GERMANY

(August 31, 1926, pp. 837-839.)

PROCEDURE: REHEARING AFTER FINAL JUDGMENT. — DAMAGE: (1) RULE OF PROXIMATE CAUSE, (2) SPECULATIVE DAMAGE. — DAMAGES IN DEATH CASES. — EVIDENCE: DECISION OF MUNICIPAL COURT OF LAST RESORT. Rehearing granted, although final decree entered before. Claims for alleged losses suffered by children by first marriage of woman, whose second husband carried life insurance payable to her in case she survived him, but who, according to decision of highest court of New York State, simultaneously with him went down with *Lusitania*. *Held* that wife's children cannot claim damages: (1) damage (insurance moneys lost) too remote, (2) Germany not liable for consequences of wife's not surviving her husband, but only for damages proximately resulting from her death, (3) no speculation permissible as to effect on her children of either her survival or her husband's.

PARKER, *Umpire*, made the announcement following:

In the cases numbered and styled as above, [a] which were consolidated, a final decree on the decision of the Umpire was entered by this Commission on February 21, 1924. [1] The claimants in the first case have presented through their attorneys to the American Agent a petition for rehearing praying for an additional award, which has been called to the attention of the Umpire. The rules of this Commission make no provision for a rehearing of any case in which a final decree has been entered. However, in deference to the earnest insistence of eminent counsel the Umpire has carefully reviewed the record in these cases in the light of the petition for rehearing. But he finds nothing in either the record or the petition which had not been taken into account and carefully weighed before the decision was rendered.

The instant petition apparently fails to take into account and correctly appraise the pertinent considerations following:

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[a] *Note by the Secretariat*, Original report: Docket Nos. 217, 293, and 544.

[1] Decisions and Opinions, pp. 361-364. (*Note by the Secretariat, not included in* Vol. VII).

(1) The claim is grounded on damages alleged to have been sustained by claimants resulting from the death of *Alice E. Tesson*, who, with her husband, went down with the *Lusitania*, the two (according to the decision of the highest court of the State of New York in *McGowin v. Menken*, 223 N. Y. 509) dying simultaneously. They both died intestate.

(2) Mrs. Tesson's separate estate amounted to approximately $5,400 and was inherited equally by the claimants William, Charles, and Roy Atkins, *her* sons of a former marriage. Mr. Tesson's separate estate, supplemented by insurance on *his* life collected by his administrator, aggregated $22,828.80, which was inherited by *his* mother, brother, and two sisters.

(3) At the time of their deaths Mrs. Tesson was 60 years of age and her husband 49 and his life expectancy therefore much greater than hers.

(4) Mrs. Tesson derived no income from her personal efforts and it is not established that she possessed any pecuniary earning power. Such contributions as she made to her children were made from her husband's earnings. Her two eldest sons, William and Charles, were 39 and 38 years old at the time she died and were able-bodied and had domestic establishments of their own. They were not dependent upon their mother to any extent. The contributions which she made to them were in the nature of occasional gifts, alleged to average $300 and $200 per annum to William and Charles respectively.

(5) It was *Mr. Tesson's* death that cut off the source of the contributions which their mother had made to these three claimants, who were not his children.

(6) The argument that the claimants through their mother's death have lost the insurance on Tesson's life, which was payable to her in the event she survived him, aside from being in legal contemplation too remote to support a claim for damages, ignores the realities. Tesson and his wife died simultaneously. His life expectancy was greater than hers. He made no provision that the policies should be payable in whole or in part to the claimants or any of them in the event his wife did not survive him. The payments were in fact made to *his* heirs. The argument put forward on behalf of these claimants amounts to a complaint that one group of American nationals (Tesson's heirs) benefited at the expense of another group of American nationals (these claimants) because Mrs. Tesson died simultaneously with her husband. Germany cannot be held liable because she did not survive him, but only for damages suffered by claimants proximately resulting from *her* death.

(7) It is not permissible to speculate with respect to the pecuniary effect on claimants had their mother survived Tesson or had Tesson survived her. The fact is, as a competent court of last resort has found, that they died simultaneously and the claimants' demand is based on the pecuniary damage suffered by them resulting from their mother's death.

(8) But if it were competent for this Commission to indulge in such speculations they would not lead to a different result. Had Tesson been lost with the *Lusitania* and his wife survived, it is apparent that her interest in his small estate and her smaller estate, supplemented by the insurance on his life which was for her benefit should she survive him, would scarcely have provided for her own needs and would not have put her in a position to make any substantial contributions to her sons. On the other hand, had Tesson survived his wife the record does not justify the conclusion that his contributions to the sons of his wife would have exceeded the equivalent of the award made.

(9) Notwithstanding this state of the record the Umpire in his opinion of February 21, 1924, said: " It is evident from the record that *if either* Tesson or his wife had lived her crippled son Roy would probably have continued to

receive small contributions of not less than $25 per month for his maintenance and support." An award was accordingly made on behalf of this son Roy, who was 28 years of age when his mother died, in the sum of $5,000 and a further award on behalf of the administrator of Mrs. Tesson's estate for $2,325, the value of her personal property lost, with interest on both amounts.

(10) In this state of the record no award was justified on behalf of Mrs. Tesson's sons William Atkins and Charles Atkins.

The petition is found to be without merit and is hereby dismissed.

Done at Washington August 31, 1926.

Edwin B. PARKER
Umpire

AMERICAN-HAWAIIAN STEAMSHIP COMPANY (UNITED STATES) *v.* GERMANY

(September 30, 1926, pp. 843-848.)

SEA WARFARE: DAMAGE TO, DESTRUCTION OF, VESSEL BY MINE, SUBMARINE. — WAR: RESPONSIBILITY UNDER GENERAL INTERNATIONAL LAW, TREATY OF BERLIN. — DAMAGES: (1) LOSS OF USE, (2) MARKET VALUE. — INTERPRETATION OF TREATIES: INTENTION OF PARTIES. — PROCEDURE: CONFIRMATION BY NATIONAL COMMISSIONERS OF AGREEMENT BETWEEN AGENTS. Damage to hull of American vessel by German mine on December 18, 1916, followed by sinking by German submarine on July 10, 1917. Claim for loss of use pending repairs, and for value of vessel, respectively. *Held* that under Treaty of Berlin, Germany not liable for loss of use or enjoyment of property injured but not destroyed outside German territory through act of war (reference made to Administrative Decision No. VII, see Vol. VII, p. 203): (1) Commission not concerned with Germany's liability under general international law (according to which loss of profit from, or use of, vessel pending repairs of injuries resulting from maritime tort is proper element of damage to be taken into account in determining tort feasor's liability): Germany's liability limited by Treaty of Berlin, (2) intention of parties to Treaty of Berlin with respect to provisions of Treaty of Versailles embodied therein by reference, shown by intention of parties to Treaty of Versailles as authoritatively expressed by Reparation Commission, whose decisions, though not binding on Commission, are entitled to great weight. Agreement between Agents on fair market value of vessel confirmed by National Commissioners. Damages allowed for loss of vessel.

Bibliography: [a] Kiesselbach, *Probleme*, pp. 35, 120.

PARKER, *Umpire*, on a certificate of disagreement of the National Commissioners delivered the opinion of the Commission.

This case is put forward on behalf of the claimant, an American corporation, the owner of the American Steamship *Kansan*, to recover damages on two distinct counts, the first arising out of an injury to the hull of that vessel when she struck a German mine in December, 1916, and the second resulting from her destruction by a German torpedo in July, 1917.

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[a] References in this section are to publications referred to in the bibliography in Vol. VII, p. 7, to be augmented with Woolsey, L. H., "The Sabotage Claims against Germany", A.J.I.L., Vol. 34 (1940), pp. 23-35, and to the Annual Digest.

From the record it appears that the *Kansan* sailed from Boston on December 6, 1916, with a general cargo for St. Nazaire. On December 18, at a point about eight miles distant from St. Nazaire, she struck and was seriously damaged by a German mine. Temporary repairs were made at St. Nazaire which were completed and made permanent at New York. The vessel was again seaworthy and ready for use on June 22, 1917. The physical damage to the hull was fully covered by insurance and no claim is here made for the cost of repairs for which through such insurance the claimant has been fully reimbursed. A consequential damage suffered by the claimant was the loss of the use of the vessel for a period of 156 days and a claim is here put forward for approximately $512,000, the amount of the alleged damage resulting therefrom.

On June 28, 1917, the *Kansan* with a general cargo sailed from the port of New York, again bound for St. Nazaire. On July 10 she was torpedoed and sunk by a German submarine off the French coast. The American and German agents have agreed that the fair market value of the *Kansan* at the time of her destruction was $3,268,564: that the war-risk insurance received by the claimant on account of her loss was $2,318,564; and that under the rules established by the decisions of this Commission the net amount of damage suffered by the claimant resulting from her loss is $950,000 with interest thereon from November 11, 1918. This agreement has been confirmed by the National Commissioners as the basis of an award on this count.

There remains for consideration only the claim for the loss of the use of the vessel pending the repair of her physical injury. This clearly presents the question. Under the Treaty of Berlin is Germany liable for the loss of the use or enjoyment of property injured but not destroyed outside of German territory through an act of war? The Umpire holds that she is not. The reasons for this decision are fully developed and foreshadowed in Administrative Decision No. VII. Suffice it here to point out that (save in cases arising in German territory) the provisions of the Treaty of Berlin defining Germany's obligations to compensate for property injured or destroyed limit such obligations to physical or material damage to tangible things and do not extend them to damages in the nature of the loss of profit, the loss of use, or the loss of enjoyment of the physical property injured or destroyed. It is quite true that this treaty rule does not follow that established by the jurisprudence of England and of America to the effect that the loss of profit from or the use of a vessel pending repairs of injuries resulting from a maritime tort is a proper element of damage to be taken into account in determining the amount of the tort feasor's liability. But the Treaty of Berlin is this Commission's charter, and its terms establish the rules which must be applied by this Commission to all cases presented to it. The exhaustive review of the American and English cases forcefully presented by able counsel in the briefs filed herein are not particularly helpful in arriving at the intention of the parties as expressed in the pertinent provisions of that Treaty. The soundness of such decisions is not questioned, and the principles they announce would be here applied if Germany's liability had to be determined either by rules of municipal law obtaining in the jurisdiction of the cases cited or by rules of international law in the absence of a treaty fixing the basis of liability. But, as has been repeatedly pointed out in the decisions of this Commission, the United States, as well as the other Allied and Associated Powers, recognized by the express terms of the Treaties that Germany's resources were inadequate to make complete reparation for all war damages, and her liability is limited to damages of the nature defined by the treaty terms, without regard to the legality or illegality or the other qualities of the acts resulting in the damages complained of. In Administrative Decision

No. VII this Commission held that the Treaty of Berlin does not place upon Germany a heavier burden with respect to damage or injury to the persons or property of American nationals than that placed upon her by the Treaty of Versailles.[1] The reasons leading to this conclusion were there fully set forth and it would not be profitable to repeat them here. But in arriving at the intention of the parties to the Treaty of Berlin the intention of the parties to the Treaty of Versailles in dealing with the same or similar matters, as that intention has been expressed by the Reparation Commission, the agency empowered to declare it,[2] may be profitably considered.

On March 4, 1921, the Reparation Commission, constituted under the provisions of the Treaty of Versailles, in an unanimous decision formally interpreting that Treaty held that while Germany was obligated to compensate for the value of property destroyed or converted, or for the cost of repairing a material injury short of destruction, where such destruction, conversion, or injury resulted from acts of Germany or her allies or directly in consequence of hostilities or of any operations of war by either group of belligerents, nevertheless Germany was not obligated to compensate for the loss of enjoyment of or profit from such property.[3] Applying this rule to the devastated regions of north and northeastern France, it results that Germany is not liable for the loss by the French nationals of the use of their factories and industrial plants in the "occupied territory" during the period of German occupation, or during the period of reconstruction following the Armistice, sometimes extending over several years; that Germany is not obligated to compensate for the loss of the use of their lands suffered by the French farmers in the devastated regions during the war and for the period thereafter required to bring them back to productivity through fertilization or otherwise; and that the compensation to be made by Germany for account of the landowners whose orchards, plantations, and vineyards were destroyed is limited to the cost of replanting, plus the shrinkage in value of the land after replanting as compared with its value had it not been damaged.[4] This rule applies to all devastated regions of France, Belgium, Italy, and elsewhere.

The shipping losses, which constitute a substantial portion of the Allied Reparation Claim against Germany, as originally prepared and presented by the maritime services of the respective Powers included damages suffered through the detention of ships from any cause. But the Reparation Commission unanimously decided (the British member of the Commission being particularly clear and emphatic in his statements in support of the decision) that Germany was not obligated to compensate for the heavy damages suffered by Allied nationals through the loss of the use and enjoyment of their vessels damaged or detained by the enemy, and by the application of this decision eliminated from the British shipping claim items aggregating in amount £46,930,000.[5] Items of a similar nature but for much smaller amounts embodied in the Italian, Japanese, Greek, Portuguese, and Brazilian shipping claims were by the application of this decision likewise eliminated.

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[1] Administrative Decision No. VII, Decisions and Opinions, page 320. (*Note by the Secretariat*, Vol. VII, p. 235).

[2] Paragraph 13 (*f*) of Annex II to Section I of Part VIII of the Treaty of Versailles.

[3] Decision No. 998 of the Reparation Commission, dealing with "Claims for loss of enjoyment", embodied in its Minutes No. 146, March 4, 1921.

[4] Minutes No. 172 of the Reparation Commission, April 15, 1921.

[5] Joint Report of the Maritime Service and the Valuation Service on maritime losses dated April 20, 1921, Annex 735-j, being a continuation of Annex 735-g, of the records of the Reparation Commission.

While the decisions of the Reparation Commission constituted under the Treaty of Versailles are not binding on this Commission, nevertheless in seeking the intention of the framers of the Treaty of Berlin with respect to provisions of the Treaty of Versailles embodied therein by reference the decisions of the Reparation Commission construing these provisions, taken long prior to the signing of the Treaty of Berlin and presumably in the minds of the parties to that Treaty at the time of its conclusion, are entitled to great weight. Especially is this true when, as in the instances cited, the decisions were unanimous, were taken a comparatively short time after the Treaty became effective, and denied to the nations whose members composed the Commission the right to demand of Germany extremely heavy payments which it was believed by the most exacting of the victorious Powers were not included in her Treaty obligations and had they been so included would have swelled the reparation demands against Germany far beyond her capacity to pay.

Counsel for claimant cite several decisions by Mixed Arbitral Tribunals constituted under the Treaty of Versailles in support of the contention that Germany is liable for the loss of use of property requisitioned or detained by Germany *in German territory*. As pointed out in Administrative Decision No. VII at page 344,[b] such cases are within the " Economic Clauses " (Part X) of the Treaty, which deal with enemy property in German territory, and under which rules for measuring damages obtain different from those applicable to the " Reparation Provisions " (Part VIII) of the Treaty. Not only was Germany directly and solely responsible for what happened within her territorial limits, but she and her nationals in the cases cited enjoyed the use of the requisitioned property, for which use she was required to pay. The Reparation Commission clearly distinguished between damages suffered by Allied nationals on account of requisitions, sequestrations, and other war measures applied by the German authorities in German territory and similar measures applied by German authorities in territory invaded by German forces. Claims belonging to the first class were not included in the reparation claims but fell within the jurisdiction of the Mixed Arbitral Tribunals constituted under Article 304 in Part X of the Treaty; while claims belonging to the second class were dealt with by the Reparation Commission as reparation claims under the provisions of Part VIII of the Treaty.[6] While claims on behalf of American nationals embraced within both classes mentioned fall within the jurisdiction of this Commission, the distinction between them is recognized and will be applied. Nothing herein contained will be taken as affecting the right of the United States to recover on behalf of its nationals for the loss of the use or enjoyment of property seized and held or used by Germany in German territory.

The claimant's ship was injured by contact with a German mine off a French port. The claimant has been fully reimbursed through insurance for the cost of repairing the material injury wrought. The Umpire holds that under the Treaty of Berlin Germany is not obligated to make compensation for claimant's loss of the use of its vessel pending repair. This item of the claim is rejected. Germany is, however, obligated to pay the net loss sustained by the claimant resulting from the destruction of the *Kansan* by a German submarine on July 10, 1917.

Applying the rule herein announced and others established by the decisions of this Commission to the facts as disclosed by the record herein, the Commission decrees that under the Treaty of Berlin of August 25, 1921, and in accord-

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[b] *Note by the Secretariat*, Vol. VII, p. 251.

[6] See letter which the Reparation Commission addressed to the President of the Franco-German Mixed Arbitral Tribunal September 15, 1922.

ance with its terms the Government of Germany is obligated to pay to the Government of the United States on behalf of American-Hawaiian Steamship Company the sum of nine hundred fifty thousand dollars ($950,000.00) with interest thereon at the rate of five per cent per annum from November 11, 1918.

Done at Washington September 30, 1926.

Edwin B. PARKER
Umpire

TIMANDRA SHIPPING COMPANY (UNITED STATES) *v.* GERMANY

(January 5, 1927, pp. 859-860.)

EVIDENCE: CIRCUMSTANTIAL EVIDENCE, REBUTTAL THROUGH DIARY OF GERMAN RAIDER, TESTIMONY. — WAR: "SINKING WITHOUT TRACE". Loss of American vessel after departure on March 6, 1917, from Norfolk (Virginia) to Campana, Argentina. Alleged "sinking without trace" by German raider. *Held* that there is no evidence that vessel was destroyed through act of war. Evidence: see *supra*.

PARKER, *Umpire*, rendered the decision of the Commission.

This case is before the Umpire for decision on a certificate of disagreement of the National Commissioners. It is put forward on behalf of the Timandra Shipping Company, which was on all material dates an American corporation. The claim is impressed with American nationality. A recovery is sought against Germany for the value of the American Ship *Timandra*, an iron sailing vessel, without auxiliary power, constructed at Glasgow in 1885, which on March 6, 1917, cleared from the port of Norfolk, Virginia, for the port of Campana (Buenos Aires), Argentine Republic, with a cargo of coal and so far as appears from this record has never since been heard from.

The claimant has sought to prove that the loss of the *Timandra* with all hands on board did not result from ordinary marine perils. To that end evidence has been offered tending to prove, and the Umpire finds, that the *Timandra* was staunch, well-found, and seaworthy, navigated by a competent and experienced master, and manned by a capable and adequate crew. Evidence in the form of weather reports tends to indicate that the *Timandra* on this particular voyage, had she pursued the usual route to her destination, would have encountered no unusual storms. The claimant contends that the *Timandra* was due to reach the equator about April 1 and that the strong probabilities are that about that time and place she encountered the German raider *Seeadler* and was sunk by the latter with all hands without trace.

In response to the highly speculative evidence offered in support of this contention the German Agent has pointed out that a state of war between the United States and Germany was not declared to exist until April 6, 1917, and that the *Timandra*, being neutral, would not have been molested had the *Seeadler* actually encountered her on or about April 1; that the German orders for prosecuting an unrestricted submarine warfare had no application to German cruisers operating outside of the "prohibited zones"; and that the record of the *Seeadler* affirmatively establishes the fact that she scrupulously observed the prize ordinances and never destroyed a ship and her crew without a trace.

But, quite independent of these contentions, the German Agent has produced a translation of the war diary of the *Seeadler* covering a period from March 6 to April 26, 1917, and has accounted for her position, movements, and activities during that entire period. From this it appears that from March 6 to 10, 1917, inclusive, the *Seeadler* was operating in the vicinity of the equator between a longitude of 25° 14′ and 28° 2′ W.; that on and after March 10 the *Seeadler* took a generally southerly and southwesterly course and rounded Cape Horn on April 18; that on the morning of April 1 the *Seeadler* was in the vicinity of latitude 39° 58′ S. and longitude 36° 35′ W., and that at no time after leaving the equator on March 10 did she return thereto but held to a general southerly and southwesterly course.

Her commander, Count von Luckner, testifies unequivocally that the *Seeadler* did not encounter and did not sink the *Timandra*, and his testimony is unequivocally corroborated by that of a wireless apprentice on the *Seeadler*. By these full disclosures the circumstantial evidence relied upon by the claimant to establish the destruction of the *Timandra* by the *Seeadler* has been fully met and rebutted. Weighing the evidence as a whole, the Umpire finds that the claimant has failed to discharge the burden resting upon it to prove that the *Timandra* was destroyed by Germany's act or was lost through an act of war.

Wherefore the Commission decrees that under the Treaty of Berlin of August 25, 1921, and in accordance with its terms the Government of Germany is not obligated to pay to the Government of the United States any amount on behalf of the Timandra Shipping Company, claimant herein.

Done at Washington January 5, 1927.

Edwin B. PARKER
Umpire

SAMUEL ROSENFIELD AND BERTHA ROSENFIELD (UNITED STATES) *v.* GERMANY

(January 5, 1927, pp. 861-862.)

WAR: CIVILIANS AND CIVILIAN POPULATION AS DISTINCT FROM PERSONS WITH MILITARY STATUS. *Held* that applicant for enlistment in U.S. Marine Corps who, on May 1, 1918, after preliminary examination, went down with American vessel, still was " civilian " within meaning of Treaty of Berlin.

Bibliography: Kiesselbach, *Probleme*, p. 140.

PARKER, *Umpire*, on a certificate of disagreement of the National Commissioners rendered the decision of the Commission.

This claim is put forward on behalf of the parents of Harry Rosenfield, who, according to the agreed statement of the American and German Agents filed herein, went down and was lost with the American Steamship *City of Athens*, which was sunk on May 1, 1918. The sole question presented by the agreed statement of the Agents is, At the time of his death was the deceased a " civilian " within the meaning of that term as found in the applicable provisions of the Treaty of Berlin?

The German Agent contends that this inquiry must be answered in the negative, from which it would follow that under that Treaty Germany is not financially obligated to compensate the claimants for the pecuniary damages, if any, which they sustained as a result of their son's death. He invokes the

principles announced by this Commission in the Hungerford case, Docket No. 5950, and in the Damson case, Docket No. 4259.[1] But the application of these principles to the facts in the case presented by this record does not produce the result contended for by the German Agent.

The deceased had applied at New York on April 30, 1918, for enlistment in the United States Marine Corps and had passed a preliminary examination. He was on the *City of Athens* en route from New York to the marine barracks at Parris Island, South Carolina, for further examination, after which if accepted he might have completed his enlistment by taking the prescribed oath. But he was subject to rejection by the military authorities and he remained free to enlist or not at his election. He was not engaged in the direct furtherance of the military effort against Germany but continued to belong to the civilian population of the United States.

Wherefore the Commission holds that at the time he came to his death Harry Rosenfield was a " civilian " as that term is used in Article 232 and in paragraph (1) of Annex I to Section I of Part VIII of the Treaty of Versailles, carried into the Treaty of Berlin.

Done at Washington January 5, 1927.

Edwin B. PARKER
Umpire

LESLIE H. CRABTREE
(UNITED STATES) *v.* GERMANY

(January 14, 1927, pp. 863-866.)

DAMAGES: PERSONAL INJURIES, PERSONAL PROPERTY TAKEN AND NOT RETURNED. — WAR: TREATMENT OF PRISONERS OF WAR, RESPONSIBILITY UNDER LAW OF WAR, TREATY OF BERLIN; MEANING OF " MALTREATMENT ": CIRCUMSTANCES, CONDITIONS, SITUATION. — DAMAGE: RULE OF PROXIMATE CAUSE, REASONABLY FORESEEABLE RESULT. Claim for personal injuries (permanent partial disability) suffered by American private from July 15, 1918, when taken prisoner, until December 7, 1918, when repatriated, and for loss of personal property. *Held* that under Treaty of Berlin (Part VIII, Section I, Annex I, para. 4, Treaty of Versailles, as carried into Treaty of Berlin) " maltreatment " dependent on circumstances, conditions, situation of parties: (1) privations resulting from exhaustion of warfare and borne alike by captured and captors do not constitute maltreatment; (2) neither do hardships of war on battlefield; (3) but heavy manual labour under working command fell short of treatment to which claimant, weakened by gas absorption in combat, was entitled by law of war even under prevailing conditions: permanent impairment of health reasonably foreseeable. Damages allowed for personal injuries, personal property.

PARKER, *Umpire*, rendered the decision of the Commission.

This case is before the Umpire for decision on a certificate of disagreement of the National Commissioners.

Leslie H. Crabtree, an American national, was inducted into the military service of the United States on April 2, 1918, and on May 3, 1918, as a private

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[1] Decisions and Opinions, pages 766 and 258 respectively. (*Note by the Secretariat*, Vol. VII, pp. 368 and 184.)

in Company M, 109th Infantry, sailed for service with the American Expeditionary Force in France. In action at Doromore in the Marne sector on July 15, 1918, he and several other members of his company were taken prisoners by the German forces, and he was held a prisoner of war until December 7, 1918, when he was repatriated. At the time of his induction into the United States military service he was almost 22 years of age, unmarried, physically sound, but slight of stature, weighing only 130 pounds. He was been engaged in the mica-manufacturing business in Philadelphia and not accustomed to heavy or continuous physical labor. He alleges that while held by Germany as a prisoner of war he was subjected to maltreatment resulting in pecuniary damage to him.

The claim is based on that provision of the Treaty of Berlin which obligates Germany to make compensation for " Damage caused by any kind of maltreatment of prisoners of war." [1] In order to bring this claim within that provision of the Treaty the burden is upon the claimant to prove (*a*) that while held as a prisoner of war he suffered maltreatment for which Germany was responsible; (*b*) that as a result of such maltreatment he sustained pecuniary damage; and (*c*) the extent of such damage measured by pecuniary standards.

The circumstances and conditions existing at the time and place and the situation of the parties concerned must be taken into account in determining the quality of the acts or omissions alleged to constitute maltreatment. The supplies and accommodations available to the captor nation must be considered in determining whether or not it has discharged its duty in caring for a prisoner of war. While the standard for the measurement of that duty does not vary, the application of that standard to varying circumstances and conditions necessarily produces varying results. Acts or omissions which would clearly constitute maltreatment in normal times, with foodstuffs relatively plentiful and housing accommodations relatively accessible, would take on an entirely different color in a country impoverished through the exhaustion of long-continued military and economic warfare. At the time claimant was held a prisoner of war both the civilian population and the military forces of Germany were compelled to endure great hardships and suffering due to the inability of Germany to procure nutritious foodstuffs and other necessaries of life. Privations resulting from conditions existing in Germany at that time, which were borne alike by the captured and the captors, do not constitute " maltreatment " as that term is used in the Treaty.

The claimant complains of maltreatment on the battlefield at the time of his capture. After carefully weighing the evidence on this issue the Umpire finds that this treatment and the great hardships to which the claimant was then subjected were hardships of the war in which the claimant was engaged as a combatant and for which Germany cannot be held liable under the Treaty.

The claimant also contends that he was subjected to maltreatment while a prisoner in the citadel of Laon, immediately back of the actual firing front, then temporarily used for the concentration of both troops and prisoners; that he was also subjected to maltreatment in the prison camps of Langensalza and Rastatt, and also while under working commands at Waghaeusel near Karlsruhe, Baden, where for a considerable period he was required to perform heavy manual labor in a sugar mill.

The evidence on these issues is voluminous and in hopeless conflict. It will not here be profitable to analyze it in detail or to state the respective contentions put forward by the claimant and by Germany. Suffice it to say that the

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[1] Paragraph 4 of Annex I to Section I of Part VIII of the Treaty of Versailles, carried by reference into the Treaty of Berlin.

general and sweeping charges of maltreatment of the claimant at Laon, Langensalza, and Rastatt are not sustained by the preponderance of the evidence in this case.

But the Umpire finds that the treatment for which Germany was responsible accorded claimant while under working commands at Waghaeusel fell short of that to which he was entitled by the law of war even under the conditions existing at that time and place.

It appears from the record that prior to and at the time of his capture the claimant inhaled and absorbed phosgene gas resulting in at least temporary partial disability. The German Agent earnestly contends that claimant's tubercular condition and diseased heart, resulting in a present rating by the United States Veterans Bureau for compensation purposes as permanent partial disability of 63 per cent, is attributable to his inhalation and absorption of gas in combat, for which Germany is not liable. There is evidence in the record supporting this contention. But there is also evidence supporting the view that the treatment accorded claimant while under working commands at the sugar mill at Waghaeusel aggravated the effects of gas absorption and resulted, to some extent at least, in the further impairment of his health. Notwithstanding claimant's weakened condition he was required to perform heavy manual labor for 12 out of 24 hours in unloading sugar beets from railroad cars and work of a similar character. On Sunday, October 27, 1918, the claimant and a number of his fellow prisoners, after working 12 hours per day for six days, were called upon to continue shoveling sugar beets over the high sides of captured Russian freight cars for a further period of 24 hours with an intermission of four hours, the alleged reason for this unusual demand being that the beets would spoil if not promptly handled. The claimant, who because of his ability to speak German acted as interpreter for the American and English prisoners, protested that they were not physically able to go on with the work, whereupon the German sergeant-major in charge of the guards struck claimant with his sword and required him and his fellow prisoners to comply with the demand of the sugar-mill authorities to proceed with the work. The happening of this incident as here recited is established by the record, although the testimony is conflicting with respect to the force of the blow, its effect upon the claimant, and the alleged necessity for the use of force to suppress threatened mutiny.

The housing accommodations at this sugar factory available to claimant and his fellow prisoners were crude and the food with respect both to quantity and quality afforded little nourishment. In these circumstances claimant was compelled, under protest, to perform heavy manual labor while in a weakened condition as a result of gas absorption, and it is fairly inferable from the record that it could reasonably have been foreseen that this treatment would result, and that it did in fact result, in reducing his already impaired vitality and contributed to the permanent impairment of his health. To the extent that this improper treatment resulted in pecuniary damage to claimant Germany, under the Treaty, is obligated to make compensation.

From the testimony submitted it appears that personal property belonging to the claimant of the value of $323.00 was taken from and not returned to him by the German authorities.

Applying the rules and principles heretofore announced in the decisions of this Commission to the facts as disclosed by the record herein, the Commission decrees that under the Treaty of Berlin of August 25, 1921, and in accordance with its terms the Government of Germany is obligated to pay to the Government of the United States on behalf of Leslie H. Crabtree the sum of five thousand dollars ($5.000.000) with interest thereon from November 1, 1923, and

three hundred twenty-three dollars ($323.00) with interest thereon from November 11, 1918, both at the rate of five per cent per annum.

Done at Washington January 14, 1927.

Edwin B. PARKER
Umpire

F. E. ATTEAUX & CO., INC. (UNITED STATES) *v.* GERMANY

(February 2, 1927, pp. 866-869.)

INTERPRETATION OF CONTRACTS: PRICE OWING WHEN SALES CONTRACT SILENT, MARKET-VALUE. — JURISDICTION: DEBT. — INTEREST. — EVIDENCE: AFFIDAVIT, CORRESPONDENCE BETWEEN PARTIES. Purchase by claimant from German firm, before United States' entry into war, of prepaid dyestuffs, not delivered. Delivery at various times from April 19 to August 12, 1921, on basis of new agreement. *Held* that price not agreed upon between parties and that seller, therefore, entitled to market-value at time and place of deliveries. *Held* also that any remainder of prepaid moneys constitutes " debt " of German firm to claimant as term is used in Treaty of Berlin, and shall bear 5 per cent interest per annum from date of last delivery. Evidence: see *supra*.

PARKER, *Umpire*, rendered the decision of the Commission.

This case is before the Umpire for decision on a certificate of disagreement of the National Commissioners.

It is put forward on behalf of F. E. Atteaux & Co., Inc., an American corporation, to recover a pre-war indebtedness, less certain credits hereinafter referred to, owing to the claimant by a German debtor.

From the record it appears that toward the end of 1915 and in the early part of 1916 claimant contracted to purchase from the Chemikalienwerk Griesheim G.m.b.H., of Frankfurt, Germany, hereinafter referred to as German debtor, certain specified dyestuffs for which claimant paid to the German debtor in Germany as follows:

September 10, 1915, M. 126,300.
November 12, 1915, M. 107,550.
April 4, 1916, $141,394.85.
June 15, 1916, $7,671.52.

The dyestuffs so purchased were invoiced to the claimant in the currency in which these remittances were made, the invoices reciting " We keep at your disposal and shall ship according to your instructions — as soon as the embargo is lifted ". No shipments were made when, in August, 1919, the claimant cabled to the German debtor inquiring whether or not the dyestuffs purchased were then available for shipment, and on August 15 received a reply reading: " Your colors are not ready for shipment as they had to be used up but we will replace same soonest possible *unless you prefer to have money refunded* ".

In the affidavit of Hermann C. A. Seebohm, director of the German debtor, dated May 8, 1923, it is stated that " In April 1921 we accordingly made arrangements with F. E. Atteaux & Co., Inc., to apply the money which they had already paid us toward the purchase of such colours as they might then designate."

From the record it appears, and the Umpire finds, that prior to and on the date of the declaration by the United States of the existence of a state of war with Germany there was owing to the claimant by the German debtor a dollar debt in the amount of $149,066.37 and a mark debt in the sum of Marks 233,850 and that after the cessation of hostilities between the United States and Germany the claimant and the German debtor agreed that this indebtedness without interest should be credited with the value of such dyestuffs as might be purchased by the claimant from the German debtor. Thereafter the German debtor delivered to the claimant several parcels of dyestuffs at various times beginning with April 19, 1921. Under the certificate the Umpire must determine the basis for accounting by the claimant for the dyestuffs so delivered to it.

The German debtor contends that it agreed to ship to the claimant certain products described and listed with respect to quantity and quality in a schedule sent to claimant on July 27, 1920, which the claimant agreed to accept in full satisfaction of the debt owing to it. The claimant on the other hand contends that the schedule in question was simply submitted for it to select from, with the understanding that it should give the German debtor credit for the dyestuffs selected and received by it at the mark prices named in the schedule, but that there was no agreement with respect to the rate of exchange which should obtain in liquidating the dollar debt. The German debtor insists that these mark prices were specified solely as a basis for the assessment of duties on imports into the United States and did not affect the agreement under which, according to the German debtor's contention, the claimant was to receive particular dyestuffs or their equivalent in dyestuffs in full satisfaction of the debt.

It will serve no useful purpose to detail the voluminous correspondence between the parties. From its careful analysis the Umpire concludes that the parties failed to reach an agreement with respect to the basis on which the claimant should account for the dyestuffs shipped to it by the German debtor from time to time for a period of several months beginning with April 19, 1921. Therefore the debtor is entitled to credits for the goods which were delivered by it in Germany for export to the United States on the basis of their market value at the time and place of such delivery.

After the schedule of July 27, 1920, hereinbefore mentioned, was submitted, and before the first shipment of April 19, 1921, was made, there was a great decline in the exchange value of the German mark. It appears from the record that, because of the instability of the mark and its constant decline in exchange value, sales of dyestuffs made in the German market for export to America after the resumption of trade relations between Germany and the United States were made on the basis and in terms of American currency. While the German debtor invoiced the shipments which it made to the claimant in terms of German paper marks, it contended prior to such shipments, has ever since contended, and now contends that " these invoices are only for customs purposes". The United States customs authorities adopted this view and declined to accept the invoice paper-mark values as the basis for the collection of import customs duties, but after extended hearings undertook to assess the shipments on the basis of the dollar export value of the dyestuffs in Germany at the time the shipments were made.

The Umpire holds that prior to the delivery of the dyestuffs in question by the German debtor it was indebted to the claimant in the sum of $149,066.37 and in the further sum of Marks 233,850 and that this has been satisfied to the extent of the value of the dyestuffs so delivered, using as a basis the market value obtaining in Germany at the time of delivery for dyestuffs intended for export to the United States. The facts should be further developed with a

view to determining what, if anything, is still due claimant after crediting the German debtor with the value of the dyestuffs delivered by it computed on this basis. As the German debtor contends that its debt has been liquidated and declines to make further payment through the delivery of additional dyestuffs or otherwise, the Umpire holds that the amount, if any, still owing by it is a " debt " owing to the claimant as that term is used in the Treaty of Berlin which debt, if any, so ascertained, shall bear interest at the rate of five per cent per annum from August 12, 1921, the date of the last delivery made by the debtor to the claimant.

Done at Washington February 2, 1927.

Edwin B. PARKER
Umpire

UNIVERSAL STEAMSHIP COMPANY (UNITED STATES) *v.* GERMANY

(February 2, 1927, pp. 871-877.)

EVIDENCE: INSURANCE ADJUSTER'S REPORT; CIRCUMSTANTIAL EVIDENCE, EX PARTE AFFIDAVITS OF MEMBERS OF CREW OF CAPTURED AND SUNK BRITISH VESSEL: REBUTTAL THROUGH DIARIES OF GERMAN RAIDERS, AFFIDAVIT OF RAIDER'S COMMANDER, REPORTS U.S. NAVY DEPARTMENT, AFFIDAVITS OF MEMBERS OF CREW OF CAPTURED AMERICAN VESSEL. Loss of American vessel which left Brunswick, Georgia, on October 25, 1916, and was last seen on December 16, 1916. *Held* that there is no evidence that vessel was destroyed through act of war. Evidence: see *supra*.

PARKER, *Umpire*, rendered the decision of the Commission.

This case is before the Umpire for decision on a certificate of disagreement of the National Commissioners. It is put forward on behalf of the Universal Steamship Company, an American corporation, and is impressed with American nationality. A recovery is sought against Germany for the value, less insurance collected, of the wooden sailing bark *Brown Brothers*, which cleared from the port of Brunswick, Georgia, on October 25, 1916, bound for Troon, Scotland, laden with a cargo of sawn pine sleepers. She had a deadweight carrying capacity of 1,450 tons, was constructed in 1875 but completely overhauled in 1916. On December 16, 1916, in latitude 41° 13′ N., longitude 43° 11′ W. she was spoken by the westbound steamship *Thorvald Halvorsen*, the master of which, testifying from her log, states in substance that at the request of the master of the *Brown Brothers* he prepared to take on board from the *Brown Brothers* a shipwrecked crew which, however, declined to be transferred. Whereupon the *Thorvald Halvorsen* proceeded to New York, arriving there on December 24. At that time the *Brown Brothers* appeared " in good shape and reported all well". Neither the bark, any member of her crew, nor any member of the shipwrecked crew which she carried has since been heard from.

The bark carried with British insurers both war-risk and marine insurance. The loss appears to have been promptly and thoroughly investigated by an impartial adjuster whose report, dated July 16, 1917, is in the record. It recites his authority to compromise the claim " by directing that both sets of

Underwriters shall contribute to the loss " notwithstanding which he finds that " the probability of this vessel being lost by a War Risk is not sufficiently great to justify me in saying that I cannot come to a conclusion as to how she was lost". After reviewing the evidence submitted this adjuster concludes that the bark " succumbed to the bad weather " and decides " that the claim must be borne wholly by the Underwriters on the Marine Risk Policy".

This finding of the insurance adjuster is not binding on anyone save the parties to the adjustment, but the evidence assembled and submitted following the loss and at a time when the claimant was not asserting any demand against Germany may be looked to in determining the cause of the loss. The claimant points out that it was not interested in which group of insurers paid the loss and contends that the adjuster failed to take cognizance of the activities of the German raiders which might have encountered and destroyed the vessel.

It is sought by circumstantial evidence to prove that the German raider *Seeadler* could and probably did encounter and destroy the missing vessel. Starting with the known location of the *Brown Brothers*, when she was last spoken by the *Thorvald Halvorsen* on December 16, which was 1,985 miles from Brunswick, Georgia, from whence she sailed, and 2,080 miles from the Troon headland, her destination, claimant has caused an experienced master-mariner and marine surveyor to plot the probable course the vessel would have taken had she completed her voyage. This witness testifies that had her progress not been interrupted she would probably have reached her destination on January 8 or 9, 1917. It is clearly established that the *Seeadler* passed the Shetland Islands southbound on December 25, 1916, and that on January 9, 1917, she captured and sank by bombs the British coal steamer *Gladys Royle* at latitude 35° N. longitude 25° W. It is argued that between December 25 and January 9 " the course of these two vessels could have converged " and the *Brown Brothers* have been destroyed by the *Seeadler*.

The German Agent has produced the war diary of the cruise of the *Seeadler* covering the period from December 16, 1916, to January 9, 1917, inclusive, purporting to give a complete and detailed account of her activities during that period. The accuracy and completeness of this diary is vouched for by the German Admiralty and Count Felix Luckner, commander of the *Seeadler*, and no mention is made in it of sighting the *Brown Brothers* or any bark answering her description. On the contrary, it affirmatively appears that the *Seeadler* did not engage any vessel prior to January 9, 1917, when she sank the *Gladys Royle*. This testimony is supplemented by the affidavit of Count Luckner, who states unequivocally that the *Seeadler* did not sink the *Brown Brothers* and he knows nothing of the latter's fate. The reports assembled from all available sources and on file in the Historical Section of the United States Navy Department corroborate this testimony. On this record the Umpire finds that the *Brown Brothers* was not destroyed by the German cruiser *Seeadler*.

But the claimant contends that if the missing vessel was not destroyed by the *Seeadler* then she was destroyed by the German raider *Moewe*, which was operating in waters contiguous to those in which the *Brown Brothers* was last spoken. In support of this contention there are offered the *ex parte* affidavits of four members of the crew of the armed English merchant ship *Georgic*, captured and sunk by the *Moewe* on December 10, 1916. The principal cargo of the *Georgic* was 1,200 horses destined to France in charge of a number of attendants. The crew and all of these attendants were transferred to the *Moewe*. On December 13 they, with other prisoners, 469 in all, were transferred to the *Yarrowdale*, which latter vessel with her valuable cargo of munitions, including machine guns, automobiles, and the like, was captured by the *Moewe* on December 11 and with all of the *Moewe*'s prisoners started for Germany on

December 14.[1] One of the four affiants mentioned, passing under an assumed name, states that he was then serving as a " seaman ". His own mother writes disparagingly of him. Another of these affiants states that he was serving " in the capacity of horseman ". Elsewhere he is decribed as a " cook ". Neither the vocation nor anything concerning the other two is disclosed. The meager statements signed by the three last mentioned, evidently emanating from the same source with essentially the same phraseology although purporting to have been taken separately, are not convincing.

They recite in effect that while confined as prisoners on the *Yarrowdale* they saw a bark with the words " Brown Brothers " and with the American flag and U.S.A. painted on her side in the course of the *Moewe* and one of them recites that " from an open port while imprisoned on board the S/S ' Yarrowdale ' " he saw " the mast of the ' Brown Brothers ' after she had been torpedoed ". The *ex parte* affidavit of the " seaman " is quite full. He states that " during the period of *six days subsequent* to my transfer to the Yarrowdale, I recall distinctly hearing cannon firing nearby on several occasions * * *. On December 22nd from the fiddly I saw the Moewe cruising on the port side of the Yarrowdale. I recall that on one of the occasions when the firing was heard, namely, on December 23rd, the engines of the Yarrowdale had been silenced and there was considerable commotion on deck; * * * there was firing, and two or three hours later I distinguished clearly *from the steps of the fiddly* the wreckage of bark or barkentine rig, three masts being visible, the masts being tilted at an angle of approximately 80 degrees, *the hull of the vessel being submerged.*" This man, had he been in a position of vantage on the steps of the fiddly of the *Yarrowdale*, had a more expansive view and a better opportunity to have witnessed a naval engagement, had there been one, than the others through " an open port " of the *Yarrowdale* on which all four of them were held prisoners. Yet this affiant who goes into considerable detail does not pretend to have seen the name " Brown Brothers " and the American flag and U.S.A. painted on the side of the bark, the hull of which he states was submerged. He does, however, identify the date as December 23. He does state that on the previous day he saw the *Moewe* cruising on the port side of the *Yarrowdale*. He does state that *six days subsequent* to his transfer to the *Yarrowdale* he heard cannon fire and thereafter witnessed the wreck described. Can these statements be true?

A photostatic copy of the war diary of the *Moewe*, a contemporaneous record of all of her activities, covering a period from December 10, 1916, the date upon which the *Georgic* was captured and destroyed, to January 10, 1917, one day after the *Brown Brothers* should have reached her destination according to the testimony of claimant's experts, has been produced by the German Agent. It gives in detail an account of the *Moewe's* activities not only from day to day but from hour to hour. It sets out in detail the capture of the *Yarrowdale*, the discovery that she had a supply of coal for 30 days and carried a valuable cargo resulting in a decision to transfer all of the *Moewe's* prisoners to her and send her to Germany. It details the plan for carrying this decision into effect, the fact that the heavy sea rendered it impossible to transfer the prisoners until the morning of December 13, and that because the sea was then still heavy it required about two hours to make the transfer of all of the *Moewe's* prisoners, consisting of seven captains, 68 ship officers, and 104 members of neutral and

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[1] See 3rd volume of Diplomatic Correspondence between the United States and Belligerent Governments Relating to Neutral Rights and Commerce (Special Supplement to XI American Journal of International Law), pages 236 to 241 inclusive; also Fayle's " Seaborne Trade", Volume III, page 29.

290 of enemy crews, a total of 469. It details the complement of the German prize crew put in charge of the *Yarrowdale* and lists the provisions for 21 days. At 6.05 p.m. on December 13 the *Yarrowdale* was detached from the *Moewe* and the latter never saw her again. On December 14 the *Yarrowdale* started for Germany laying a course to the far north to elude British patrols, following a route just south of Iceland and the territorial waters of Norway through Danish and Swedish waters, and, favored by the long nights and stormy weather, arrived at Swinemünde, Germany, on December 31. This is confirmed in every detail by information assembled by the Navy Department of the United States from British and other sources. On February 5, 1917, two American nationals, seamen on the *Yarrowdale*, appeared before the American Consul General at London and made an affidavit of the capture and movements of the *Yarrowdale* which confirms in every detail the records of the German Admiralty submitted by the German Agent. A copy of this affidavit transmitted by the American Consul General to the Secretary of State February 6, 1917, is found in the 3rd volume of the diplomatic correspondence referred to above at pages 240-241.

After dismissing the *Yarrowdale* on December 13 the *Moewe* next day laid a course to the south. Her activities for the following month are well known to the British Admiralty and to the United States Navy, whose records corroborate her war diary produced by the German Agent. On December 18 the *Moewe* sank the British Steamship *Dramatist* at approximately latitude 33° 2′ N. longitude 37° 29.2′ W. On December 26 the *Moewe* sank the French Bark *Nantes* in latitude 12° 37′ longitude 34° 0′ W.

When the *Brown Brothers* eastbound was last spoken (hour not given), December 16, 1916, she was in latitude 41° 13′ N. longitude 43° 11′ W. At midnight of December 15 - 16 the *Moewe* was in latitude 39° 27.3′ N. longitude 39° 24′ W. and at noon December 16 the *Moewe's* position was latitude 38° 42.8′ N. longitude 39° 17.3′ W. Presumably the *Brown Brothers* continued on her eastern course, but, no matter what course she took, as it is known that the *Moewe* continued on her southern course their paths could not have crossed.

The claimant's witness fixes the date of the alleged sinking of the *Brown Brothers* by the *Moewe* " off the Azores " as December 23. At noon on December 23 the *Moewe's* position was latitude 14° 56.2′ N. longitude 40° 1.8′ W. or approximately 1,380 miles south of her position at noon December 13, on which latter date the *Yarrowdale* separated from her and next day began steaming north with all possible speed by the route just south of the coast of Iceland. It is estimated by the Historical Section of the United States Navy Department that on December 23 the *Moewe* and the *Yarrowdale* were approximately 3,100 miles apart.

There were 465 other prisoners on the *Yarrowdale*; seven of them were ship captains and 68 other ship officers. A large percentage of the officers were British. Eighty-seven of the prisoners were American citizens. Both Great Britain and the United States have been diligent in assembling all procurable information concerning the activities of the *Moewe* and the vessels destroyed by her. Yet so far as disclosed by this record and the data assembled by the Historical Section of the United States Navy Department none of the other prisoners on the *Yarrowdale*, including the seven ship captains and the 68 ship officers, has ever reported witnessing the naval engagement described in the four affidavits offered by the claimant. No mention is made of it by the two American seamen whose affidavits were taken before the American Consul General at London on February, 5, 1917, although had they acquired knowledge while prisoners on the *Yarrowdale* of the destruction of an American vessel, or any other vessel for that matter, by the *Moewe* or any other German

raider, this fact would almost certainly have been developed by the American Consul General. That the four affiants whose statements are offered by the claimant were prisoners on the *Yarrowdale* there can be no doubt.

On the record presented it is equally clear, and the Umpire finds, that they did not see the *Moewe* destroy the bark *Brown Brothers* on December 23 or on any other day.

Applying the principles announced in Docket No. 6552, Waterman A. Taft *et al.*, claimants (Decisions and Opinions, pages 801-806), [a] and other decisions of this Commission, and weighing as a whole the record presented, the Umpire finds that the claimant has failed to discharge the burden resting upon it to prove that the *Brown Brothers* was lost through an act of war.

Wherefore the Commission decrees that under the Treaty of Berlin of August 25, 1921, and in accordance with its terms the Government of Germany is not obligated to pay to the Government of the United States any amount on behalf of the Universal Steamship Company, claimant herein.

Done at Washington February 2, 1927.

Edwin B. PARKER
Umpire

STANDARD OIL COMPANY (NEW JERSEY) (UNITED STATES) *v.* GERMANY

(November 23, 1927, pp. 877-878.)

DAMAGE: INDIRECT (TO STOCKHOLDER), JURISDICTION. — WAR: PROPERTY BEYOND LIMITS OF ENEMY TERRITORY. Destruction in 1914 by Belgian military authorities in Belgium of property of Dutch corporation in which claimant was majority stockholder. *Held* that, thought claim within Commission's jurisdiction, Germany not liable: destruction not Germany's act under Treaty of Berlin.

BY THE COMMISSION: —

This claim is put forward on behalf of an American corporation to recover damages sustained by it as a majority stockholder in a corporation organized under the laws of the Kingdom of Holland growing out of the destruction in the latter half of 1914 by the Belgian military forces of petroleum products and installations belonging to the Dutch corporation and located in Belgian territory.

From the record it appears that the petroleum products and installations were destroyed by the Belgian military forces to prevent their seizure and use by the advancing German troops as military materials in furtherance of military operations.

The destruction of the property operated indirectly upon, and resulted in damage to, the claimant as a stockholder in the Dutch corporation. Therefore the claim falls within the jurisdiction of this Commission (Decisions and Opinions, page 12).[b]

But inasmuch as the property was destroyed during the period of neutrality of the United States the test of Germany's liability is: Was the property destroyed by an act " committed by the German Government or by any German authorities " or by an act " of the Imperial German Government, or its agents", within the meaning of the Treaty of Berlin as interpreted by this Commission?

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[a] *Note by the Secretariat*, this volume, p. 3.
[b] *Note by the Secretariat*, Vol. VII, p. 29.

Applying this test the Commission holds that Germany is not obligated to compensate the claimant for its interest in the property destroyed.

The act of the Belgian military authorities in destroying materials of neutral ownership susceptible of use for military purposes, in order to prevent their being used by Germany in military operations, was an act in the prosecution of the war. But it was not Germany's act any more than any other act of Germany's enemies in the prosecution of the war was, within the meaning of the Treaty. the act of Germany. The Treaty clearly differentiates between damage caused by acts of Germany or her agents during the period of neutrality of the United States and damage in consequence of hostilities or of any operation of war caused by the act of any belligerent after the United States entered the war (Decisions and Opinions, pages 2, 3, 11, 66, 316, 324).[a]

Wherefore the Commission decrees that under the Treaty of Berlin of August 25, 1921, and in accordance with its terms the Government of Germany is not obligated to pay the Government of the United States any amount on behalf of the claimant in connection with the claim here put forward.

Done at Washington November 23, 1927.

Edwin B. PARKER
Umpire

Chandler P. ANDERSON
American Commissioner

W. KIESSELBACH
German Commissioner

BANK OF NEW YORK AND TRUST COMPANY, ADMINISTRATOR WITH WILL ANNEXED OF THE ESTATE OF FRITZ ACHELIS (DECEASED) (UNITED STATES) *v.* GERMANY

(December 6, 1927, pp. 879-880.)

NATIONALITY OF CLAIMS: ASSIGNMENT OF CLAIM. — APPLICABLE LAW: MUNICIPAL LAW. Assignment in May, 1919, by British subjects to their American *Unterbeteiligter* of German national's indebtedness dating back to December 31, 1914. *Held* that, under applicable German law, original debt was not owing to assignee at time of United States' entry into war and, consequently, that claim was not impressed with American nationality continuously during period of United States' belligerency.

BY THE COMMISSION: —

From the record it appears that in 1909 Konig Brothers of London, British nationals, entered into a contract with one Heinrich Otto Traun, a German national of Hamburg, by the terms of which Konig Brothers became a partner *en commandita* in Traun's business located at Hamburg to the extent of Marks 3,000,000. It was stipulated that the capital contributions made by Konig Brothers should be repaid in installments. Under this contract, which was twice amended, the entire amount invested by Konig Brothers was repaid to them with the exception of Marks 359,666.75, for which amount with interest claim is here made.

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[a] *Note by the Secretariat*, Vol. VII, pp. 22, 28, 68, 232 and 238.

The basis of this claim is that Fritz Achelis, an American national, contributed the amount here claimed and more to Konig Brothers to be invested by them under their contract with Traun and that it was so invested with Traun's knowledge.

The Commission finds that there was no privity of contract between Traun and Achelis. But as against Konig Brothers Achelis had a " subparticipation " interest in Konig Brothers' investment with Traun. This interest was an " Unterbeteiligung " (" under-participation "), a term familiar to German jurisprudence connoting that behind a party to a contract are others who are not parties but who have a financial interest in the transaction as against such contracting party only but not as against the other contracting party.

The Commission further finds that the amount here claimed became payable by Traun as of December 31, 1914. At that time Great Britain and Germany were at war, and notwithstanding Traun's willingness so to do he was unable to make payment to Konig Brothers.

Thereafter in May, 1919, Konig Brothers executed and delivered a formal assignment to Achelis of Traun's indebtedness, which indebtedness is the basis of this claim.

The contract of partnership between Traun and Konig Brothers had its situs in Germany and its interpretation, and all rights and liabilities based upon it, are controlled by German law. Applying that law as developed in this case to the facts as disclosed by this record, the Commission holds that the debt owing by Traun, a German national, was not a debt owing to an American creditor at the time of America's entering the war on April 6, 1917.

It may be that there exists in the Estate of Achelis rights arising under German law which may be asserted and enforced against Traun before German courts, and that under the assignment to Achelis of May, 1919, his estate will, under the German revaluation law, be entitled to recover a substantial amount from Traun. Be this as it may, the Commission holds that on the facts submitted this claim was not impressed with American nationality continuously during the period of America's belligerency and that under the Treaty of Berlin of August 25, 1921, and under the rules and principles heretofore laid down by this Commission Germany is not obligated to pay to the Government of the United States any amount on behalf of the claimant herein.

Done at Washington December 6, 1927.

Edwin B. PARKER
Umpire

Chandler P. ANDERSON
American Commissioner

W. KIESSELBACH
German Commissioner

UNITED STATES OF AMERICA ON ITS OWN BEHALF THROUGH THE ALIEN PROPERTY CUSTODIAN *v.* GERMANY AND KALLE & CO. AKTIENGESELLSCHAFT, IMPLEADED

(March 8, 1928, pp. 881-882.)

NATIONALITY OF CLAIMS: ASSIGNMENT TO ALIEN PROPERTY CUSTODIAN. — DEBT. — INTERPRETATION OF TREATIES: LETTER, SPIRIT, MUNICIPAL LAW. Assignment to Alien Property Custodian, prior to coming into force of

Treaty of Berlin, of German two-third interest in American corporation. *Held* that claim against German corporation presented by Custodian was not American on coming into force of Treaty of Berlin: " debts " under Treaty and under Agreement of August 10, 1922, limited to those owing to American nationals (letter, spirit of Treaty and Agreement, Settlement of War Claims Act).

Cross-reference: A.J.I.L., Vol. 22 (1928), pp. 683-684.

BY THE COMMISSION: —

From the record in the above captioned case it appears that the Kalle Color and Chemical Company, Inc., a New York corporation (hereinafter designated New York corporation), during the period of American neutrality sold goods, wares, and merchandise and made advances to Kalle & Co. Aktiengesellschaft (hereinafter designated German corporation). It is alleged that as a result of these transactions the German corporation was on September 29, 1917, indebted to the New York corporation in the sum of $182,881.63.

The Government of the United States, through its Alien Property Custodian, during the period of American belligerency lawfully seized as German-owned 1,000 shares (being two-thirds) of the capital stock of the New York corporation, and through voting these shares elected a board of directors of its selection. This board caused the New York corporation to be dissolved and liquidated in pursuance of the laws of the State of New York. In the course of such liquidation the alleged claim of indebtedness of the New York corporation against the German corporation was on February 15, 1921, proportionately assigned by the liquidating trustees to the stockholders of record of the New York corporation as their respective interests then appeared, one-third of such claim being assigned to stockholders of American nationality and the remaining two-thirds to the Alien Property Custodian as such. It is for this two-thirds — amounting to $121,921.08 — that an award is here sought against Germany.

It will be noted that the New York corporation, which possessed American nationality, had been dissolved and liquidated prior to the coming into force of the Treaty of Berlin on November 11, 1921. In the course of such liquidation the Alien Property Custodian, through the board of directors designated by him, caused the German interest to be carved out of the claim of the New York corporation against the German corporation and, because it was German-owned, assigned to the Custodian in his official capacity.

It is apparent therefore that on the coming into force of the Treaty of Berlin no American national had any interest in the claim here asserted.

Under the Treaty of Berlin and the Agreement between the United States and Germany in pursuance of which this Commission was constituted, " debts " for the payment of which Germany is obligated are limited to those owing by the German Government or by German nationals to American nationals.

The Commission holds that the debt here asserted by the United States through its Alien Property Custodian as an obligation of Germany is not embraced within either the letter or the spirit of the Treaty and of the Agreement mentioned.

This view is strengthened by the Act of the Congress of the United States designated " Settlement of War Claims Act of 1928 ", providing among other things for the ultimate return of all property of German nationals held by the Alien Property Custodian. Considering the claim here asserted in the light of the provisions of that Act, the United States through its Alien Property Custodian is, in the last analysis, seeking an award against Germany on behalf not of American nationals but of German nationals.

Wherefore the Commission decrees that under the Treaty of Berlin of August 25, 1921, and in accordance with its terms the Government of Germany is not obligated to pay to the Government of the United States any amount on account of the claim asserted herein.

Done at Washington March 8, 1928.

Edwin P. PARKER
Umpire

Chandler P. ANDERSON
American Commissioner

W. KIESSELBACH
German Commissioner

ROSA VOLLWEILER (UNITED STATES) *v.* GERMANY

(March 8, 1928, pp. 883-893.)

WAR: EXCEPTIONAL WAR MEASURES; PROPERTY, RIGHTS, INTERESTS IN ENEMY COUNTRY. — DAMAGE: RULE OF PROXIMATE CAUSE, DEPRECIATION OF MARKET-VALUE OF BONDS, ACTUAL AND POTENTIAL LOSS. — EVIDENCE: BURDEN OF PROOF, PRESUMPTIONS, CLAIMANT'S UNSUPPORTED TESTIMONY. Purchase by claimant from broker, on September 28, 1915, and February 7, 1916, of German war bonds, deposited with German bank. Claim for loss through depreciation in market-value of bonds suffered during period from November 10, 1917, when exceptional war measure prohibited their withdrawal from Germany, to September 25, 1919, when bonds delivered to broker. *Held* that period from November 10, 1917, to July 23, 1919, when first unconditional instructions to deliver given, immaterial, and that no evidence submitted that exceptional war measure was proximate cause of (actual, not potential) loss through depreciation in market-value between July 23, 1919, and September, 25 1919: claimant failed to prove that she would have sold or exchanged bonds had she had possession of them during this period (burden of proof on claimant, no presumption in favour of intention to sell or exchange, claimant's unsupported testimony not sufficient).

Cross-reference: A.J.I.L., Vol. 22 (1928), pp. 685-693.
Bibliography: Annual Digest, 1927-28, p. 276.

BY THE COMMISSION: —

From the record it appears that the claimant, Rosa Vollweiler, an American national, purchased from Zimmermann & Forshay, bankers and brokers of New York City, Imperial German Government bearer bonds of the face value of M. 15,000, of which M. 10,000 were purchased September 28, 1915, and M. 5,000 were purchased February 7, 1916. At the time of such purchases Zimmermann & Forshay issued and delivered to the claimant so called " Interim Certificates " signed by them, the terms of which will be hereinafter examined. The definitive bonds were not received by Zimmermann & Forshay until September 25, 1919, and not delivered by them to the claimant until December 11, 1919.

Claimant seeks compensation from Germany for damages alleged to have been suffered by her resulting from the above-mentioned bonds having been subjected by Germany to " exceptional war measures " which prevented their withdrawal from Germany for the purpose of sale or exchange by claimant prior to their depreciation in value.

This is one of a group of cases put forward on behalf of American nationals who purchased from Zimmermann & Forshay during the period of American neutrality German war bonds and received from Zimmermann & Forshay " Interim Certificates " but did not receive the definitive bonds until after September 25, 1919. In each case an award is sought against Germany under that clause of the Treaty of Berlin which provides, in substance, that Germany is obligated to compensate American nationals for " damage or injury inflicted upon their property, rights or interests * * * in German territory as it existed on August 1, 1914, by the application " of " exceptional war measures " as that term is defined in the Treaty (Article 297 (*e*) and paragraph 3 of the Annex to Section IV of Part X). As the facts in many of these cases are identical so far as pertains to the purchase of these bonds by Zimmermann & Forshay and their delivery to them, it will be useful concisely to state here these facts as disclosed by the records in this group of cases.

From these records it appears that prior to the war and during the period of American neutrality Zimmermann & Forshay specialized in German securities and German exchange and during the period of American neutrality cooperated with the German authorities and with German bankers in making a market in the United States for German war bonds. The circular issued by them advertising these bonds for sale recited that " This issue will be listed on all the German Exchanges, and *after the war* at other European financial centers, and the holders will be able to dispose of them at any time through our House." Leopold Zimmermann, senior member of the firm, testifies that " most every other German banker in the United States sold German securities with the understanding that they were not to be delivered until after the war was over ". Assuming the truth of this testimony it appears that the general practice of the American purchasers of German war bonds was to leave the definitive bonds in Germany — the principal market for German bonds. Zimmermann & Forshay did not adopt this general practice but with respect to the bonds which they purchased by and through the Deutsche Bank they instructed that bank to " hold subject to our instructions, in a separate portfolio, marked ' property of Zimmermann & Forshay, New York ' ".

This circular further recited that the bonds would be " delivered free of all expense "; that they were offered " subject to change in price, owing to the possibility of violent fluctuations in the rate of exchange "; that " These bonds are exempt from all tax in Germany "; and that " Owing to the present low rate of German Exchange, these bonds yield a very high interest return ". This suggestion of the desirability of taking advantage of the German exchange rate while it was still low, coupled with an extensive advertising campaign and German propaganda frankly participated in by Zimmermann & Forshay, enabled them to sell to " upwards of three thousand persons residing in the United States " the " several million dollars worth " of German war bonds which they had purchased in Germany (Leopold Zimmerman's affidavit, February 24, 1926, Exhibit 9).

The circular further recited that " Delivery will be made upon receipt of New York funds in the form of our own temporary receipt, exchangeable for the definitive bonds upon their arrival from Europe." This " temporary receipt " took the following form:

" ZIMMERMANN & FORSHAY

Members of the New York Stock Exchange

170 Broadway New York

No. Dated 19

THIS IS TO CERTIFY THAT

Mr. .....

has paid $.....

..... Dollars

for

The aforesaid securities are to be delivered by us, at our office against return of this *Interim Certificate*, upon arrival from Europe.

ZIMMERMANN & FORSHAY."

Reading the circular of Zimmermann & Forshay offering these bonds for sale in connection with the " Interim Certificate " issued by them, the Commission holds that they were obligated to use reasonable diligence to deliver the definitive bonds to their customers in New York within a reasonable time, but the time of delivery was uncertain and necessarily so on account of the uncertainties of communication and transportation.

It is apparent from the record that Zimmermann & Forshay made purchases from and had dealings with several German banking institutions, but we are here concerned only with German war bonds purchased by them from or through the Deutsche Bank of Berlin. These purchases were made from time to time in large amounts. The bank charged Zimmermann & Forshay's account with the price of the bonds subscribed and held the bonds for Zimmermann & Forshay subject to their order. As the coupons matured they were clipped and surrendered by the bank and the proceeds were credited by the bank to the account of Zimmermann & Forshay, who, at least so far as the Deutsche Bank was concerned, were the absolute owners of these bonds. The customers of Zimmermann & Forshay were unknown to the bank and there was no privity of contract between such customers and the bank.

It is contended on behalf of the claimants in this group of cases that as claimants' agents Zimmermann & Forshay during 1915 and thereafter sought to have the Deutsche Bank forward to them in New York the definitive bonds which they had agreed to deliver to the claimants " upon arrival from Europe ". so that delivery to claimants could be effected upon surrender of the interim certificates. The bonds were not in fact delivered to Zimmermann & Forshay until September 25, 1919.

The first question presented is, Were the bonds in question subjected to exceptional war measures by Germany which prevented their delivery at an earlier date?

The Commission answers this question in the affirmative, but holds that such delay was limited to the time intervening between the date of the first unconditional instructions by Zimmermann & Forshay to deliver, July 23, 1919, to the date delivery was actually effected in Holland, September 25, 1919.

It will serve no useful purpose to review the voluminous evidence from which this conclusion is drawn. The Commission finds that in the latter part of 1915 and from time to time thereafter Zimmermann & Forshay did suggest several plans having in view the forwarding of these bonds to them in New

York without risk to them and without cost to them for insurance exceeding 1/8 of 1%. But the record is barren of evidence of any *unconditional* requests or instructions given by Zimmermann & Forshay prior to July 23, 1919, to ship these bonds to New York, and the record indicates that the plans for shipment proposed by them prior to that date were not workable. There is much evidence indicating not only that the officers of the Deutsche Bank but the German Government authorities in both the United States and Berlin as well were anxious to cooperate with Zimmermann & Forshay to have their bonds delivered in America on terms acceptable to them. As pointed out by Zimmermann & Forshay in their letter of November 15, 1916, to the Deutsche Bank, the delivery at New York of the actual bonds was in the interest of Germany as tending to stimulate further sales. But notwithstanding all this, the difficulties of communication and transportation incident to the war were such as to prevent the transmission of the bonds from Berlin to New York on terms acceptable to Zimmermann & Forshay during some two years of American neutrality when exceptional war measures taken by Germany did not apply to or operate upon American-owned securities in a way to prevent their being shipped out of Germany.

But there were many practical difficulties in the way of shipping bearer bonds from Germany to the United States. That Zimmermann & Forshay were keenly alive to these difficulties is evidenced by the interesting opinion of Lord Sumner speaking for the Judicial Committee of the Privy Council in the case of Steamship "Noordam" and Other Vessels.[1] It appears from this opinion that Baltimore & Ohio Railroad Company stock certificates and Japanese bonds owned by Zimmermann & Forshay were, by virtue of the Reprisals Order in Council of March 11, 1915, seized by British authorities while being transported on a neutral mail steamer from Holland to the United States. The judgment of the Judicial Committee was delivered May 4, 1920, after the Treaty of Versailles became effective, notwithstanding which the Judicial Committee decreed that the order of the prize court releasing Zimmermann & Forshay's securities should be vacated and an "order for their detention, till it be otherwise ordered", substituted. In construing and applying this British order in council Lord Sumner held that it was "made for the purpose of further restricting the commerce of Germany", that its general object was "to prevent commodities of any kind from reaching or leaving Germany", and that "in order to deter neutrals from assisting the enemy by engaging in his commerce, the Order tells them that their goods, if of German origin, are exposed to detention".

These conditions and the resulting high cost of insurance — not exceptional war measures taken by Germany — to some extent deterred American nationals owning securities and other valuables in Germany from shipping them to the United States during the period of American neutrality. But it is evident from the records in numerous cases before this Commission that during that period American-owned securities could have been shipped, and were in fact shipped, from Germany to the United States if their owners were willing to pay the cost and take the risk of such shipment. In fact it appears from the record in one of these cases that Zimmermann & Forshay's Berlin representative on December 3, 1915, gave instructions for the shipment from Germany of M. 100,000 4% German Government Loan via Amsterdam to Zimmermann & Forshay at New York, the receipt of which shipment was acknowledged by Zimmermann & Forshay by their letter of January 3, 1916 (Exhibit H-1, Docket No. 6733, Abraham S. Rosenthal, claimant).

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[1] IX Lloyd's Reports of Prize Cases 232.

The Commission finds that during the period of American neutrality it was not an act of Germany but the unwillingness of Zimmermann & Forshay to incur the expense or take the risk of shipment which prevented the delivery of the bonds in question to them in New York.

After the United States entered the war the risk of transmission and the cost of insurance increased. The record does not justify the conclusion that Zimmermann & Forshay then sought to reverse the course they had long adopted or that they would then have incurred the increased expense and increased risk of shipping the bonds to New York had the bonds not been subjected to the exceptional war measure of the decree of November 10, 1917, issued by Germany.

When it was apparent that the United States would enter the war against the Central Powers Zimmermann & Forshay's chief concern was for the safety of their securities in German territory. Through their representative, one Willy Cale, they were given the strongest assurances, not only from their banking correspondents but also from the German Government authorities, that their securities would not be confiscated or subject to governmental sequestration. Leaving out of account instructions and requests made by Zimmermann & Forshay direct by mail and wire which are in the record, whatever action was taken by them in Berlin was taken for them by Willy Cale, who represented them in Germany from October 1, 1915, throughout the war, and he testifies (translation]:

" * * * I never attempted to withdraw the bonds from their deposit at this place [Berlin] and to transfer them to somewhere else. I had no reason whatsoever to do so after the assurances given to me by the Deutsche Bank and in the light of conferences which I had with Geh. Rat Schmiedicke of the Reichsbank Direktorium, who is now deceased. From these conferences I gained the absolute certainty that the securities of the firm of Zimmermann & Forshay, even in case of war with the United States, would be absolutely safe at the Deutsche Bank and would remain there untouched. I also remember that after these conferences I sent a cablegram to Zimmermann & Forshay to the effect that they had no reason to be worried in the least concerning the sequestration of their securities."

So far as disclosed by the record the first unconditional request made by Zimmermann & Forshay to ship their bonds from Berlin to New York was their cable to the Deutsche Bank of July 23, 1919, reading:

" Ship all our securities as soon as possible cable best insurance rate."

To this the Deutsche Bank replied by cable:

" Shipment securities and disposal old balance about four millions eight hundred thirty-nine thousand marks impossible at present consequent peace conditions."

Here it is evident that the obstacles to making shipment which the Deutsche Bank had in mind were provisions embodied in the Treaty of Versailles — peace measures, not exceptional war measures. However, the Treaty of Versailles which had been signed had not at that time come into effect and the German exceptional war measures were still, nominally at least, in effect. Following the receipt of this cable the senior member of the firm of Zimmermann & Forshay went to Berlin and arranged for their bonds to be delivered to him at Rotterdam September 25, 1919.

The Commission therefore finds that a German exceptional war measure prevented the delivery of the bonds in question during the time intervening between the first unqualified request for their delivery made on July 23, 1919, and the date of their actual delivery, September 25, 1919.

The questions then arise: Did this delay result in pecuniary damage or injury to the claimant? If so, how and to what extent?

The claim is predicated on the alleged depreciation in the market value of the bonds during the period of delay. The Commission holds (Order of May 7, 1925) that these bonds were subjected to an exceptional war measure by Germany's issuance of the decree of November 10, 1917. But the burden is upon the claimant to prove (1) that the alleged depreciation in market value occurred and (2) that through such depreciation claimant suffered damage proximately caused by the subjection of these bonds to this exceptional war measure.

The record is barren of any testimony indicating that the bonds in question depreciated in market value between July 23 and September 25, 1919. But there is evidence before this Commission that during the month of July, 1919, the average rate of exchange in Germany was 15.157 paper marks per dollar, while in September, 1919, the average rate was 24.067 paper marks per dollar. The Commission finds that the value of the mark declined during the two-month period when the delivery of the bonds was prevented by German exceptional war measure. The extent of the decline affects the amount of the damage, if any, suffered by the claimant and need not be here decided, because the claimant has failed to prove that through such depreciation she suffered damage caused by the exceptional war measure to which her bonds were subjected.

Ordinarily fluctuations in market value result in a potential but not an actual profit or loss, as the case may be, to an owner of securities who voluntarily continues to hold them. Therefore in order to establish a claim against Germany under the Treaty of Berlin the claimant must not only prove depreciation in market value during the period her bonds were subjected to an exceptional war measure but go further and prove that through sale or otherwise she would have realized on her securities at a time and on conditions which would have avoided the loss complained of had not she been prevented from so doing by such war measure.

This Commission has held that if the reasonable inference to be drawn from the evidence adduced in any particular case is that the claimant would have withdrawn his bonds from Germany for the purpose of sale or exchange, and was prevented from so doing by an exceptional war measure of Germany, then the exceptional war measure will be regarded as the proximate cause of a damage sustained by claimant to the extent of the depreciation in value between the date such sale or exchange would have been made but for such war measure and the date of the removal of this obstacle to making the sale (Order of Commission entered May 7, 1925, particularly paragraphs 11 to 15, inclusive).

It is contended on behalf of the claimant herein that the Commission must presume that the customers of Zimmermann & Forshay would have acted as " a careful and prudent person would have acted " and that " they would have sold or exchanged the bonds " had they been shipped out of Germany. If the claimant had intended or desired to sell or exchange her bonds, that fact can and should be established by competent evidence, direct or circumstantial, as any other fact is established. Such competent evidence should be something more than the mere testimony of claimant after the lapse of many years of an intention to sell or exchange, unsupported by testimony of any act on claimant's part toward carrying such intention into effect. Numerous records before this Commission are replete with evidence demonstrating the unsoundness of a rule that a presumption of fact will be indulged that a holder of securities would have disposed of them by sale or exchange had he not been prevented from so doing by a German exceptional war measure.

This particular case aptly illustrates the danger of indulging such a presumption of fact. The claimant's testimony is in the record. It appears from it that she first purchased war bonds from Zimmermann & Forshay on September 28, 1915. During the ensuing year Zimmermann testifies that his customers were demanding the delivery of the definitive bonds which they had purchased and he in turn was seeking to procure them for delivery. But there is not a syllable in claimant's testimony indicating that she ever requested Zimmermann & Forshay to deliver the definitive bonds to her or that she desired to dispose of them. On the contrary she testifies that on February 7, 1916, she invested through Zimmermann & Forshay M. 5,000 in the purchase of additional war bonds; during February, 1917, she bought marks for which she paid $5,212 and deposited them in the Deutsche Bank of Berlin; on October 14, 1919, she invested $850 in marks and deposited them in the same bank; on December 11, 1919, she invested $200 and on February 10, 1920, $228 in marks and deposited them in the same bank; on February 18, 1920, she paid $540 and on March 5, 1920, $1,440 for municipal bonds issued by German cities. It is significant that while Zimmermann & Forshay received their bonds September 25, 1919, they did not deliver her bonds to claimant until about two and one-half months later — December 11, 1919. It is evident that the claimant had confidence in German securities and in the recovery of the mark, and instead of selling on a declining market to stop her losses she continued to invest additional funds, taking advantage of what she and many thousands of others speculatively inclined believed to be an opportune time to buy. It may fairly be deduced from this record that the Commission is urged to indulge a presumption in order to supply the absence of evidence which never existed in fact.

In a case before this Commission, Docket No. 8123, Percy K. Hudson, claimant, we find an experienced New York banker visiting Germany during the fall and winter of 1916 and the early part of 1917 and investing American dollars in the purchase of German securities of the face value of approximately one-half million marks. We even find the firm of Zimmermann & Forshay buying during the spring and summer of 1916 M. 2,100,000 of German war bonds, although Zimmermann testifies that during 1915 he in vain endeavored to have shipped, without excessive risk or expense, the war bonds already purchased by him. These heavy purchases would seem to indicate that able and experienced financiers confidently expected the ultimate recovery of the mark.

These instances, which might be multiplied, demonstrate the soundness of the Commission's rule that, in order to establish a right to recover compensation on account of depreciation in the value of securities subjected to exceptional war measures, it is not sufficient to prove depreciation during the period of such subjection, but the claimant must go farther and prove by competent evidence that he would have disposed of such securities by sale or exchange had he not been prevented from so doing by such war measures.

The ultimate issue of any war is necessarily uncertain. The varying fortunes of the belligerents as variously viewed by different individuals necessarily influenced the market value of their respective securities. The fact that different investors at different times held different views with respect to the ultimate result of the war contributed to supplying both buyers and sellers, which made a market for these securities. Obviously this Commission can indulge no presumption with respect to the intention of a particular claimant to buy or sell at a particular time but must require this fact to be established as any other fact. The Commission's rule is in harmony with decisions of the Mixed Arbitral Tribunals constituted under the Treaty of Versailles (Hammer *v.* German Government, decided by Anglo-German Mixed Arbitral Tribunal,

II Dec. M.A.T. 526 et seq.; Green *v.* German Government, same tribunal, III Dec. M.A.T. 522 et seq.).

Because the record fails to establish that claimant would have sold or exchanged her bonds had she had possession of them during the period delivery was prevented by German exceptional war measures. a decree must be entered in favor of Germany.

Wherefore the Commission decrees that under the Treaty of Berlin of August 25, 1921, and in accordance with its terms the Government of Germany is not obligated to pay to the Government of the United States any amount on behalf of the claimant herein.

Done at Washington March 8, 1928.

Edwin B. PARKER
Umpire

Chandler P. ANDERSON
American Commissioner

W. KIESSELBACH
German Commissioner

RUDOLPH W. FRANK (UNITED STATES) *v.* GERMANY

(March 13, 1928, pp. 893-896.)

ESTATE CLAIMS: EXCEPTIONAL WAR MEASURES. — DAMAGE: RULES FOR DETERMINATION, RATE OF EXCHANGE; DEPRECIATION OF SECURITIES; RULE OF PROXIMATE CAUSE. — PROCEDURE: REFERENCE BACK TO AGENTS TO ASCERTAIN AMOUNT DUE, REVISION. Claim for loss through depreciation of securities resulting from prevention by German exceptional war measure of transmission of securities to American heir in German estate. Application of rules announced in Administrative Decision No. IV, see Vol. VII, p. 117. *Held* that depreciation until October 15, 1919, caused by executors' decision, prior to enactment of German war legislation affecting American property, to keep claimant's property in their custody, and that from that date on, when executors appear to have changed their position, to January 10, 1920, when German war legislation repealed, this legislation was proximate cause for further retention (except for securities deposited with tax department under German law). Case referred back to Agencies to ascertain amount due claimant. Subsequent plea for revision dismissed.

BY THE COMMISSION: —

The principal issue in dispute in this case is whether or not Germany is financially liable for the depreciation of the securities which belong to claimant's share in the estate of Bertha Glazier and which remained in the hands of her executors during the war.

In support of the contention that Germany is so liable the Agent of the United States refers to section 15 (d) of the Order of the Commission of May 7, 1925, and to Administrative Decision No. IV. To these rules the Commission adheres. They will neither be modified nor deviated from. However, in applying these rules to the present case the Commission finds as a conclusion of fact that the loss complained of, so far as the depreciation occurred prior to August 15, 1919, was caused by certain definitely established circumstances other than the application of German exceptional war measures.

In the light of the depositions of Siegmund Wormser (Exh. a), Friedrich Kohn (Exh. G) and Dr. Baerwald (Exh. B) the Commission is satisfied that in or about August 1916 or prior thereto the three executors — whose diligence and care in attending to their duties is illustrated by the investigations instituted as early as 1913 — unanimously agreed (Naphtaly Kohn concurring by correspondence with his brother) in accordance with the will of Bertha Glazier to keep claimant's property in their custody beyond the completion of his fortieth year. On the other hand even if Naphtaly Kohn, who lived at that time in Switzerland, did not participate in that decision the record establishes positively that Siegmund Wormser and Friedrich Kohn decided not to transmit to the claimant his property upon the completion of his fortieth year. It is immaterial in this connection whether this decision was prompted by the result of the investigations concerning claimant's financial situation or on account of the war-time conditions involving large expenses and heavy risk of loss to the claimant in case of the transmittal of his property. This attitude of at least two of the executors operated as an obstacle which by reason of Article X of the will actually prevented, under German law, the transmittal of claimant's property no matter whether or not the decision was concurred in by the third executor.

It results that the record establishes *definite and specific facts* existing prior to the enactment of the German war legislation affecting American property, which facts, unless and until they ceased to exist subsequently, prevented the transmittal of claimant's property even if there had been no German war legislation.

So far as the period prior to October 15, 1919 is concerned there is nothing on record to show that these conditions ceased to exist.

But it appears from the record that when the claimant made a demand in September 1919 he was advised that his property was still under the control of the German Government, and on February 25, 1921, the executors wrote a letter to claimant (Exh. 2 attached to Exh. 3) which is susceptible of the interpretation that, but for the exceptional war measures still existing in 1919, the executors might have changed their position at that time following claimant's demand. Thus the inference might be drawn that from that time on the German war legislation became the virtual and proximate cause for the further retention of claimant's property.

Still this inference remains somewhat doubtful. In the light of the testimony of Friedrich Kohn (Exh. G) it would appear that it was the news of claimant's marriage which ultimately caused the executors to release his property. On the other hand, the record does not disclose at what time the executors received the information of claimant's marriage, and the latter of the executors of February 25, 1921, fails to refer to this fact or to give a clear statement of the time when, and the reasons why, the executors became inclined to change their former attitude. In these circumstances, it appears appropriate to allow claimant the benefit of the doubt.

As claimant's letter was dated September 30, 1919 (page 17 of the American Brief) and as at time that it took probably at least a fortnight for a letter to go from the claimant in Texas to Frankfort o/M. it would follow that claimant is entitled to compensation for the depreciation of the value of his property during the period from October 15, 1919, to January 10, 1920, when the German war legislation was repealed.

This conclusion does not apply to M. 26,000. — $3^1/_2\%$ Prussian Consols which were deposited with the tax department in order to secure the inheritance taxes (see letter of March 8, 1921 of the executor's attorney). Such deposit has to be made under the German law of inheritance taxes on the demand of

the tax department, and the retention of this amount of the securities therefore has nothing to do either with the executor's attitude or with German exceptional war measures. But the conclusion applies to

87.200 Marks 3½% Prussian Consols
10.000 Marks 4% Moskau & Jarosaw Archangel EB priority 1997 and
34.680 Marks 4% Russian Southwestern Railroad priorities.

Following the rules laid down by this Commission in Administrative Decision No. IV the measure of damages to which the claimant is entitled is the market value of the securities as of October 15, 1919, less their market value as of January 10, 1920, together with interest at the rate of 5% from October 15, 1919. The case is accordingly referred back to the Agencies of the two governments to ascertain the dollar amount to which claimant is entitled under such computation.

In addition to the amount thus to be ascertained the claimant is, furthermore, entitled to an award in the amounts admitted by the German Agent, to wit:

$2869.80 with 5% interest from December 11, 1921,
$101.57 with 5% interest from October 27, 1919, and
$401.83 with 5% interest from January 1, 1920 for a bank balance in the amount of M. 2511.46 due from the Frankfurter Bank.

Done at Washington March 13, 1928.

Chandler P. ANDERSON
American Commissioner

W. KIESSELBACH
German Commissioner

[Extract from the Minutes of the meeting of the Commission held on June 14, 1928.]

In the case of Rudolph W. Frank, claimant, Docket No. 8130, the American Commissioner announced on behalf of the National Commissioners that the petition filed on April 13, 1928, by the American Agent for a revision of the interlocutory decree has been brought to their attention and, after careful consideration of the arguments set forth therein both as to the facts and the law, the Commission does not find justification for the contention of the American Agent that the aforesaid decree conflicts with the rules adopted by this Commission in Administrative Decision No. IV or with subsection (*d*) of paragraph 15 of the Order of May 7, 1925, as interpreted by this Commission, or with any decisions or decrees heretofore rendered in estate claims, and accordingly dismissed the Petition and reaffirmed the interlocutory decree and ordered that a final decree be entered in accordance therewith.

[*Note.* — The National Commissioners under date of January 31, 1929, entered an award in Docket No. 8130 in favor of the Government of the United States on behalf of Rudolph W. Frank, claimant, against the Government of Germany in the amounts of $1.953.98. $101.57, $401.83, and $2.869.80 with interest thereon at the rate of 5% per annum from October 15, 1919, October 27, 1919, January 1, 1920, and December 11, 1921, respectively, to the date of payment.]

JAMES A. BEHA, SUPERINTENDENT OF INSURANCE OF THE STATE OF NEW YORK, AS LIQUIDATOR OF NORSKE LLOYD INSURANCE COMPANY, LIMITED, FOR AMERICAN POLICYHOLDERS (UNITED STATES) *v.* GERMANY

(April 12, 1928, pp. 901-903.)

DAMAGE: RULE OF PROXIMATE CAUSE. Insolvency of Norwegian insurance company alleged to be caused by destruction by Germany of non-American property insured by it. Claim for extent to which, on account of insolvency, certain American policyholders, owners of property destroyed, but not by Germany, will not be paid their contracted indemnities. *Held* that destruction of non-American property resulting in company's insolvency is not proximate cause of inability to collect full indemnity.

BY THE COMMISSION: —

This claim is put forward by the United States on behalf of the Superintendent of Insurance of the State of New York as statutory liquidator for American policyholders of the Norske Lloyd Insurance Company, Limited, a Norwegian corporation, which, in January, 1916, pursuant to the laws of the State of New York, was admitted to transact and thereafter transacted business in that State. The corporation was adjudged insolvent in 1921. The claimant as liquidator of its assets in the United States found them sufficient for the payment of all claims of all American policyholders. But the Court of Appeals of the State of New York held that only those American nationals (designated class 1 policyholders) whose policies were issued through the United States branch of the Norske Lloyd were entitled to preferential payment from the assets in the United States, and that the American nationals (designated class 2 policyholders) holding policies issued to them by the corporation but not through the United States branch thereof were not entitled to such preferential payment but as common creditors must share pro rata with all policyholders. It is alleged that while class 1 policyholders will be paid in full class 2 policyholders, whose claims are estimated at $432,000, will recover from the Norwegian corporation as general creditors only 23 per cent of their claims.

The argument put forward in support of this claim may be briefly stated thus:

It is claimed that the Norske Lloyd, a Norwegian national, was rendered insolvent through the destruction by Germany of property insured by it belonging to other than American nationals, which insurance, in the light of Germany's effective war activities, proved to have been unprofitable and therefore improvidently written. American nationals holding policies written by this neutral insurer, but not through its American branch, whose property was destroyed, but not by Germany, will, because of the insolvency of this neutral insurer, be unable to collect from it 77 per cent of the amount of the indemnity for which they contracted. While Germany is not obligated under the Treaty of Berlin to reimburse the neutral insurer for the losses paid by it, nevertheless demand is now made that Germany reimburse insured American nationals to the extent of their losses which the neutral insurer cannot pay in full because of its insolvency.

The claimant's counsel frankly state that this claim is asserted not to collect insurance under policies written by the Norwegian insurer but rather to collect damages resulting from the insurer's inability to pay because of its insolvency caused by Germany's acts.

Assuming the truth of the facts upon which this argument rests, the vice in it is that the inability of these American policyholders to collect from the Norwegian insurer indemnity in full was not the natural and normal consequence of the acts of Germany in destroying property not American-owned which happened to be insured by the same Norwegian insurer.

The property of the American class 2 policyholders, for whom the claimant herein is acting, has been destroyed to their damage. It is not contended that the destruction resulted from any act of Germany. They have sought indemnity from the neutral insurer under policies written by it, but because of its insolvency it cannot discharge its contractual obligations. To these contracts Germany was not a party, of them she had no notice, and with them she was in no way connected. In destroying non-American-owned property insured by this neutral insurer Germany inflicted damage on such insurer. But Germany did not directly or indirectly touch any property owned by these American policyholders or in which they held a property interest. The destruction by Germany of non-American-owned property insured by this Norwegian insurer which resulted in its insolvency cannot, in legal contemplation, be attributed as the proximate cause of damages sustained by American nationals resulting from their inability, because of the insurer's insolvency, to collect full indemnity for the loss of their property not touched by Germany.

But for the existence of a state of war this neutral insurer would have written no war-risk insurance. The heavy premiums charged were intended to be commensurate with the risks assumed. The insurer doubtless thought it was being adequately compensated for such risks. It knew, and all of its policyholders must be presumed to have known, that, speaking generally, it at the time had no recourse against Germany or any other belligerent for losses which it might sustain under its contracts of indemnity. The fact that subsequent events proved that the premiums collected were not sufficient in amount to justify the risks assumed and hence that its contracts of indemnity were improvidently entered into by it, resulting in its insolvency and its inability to pay in full American policyholders whose property was not damaged or destroyed by any act of Germany, cannot be attributed to Germany's acts as a proximate cause.

Applying the principles announced in numerous cases heretofore decided by this Commission, it is decreed that under the Treaty of Berlin of August 25, 1921, and in accordance with its terms the Government of Germany is not obligated to pay to the Government of the United States any amount on behalf of the claimant herein.

Done at Washington April 12, 1928.

Edwin B. PARKER
Umpire

Chandler P. ANDERSON
American Commissioner

W. KIESSELBACH
German Commissioner

EDWARD GALVIN, REPRESENTATIVE AND AGENT OF POLICYHOLDERS ASSOCIATION (UNITED STATES) *v.* GERMANY

(April 12, 1928, pp. 904-905.)

DEBT: ASSIGNMENT, UNLIQUIDATED INDEBTEDNESS, JURISDICTION. *Held* that no evidence submitted of title or interest, through assignment or otherwise, in alleged indebtedness, and that claim not within Commission's jurisdiction: indebtedness unliquidated and no "debt", therefore, as term used in Treaty of Berlin.

BY THE COMMISSION: —

This claim is put forward by the United States on behalf of Edward Galvin, Representative and Agent of Policy Holders Association, a voluntary association existing under the provisions of the civil code of the State of California.

The claimant seeks to recover debts alleged to be due American nationals, members of the association, under policies of fire insurance issued by companies organized under the laws of Germany and covering losses sustained by such members in the San Francisco conflagration.

The record is barren of any evidence that the claimant or the Policy Holders Association has acquired by assignment or otherwise any title or interest in the alleged indebtedness upon which the claim is founded. For this reason the claim must be dismissed.

It is alleged that many of the members of the association received payments from the German insurance companies in full settlement of their losses covered by their insurance policies, but that such settlements were in fact made under duress and threats that unless the policyholders accepted the comparatively small sums paid them they would get nothing, and demand is made for the difference between the amount actually received by the policyholders and the full amount which they claim they were entitled to receive under the policies. Even if the truth of these allegations be admitted, still, as the indebtedness is unliquidated and there exists no "debt" as that term is used in the Treaty of Berlin, the claim does not fall within the jurisdiction of this Commission as an obligation of Germany. It follows that if the claims of those members of the association who seek to set aside settlements made by them with German insurance companies were properly before the Commission there is no warrant under the Treaty of Berlin for entering awards on their behalf.

Wherefore it is ordered by the Commission that under the Treaty of Berlin of August 25, 1921, and the Agreement of August 10, 1922, in pursuance of which this Commission is constituted, this case be, and it is hereby, dismissed.

Done at Washington April 12, 1928.

Edwin B. PARKER
Umpire

Chandler P. ANDERSON
American Commissioner

W. KIESSELBACH
German Commissioner

KNICKERBOCKER INSURANCE COMPANY OF NEW YORK, SUCCESSOR TO EQUITABLE UNDERWRITERS OF NEW YORK (UNITED STATES) *v.* GERMANY

(April 18, 1928, pp. 912-914.)

PROCEDURE: REHEARING AFTER FINAL JUDGMENT. — DISTRIBUTION OF AMOUNTS PAID. Contestation of transfer to claimant of claims forming basis of final judgment. Request for rehearing. *Held* that question must be decided by municipal tribunal according to local jurisprudence (reference made to Administrative Decision No. II, Vol. VII, p. 23).

BY THE COMMISSION: —

In the case numbered and styled as above [a] a final judgment was entered by this Commission on September 18, 1924, decreeing that

> " the Government of Germany is obligated to pay to the Government of the United States on behalf of Knickerbocker Insurance Company of New York, Successor to Equitable Underwriters of New York, the sum of Two Hundred Twelve Thousand, Eight Hundred Eleven and 71/100 Dollars ($212.811.71), with interest thereon at the rate of 5 per cent. per annum from November 11, 1918, to the date of payment."

The American Agent now presents and brings to the attention of the Commission a " Petition in the nature of a petition for rehearing and protesting against the certification of any award on the claim of the Equitable Underwriters of New York to the Knickerbocker Insurance Company " dated March 20, 1928, filed by Thomas A. Duffey for himself and as attorney-in-fact for Estate of W. Eitingon, Herman Basch, James Stuart Lowry, Herbert Buxton, Simon J. Steiner, E. H. Fischer, Philip B. Fouke, F. Jarrigeon, Henry J. Fuller, Alfred deJonge, I. Galland, Charles I. McLaughlin, S. Schild, A. V. Berner, R. S. Charlton, and B. M. Crosthwaite, for themselves and on behalf of all other individual members of the Equitable Underwriters of New York.

The Equitable Underwriters of New York was a Lloyds unincorporated association which, during the years 1917 and 1918, underwrote war risks, the payment of which forms the basis of the award in this case.

On December 31, 1919, the Equitable Underwriters of New York was converted under the laws of the State of New York into a stock insurance corporation under the name of New York Equitable Assurance Company, which was on March 11, 1920, consolidated or merged with the Knickerbocker Insurance Company of New York, a corporation created under the laws of that State.

The petitioners, Duffey and others, now assert that the claims against Germany which formed the basis of the award herein were never transferred to or vested in the New York Equitable Assurance Company and through it to the Knickerbocker Insurance Company of New York but remained and still remain the property of the *individual members* of the Equitable Underwriters of New York.

It is apparent that both the petitioners and the Knickerbocker Insurance Company of New York claim through and under the Equitable Underwriters of New York, a juridical entity. Neither challenge the correctness of the award with respect to the obligation of Germany to pay the Equitable Underwriters of New York, their successor or successors.

[a] *Note by the Secretariat*, Original report: Docket No. 3172.

This Commission in its Administrative Decision No. II (Decisions and Opinions, page 10) [a] held in effect that while this Commission, as an international tribunal applying the terms of the Treaty of Berlin in the light of established rules of international law and such rules of municipal law as may be applicable, has the exclusive and final power to determine the existence or non-existence of the original obligations, if any, of Germany, all questions involving conflicts in interests between American nationals or the transfer of interests in or to such original obligation must be decided by municipal tribunals according to local jurisprudence. [1]

So far as concerns the *original* claimant's primary *right to recover* this Commission's jurisdiction is exclusive and final, but all controversies over asserted rights to *receive payment* arising (1) between the original claimants and those claiming under them or (2) between two or more whose rights are derivative, not original, claiming through assignments or otherwise, voluntary or involuntary, from the original claimants, must be decided by municipal tribunals.

It follows that this is not the forum in which the petitioners should seek relief.

Although the rules of this Commission make no provision for a rehearing of any case in which a final decree has been entered, this petition has been carefully considered. It is hereby dismissed.

Done at Washington April 18, 1928.

Edwin B. PARKER
Umpire

Chandler P. ANDERSON
American Commissioner

W. KIESSELBACH
German Commissioner

GEORGE ACHELIS, JULIE ACHELIS SPIES, JOHN ACHELIS, ESTATE OF ANNIE ACHELIS VIETOR, DECEASED, AND ESTATE OF FRITZ ACHELIS, DECEASED, HEIRS AND LEGATEES OF THE ESTATE OF THOMAS ACHELIS, DECEASED (UNITED STATES) *v.* GERMANY

(April 25, 1928, pp. 914-920.)

ESTATE CLAIMS: EXCEPTIONAL WAR MEASURES. — DAMAGE: RULE OF PROXIMATE CAUSE. Claim for loss resulting from prevention by German exceptional war measures of distribution of estate prior to August, 1921. Appli-

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[a] *Note by the Secretariat*, Vol. VII, p. 28.

[1] See Comegys and Pettit *v.* Vasse, 1828, 1 Peters (26 U.S.) 193, 212; Frevall *v.* Bache, 1840, 14 Peters (39 U. S.) 95, 97; Judson *v.* Corcoran, 1855, 17 Howard (58 U.S.) 612, 614; Phelps *v.* McDonald, 1879, 99 U. S. (9 Otto) 298, 307; Frelinghuysen *v.* Key, 1884, 110 U. S. 63, 71; Leonard *v.* Nye, 1878, 125 Massachusetts 455, 466; Brooks *v.* Ahrens, 1888, 68 Maryland 212, 221; Heard *v.* Sturgis, 1888, 146 Massachusetts 545, 547, and Williams *v.* Heard, 1891, 140 U.S. 529, 539-540; Kingsbury *v.* Mattocks, 1889, 81 Maine 310, 315; Taft *v.* Marsily, 1890, 120 New York 474, 477.

cation of rules announced in Administrative Decision No. IV, see Vol. VII, p. 117. *Held* that delay in distribution of estate and transmission and delivery to claimants of their interest therein was not proximately caused by German exceptional war measures, but by executor's decision, prior to enactment of German war legislation affecting American property, to wait until documents relating to securities deposited in England and taken over as enemy property by British Public Trustee for Enemy Property could be procured.

BY THE COMMISSION: —

This claim is put forward by the United States on behalf of those named in the foregoing caption as claimants, all American nationals, for compensation claimed to be due them from Germany for damages and injuries alleged to have resulted from the application of German exceptional war measures to money and securities which they were entitled to receive as heirs and legatees of the estate of Thomas Achelis.

From the record it appears that on April 6, 1911, Thomas Achelis, an American national, died, leaving a large estate located partly in the United States and partly in Europe. H. Hildebrand, Bürgermeister of Bremen, was appointed and qualified German executor in charge of the European estate. The five brothers and sisters of the decedent who were American nationals and who are claimants herein, together with their sister, Marie Achelis Smidt, of Bremen, Germany, a German national, were the residuary legatees.

At the outbreak of the war in July, 1914, certain of the securities constituting a portion of the European estate were held by the Deutsche Bank (Berlin) London branch in the name of Deutsche Bank, Bremen branch, but really for the account of the estate of Thomas Achelis. These securities were taken over as enemy property by the British Public Trustee for Enemy Property and they or their proceeds were not released by him until after the taking effect of the Treaty of Versailles (Exhibit 1).

Under the applicable German law Bürgermeister Hildebrand as executor was clothed with authority to liquidate and distribute the estate at such time or times and in such manner as dictated by his sound judgment and discretion. The record indicates that in the exercise of that discretion the German executor determined not to force liquidation and distribution of the estate but from time to time to sell the securities, which were of substantial value, when markets and conditions were favorable to yielding the largest returns, and that through his diligence, sound judgment, and discretion in the discharge of his duties as executor practically the entire estate was profitably liquidated.

Distributions were made by the German executor to the claimants and to their German sister and co-residuary legatee, each receiving one-sixth, as follows:

Prior to May 6, 1912 (the exact date not being disclosed). . .	M.1,800,000.00
On May 6, 1912	509,771.97
November 30, 1912	720,000.00
March 12, 1914	180,000.00

While the liquidation proceeded, no further distributions were made by the German executor until August, 1921.

In the meantime the checking account of the German executor showed credit balances as follows:

July 1, 1914	M.	95,230.00
January 1, 1915		75,736.90
July 1, 1915		111,277.10
January 1, 1916		244,312.00
July 1, 1916		288,649.00
December 31, 1916		478,764.15
January 31, 1917		628,029.80

On January 31, 1917, there was transferred from the checking account to the deposit account of the German executor marks 600,000. As the deposit account bore a higher rate of interest than the checking account, conditioned upon the funds remaining on deposit for a definite period, this transfer indicated an intention on the part of the German executor to leave these funds on deposit for some time at least and reap the benefit of the higher interest rate.

A further sale of securities was made by the German executor February 23, 1917, so that on March 1, 1917, the checking account showed a credit balance of marks 52,658.65 while the deposit account showed a credit balance of marks 600,000 plus accrued interest. At that time there remained undisposed of in the hands of the German executor securities of the nominal value of only marks 112,000.

The claimants contend that German exceptional war measures prevented the German executor from distributing the estate prior to August, 1921, and that this delay resulted in damage to claimants for which compensation is demanded of Germany under Article 297 (*e*) of the Treaty of Versailles incorporated in the Treaty of Berlin.

The German Agent denies any obligation on the part of Germany to make compensation, contending that the German executor's failure to make distributions of the estate subsequent to March 12, 1914, was due to causes other than German exceptional war measures and that no such distribution would have been made had such war measures not been in effect.

The issue thus sharply drawn must be determined according to the rules applicable to estate claims deduced from the Treaty of Berlin by this Commission and embodied in Administrative Decision No. IV, which are substantially as follows:

(1) The amounts due from German executors, administrators, or other German nationals in connection with the administration of estates in Germany to American nationals claiming as heirs or legatees an interest in such estates are not " debts " as that term is used in Section III of Part X of the Treaty of Versailles incorporated in the Treaty of Berlin.

(2) If and when such executor, administrator, or other German national *became obligated* to transmit money or securities constituting a part of an estate in Germany to an American national residing beyond German territory and was prevented from so doing by a German exceptional war measure as that term is defined in the Treaty, such American national would, in pursuance of Article 297 (*e*) of the Treaty, be entitled to compensation from Germany in respect of resulting damage or injury, if any, inflicted thereby.

(3) By decree of the German Government effective August 9, 1917, it was prohibited to anyone in Germany to make any payments from Germany either directly or indirectly to creditors residing in the United States (or in an Allied country to which the prohibition applied) " whether in cash or by means of bills or checks or by transfer or in any other manner whatsoever, or to remove or transfer money or securities directly or indirectly " to the United States (or to such Allied country).

(4) By decree of the German Government effective November 10, 1917, it was made unlawful for anyone in Germany " to remove abroad, either directly or indirectly, property belonging to " American nationals, " in particular securities and money, without the authority of the Imperial Chancellor ", etc.

(5) These two decrees of August 9, 1917, and November 10, 1917, were, in pursuance of the provisions of the Treaty of Versailles, repealed by the German Government effective January 11, 1920.

(6) On August 9, 1917, the rate of exchange for the German mark was 14.2 cents to the mark and on January 11, 1920, the rate of exchange was 2 cents to the mark.

(7) The repeal effective January 11, 1920, of the two decrees above mentioned ended any statutory interference by the German Government through exceptional war measures or measures in the nature of exceptional war measures with the sending of money and securities by executors, administrators, and heirs to American nationals entitled thereto. The German law of August 31, 1919, was enacted in pursuance of and to carry into effect the provisions of the Treaty of Versailles and particularly subdivision (*a*) of Article 296 thereof, and prohibited the payment by German debtors of " money demands and debts " save through Clearing Offices constituted as provided by the Treaty or until the Allied Opposing Power had formally elected not to adopt the Clearing Office system. The Commission holds that this German law of August 31, 1919, and the decree promulgated in pursuance thereof were peace measures and not exceptional war measures within the meaning of the Treaty.[1]

(8) In order to determine the damage or injury inflicted upon such American nationals by the application of exceptional war measures to securities and moneys of German estates to which they were entitled, there should be deducted from the market value of securities and the exchange value of money at the time delivery would have been made to them but for the application of German exceptional war measures the market or exchange value, as the case may be, as of January 11, 1920.

(9) Where it is made to appear that an obligation of a German executor or administrator to transmit money or securities to an American national arose during the period when the two German decrees above-mentioned were in effect and that he failed to discharge such obligation, it will be presumed, in the absence of evidence to the contrary, that these exceptional war measures were the proximate cause of such failure.

(10) But if it appears, from the evidence presented in any particular case and the reasonable inferences to be drawn therefrom, that such money or securities would not have been distributed or transmitted and delivered to the American national or nationals claiming as heirs or legatees of the estate even had such exceptional war measures not been in effect, then the exceptional war measures will not be held to have been the proximate cause of the damage and injury complained of and Germany will not be held liable to make compensation for the failure or delay in making such distribution and delivery.

Applying these rules to the facts as disclosed by the record in this case, the Commission finds that the delay complained of in the distribution of the German estate and the transmission and delivery to them of the claimant's interest therein was not proximately caused by German exceptional war measures.

As heretofore noted, a part of the European estate was seized as enemy property by the British Public Trustee for Enemy Property and not released

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[1] Proctor *v.* German Government, decided by Anglo-German Mixed Arbitral Tribunal December 8, 1927. [VII Dec. M. A. T. 479.]

until after the coming into effect of the Treaty of Versailles. In response to a request of the private counsel for claimants, the German executor, who was responsible for the liquidation and distribution of the European estate, wrote [translation, Exhibit 4]:

"... In regard to the various stocks and other investments, shares in joint stock companies, etc., favorable conditions for paying off, which during the first years after 1911 and even afterwards did not present themselves, had to be waited for, inasmuch as documents relating to the matter were deposited in England and were not realized until later. In connection therewith, the distribution of the bank balance was likewise postponed."

This is the only positive estatement in the record with respect to the cause of the delay in the distribution of the German estate. The claimants themselves, by their own testimony or that of their representatives in Germany, do not undertake to ascribe such delay to German exceptional war measures.

But it will be noted that no distribution was made between March 12, 1914, and August, 1921, although the cash credit balances of the German executor were considerable and, generally speaking, continued to increase practically up to the time of the entry of the United States into the war, until on February 1, 1917, they amounted to more than marks 628, 000 and only slightly increased thereafter. During the period of approximately three years and five months. from March 12, 1914, the date of the last distribution, to August 9, 1917, the date of the coming into force of the first exceptional war measure of Germany against the United States and its nationals, there was in force no statute or decree of the German Government which would have prevented the German executor from making a further distribution of the cash assets in his hands to the five American legatees and to the German legatee. This fact, coupled with his transfer on January 31, 1917, from the checking account to the deposit account of practically the entire credit balance, tends to corroborate the statement of the German executor that, in the exercise of his discretion, he determined that a further distribution of the bank balances should be postponed until the documents relating to the securities deposited in England could be procured, the estate fully liquidated, and a final distribution made. That he persisted in this determination throughout the period of American belligerency is evidenced by the fact that during that period he made no payment to Mrs. Marie Achelis Smidt, a German national living in Bremen, on account of her one-sixth distributive share of the available bank balances, notwithstanding there was no legal obstacle to his so doing.

By far the larger part of the German estate had been liquidated prior to July 1, 1914. The legatees were financially strong and the distributive share of each in the remainder was of comparatively small moment to them. The German estate was being ably administered. Apparently no reason existed for a further distribution prior to the final settlement.

Because the damage complained of was not proximately caused by German exceptional war measures, the Commission decrees that under the Treaty of Berlin of August 25, 1921, and in accordance with its terms the Government of Germany is not obligated to pay to the Government of the United States any amount on behalf of the claimants herein.

Done at Washington April 25, 1928.

Edwin B. PARKER
Umpire

Chandler P. ANDERSON
American Commissioner

W. KIESSELBACH
German Commissioner

EMIL F. HELPUP (UNITED STATES) *v.* GERMANY AND KARL HELPUP, IMPLEADED

(April 25, 1928, pp. 922-923.)

ESPOUSAL OF CLAIMS: EFFECT OF COMPROMISE BETWEEN PRIVATE PARTIES. — DAMAGE: RULE OF PROXIMATE CAUSE. *Held* that debt discharged by compromise between private parties entered into after espousal of claim by United States (Comp. Order of May 7, 1925, No. 3, see p. 481 *infra*), and that exceptional war measures not proximate cause of alleged depreciation in value of inheritance.

BY THE COMMISSION: —

This claim is put forward by the United States on behalf of Emil F. Helpup, born a German but, through naturalization in 1913, an American citizen. It is based on two counts: (1) the existence of an alleged pre-war indebtedness due claimant from his brother, a German national, and (2) for depreciation in claimant's share of his father's estate alleged to have been due to the application of exceptional war measures thereto causing delay in payment to him.

At the request of the claimant, the Government of the United States espoused this claim against Germany prior to April 9, 1923. Thereafter, on May 7, 1925, claimant voluntarily negotiated a compromise ("Vergleich," referred to in Exhibit 9) with his German debtor, realizing thereby more than he would have realized had this part of the claim fallen within the jurisdiction of the Commission and an award been made on his behalf. On this count, therefore, no obligation of Germany could exist, the debt having been discharged by direct action of the private parties.

From a careful examination of the record the Commission finds that the claimant's share of his parent's estate would not have been distributed and forwarded to him during the war period prior to January 11, 1920, had there been no German exceptional war measures in effect applicable to property of American nationals. The claimant therefore was not prevented from receiving the inheritance due him from the estate of his parent as the result of the application thereto of a German exceptional war measure, and hence under the rule laid down in this Commission's Administrative Decision No. IV Germany is not liable for the depreciation in the value of the inheritance as claimed.

Wherefore the Commission decrees that under the Treaty of Berlin of August 25, 1921, and in accordance with its terms the Government of Germany is not obligated to pay to the Government of the United States any amount on behalf of the claimant herein.

Done at Washington April 25, 1928.

Edwin B. PARKER
Umpire

Chandler P. ANDERSON
American Commissioner

W. KIESSELBACH
German Commissioner

WILLIAM J. QUILLIN *ET AL.* (UNITED STATES) *v.* GERMANY

(June 14, 1928, pp. 923-924.)

CORRECTION AND REVISION OF AWARDS. American motion to correct and revise award granted, the German Agent concurring.

Whereas, the above numbered [a] and entitled cause was certified by the National Commissioners to the Umpire for decision and thereafter on April 21, 1926, a decision was handed down by the Umpire (Decisions and Opinions of the Commission, page 654-657),[b] and

Whereas, thereafter on April 21, 1928, a motion to correct and revise the said decree of April 21, 1926, was filed herein by the American Agent, concurred in and approved by the German Agent, and

Whereas, the said motion with evidence filed in support thereof has been submitted by the said Agents and considered by the Umpire;

Now, therefore, the Commission orders that the decree embodied in the decision of the Umpire of April 21, 1926, be, and the same is hereby, corrected and revised to read as follows:

The Commission decrees that under the Treaty of Berlin of August 25, 1921, and in accordance with its terms the Government of Germany is obligated to pay to the Government of the United States on behalf of the claimants herein the sum of ninety-six thousand eight hundred fifty-three dollars and sixty-three cents ($96,853.63) with interest thereon at the rate of five per cent per annum from November 11, 1918, distributed as follows:

William J. Quillin	$9,973.49
Oscar Bell	742.56
John W. Callaway	1,485.13
Annie S. Carey	1,485.13
James C. Conwell	1,485.13
Mary S. Coulbourn, Trustee of Joseph N. Coulbourn	1,485.13
A. D. Cummins	11,881.06
Alverda S. Elzey	1,485.13
Samuel J. Furniss	1,485.13
Harlan E. Goodell	1,485.13
Ethel Hastings	2,970.26
C. L. Horsey	742.56
Charles M. Kelley	1,485.13
S. Crowley Loveland	1,485.13
Francis J. McDonald	5,940.52
William Martino	1,485.13
Jonathan May & Sons	11,881.06
C. W. Riggin	1,485.13
F. H. Small	742.56
John Sullivan	1,485.13
Edward G. Taulane	2.970.26
George Taulane	2,970.26
Lewis B. Taulane	2,970.26
Herbert L. Black	1,485.13
Harold G. Foss	1,485.13
Georgie S. Foster and Samuel K. Dennis, Administrators of the Estate of Arthur D. Foster	1,485,13

[a] *Note by the Secretariat*, Original report: Docket No. 6120.
[b] *Note by the Secretariat*, Vol. VII, pp. 299-301.

Joseph F. O'Brien	$1,485.13
David Baird Company	1,485.13
Clara Stetson Meigs, Executrix of the Estate of Mary L. Stetson	8,910.79
Clara Stetson Meigs	2,970.26
Mary J. Winsmore, Executrix of the Estate of Thomas Winsmore	5,940.52

Done at Washington June 14, 1928.

Edwin B. PARKER

Umpire

[*Editorial note.* — The effect of the foregoing corrected and revised decree was (1) to enter awards in favor of the holders of the remaining $^{12}/_{64}$ interest in the schooner, i. e., the three parties last named in the foregoing decree, (2) to apportion to William J. Quillin instead of among the part-owners the value of the schooner's stores lost with her, and (3) to correct certain inaccuracies in the names of the part-owners discovered after the entry of the original decree, which in all other respects remained unchanged.]

ALEXANDER SPRUNT & SON (UNITED STATES) *v.* GERMANY

(March 7, 1929, p. 927.)

WAR: DIRECT IMPACT OF EXCEPTIONAL WAR MEASURES ON PROPERTY, RIGHTS, INTERESTS. Claim for loss through prevention of German bank, by exceptional war measures, from paying British bank, with which claimants were in contractual relation. *Held* that claim not within terms of Treaty of Berlin: war measures did not operate *directly* on claimants' property, rights, or interests.

BY THE COMMISSION: —

The title to the cotton held in Germany and involved in this claim was, under the German law which controlled the transaction, in the Deutsche Nationalbank as agent for the Anglo-Austrian Bank, London Branch. When the cotton was sold its cash proceeds were held by the Deutsche Nationalbank as agent for the Anglo-Austrian Bank, London Branch. The exceptional war measures complained of by claimants prevented the Deutsche Nationalbank from accounting to and making payment to its principal, the London Branch of the Anglo-Austrian Bank. These war measures were not directed against American nationals nor did they operate directly upon the property of, or the debts owing by German nationals to, American nationals. The losses complained of by claimants resulted not from any exceptional war measures operating directly upon their property, rights, or interests within the meaning of the Treaty, but only indirectly and remotely through their contractual relations with the London Branch of the Anglo-Austrian Bank. There never was a time during the war when the claimants were entitled to demand and receive the cotton in question or the proceeds thereof nor when the Deutsche Nationalbank was indebted to the claimants for the amount of such proceeds.

The loss sustained by claimants is not one falling within the terms of the Treaty of Berlin for which Germany is financially obligated.

The claim is dismissed.

Done at Washington March 7, 1929.

Edwin B. PARKER
Umpire

Chandler P. ANDERSON
American Commissioner

W. KIESSELBACH
German Commissioner

PHILADELPHIA-GIRARD NATIONAL BANK (UNITED STATES) *v.* GERMANY

(April 3, 1929, pp. 936-939.)

DEBT: RELATIONSHIP OF CREDITOR AND DEBTOR. — NEGLIGENCE, DEFAULT. — WAR: EXCEPTIONAL WAR MEASURES. Establishment by German bank, in its own name, but for account and at risk of claimant, who made remittances to this end, of rouble credits in Russian banks, against which claimant was entitled to issue drafts. Failure of claimant shortly before outbreak of war, to heed German bank's suggestion for instructions to sell out credits, followed, immediately at outbreak of war, by Russian prohibition of transfer of credits to claimant. Claim for losses resulting from termination and frustration of arrangement between two banks. *Held* that no relationship of creditor and debtor existed between claimant and German bank: latter merely obliged to establish credits, which obligation is fulfilled; and that loss to claimant not due to German bank's negligence or default, nor to action by Germany; and that no exceptional war measures within meaning of Treaty of Berlin involved: claimant American national, United States neutral at time of transactions.

OPINION BY THE COMMISSION: —

The transactions between the Philadelphia-Girard National Bank [1] (hereinbelow called the Philabank) and the Disconto-Gesellschaft (hereinbelow called the Disconto), out of which this claim arises, were briefly as follows:

For several months prior to the outbreak of the World War, the Philabank transmitted from time to time to the Disconto funds which the Disconto used at the request of the Philabank to establish ruble credits in its own name but for the account of the Philabank in unnamed banks in Russia. The Philabank was entitled to issue drafts against these credits and did so in the course of its business, which drafts were always honored up to the outbreak of the War between Russia and Germany. Immediately before that date the Disconto endeavored to arrange for a transfer to the Philabank of the entire remaining ruble credit in Russia to which it was entitled under these transactions. The then existing ruble credit of the Disconto in Russia was ample for this purpose, but the attempted transfer was prevented because the Russian authorities,

[1] Claimant bank's name having been changed, the award entered on April 3, 1929, was on behalf of " The Philadelphia National Bank".

immediately upon the outbreak of the War, prohibited the Russian banks from carrying on any business dealings with German nationals

It also appears that the Disconto, shortly before the outbreak of the War, suggested to the Philabank the advisability of selling ruble exchange in order to close out its ruble credits, and asked for instructions, which the Philabank failed to give. At that time the entire ruble interest of the Philabank could have been sold out at a comparatively small loss.

As a matter of act, the Disconto, acting on its own responsibility, did sell at that time for the Philabank 150,000 rubles without any substantial loss, but, although the Philabank accepted this transaction, it failed to respond to the Disconto's specific request for a " firm order " as to further sales.

The purpose of the Philabank in entering into these transactions with the Disconto was to take advantage of the latter's well known and extensive banking interests in Russia in securing ruble credits there. It relied upon the Disconto to maintain in Russia for its account ruble credits equivalent to the value of its remittances to the Disconto, and it also relied upon the Disconto to make these credits available wherever in Russia the Philabank might desire to draw against them.

During all this period the ruble credits maintained by the Disconto in Russia were far in excess of the remittances from the Philabank.

The above stated purposes of these transactions are confirmed in the claimant's brief, which states that they were made " with the object of enabling the claimant to invest in Russian exchange, and to obtain a higher rate of interest on funds so invested than it could obtain at home, without any of the risks to the claimant in establishing and operating against a ruble account in Russia, with whose banks, and financial and industrial conditions and methods the claimant was not at the time familiar ".

As a matter of law, the relationship established between the two banks by these transactions did not constitute the Disconto a debtor of the Philabank, as contended by that bank, because the Disconto's obligation was merely to establish for the use of the Philabank ruble credits in Russia, which obligation it completely fulfilled. It did not sell, and was not asked to sell, rubles or ruble credits in Germany to the Philabank. On two occasions it bought for the Philabank Russian rubles in Germany, but in both instances it acted under special instructions outside of the general arrangements and transactions above described. Those two purchases do not enter into the present claim. Neither did the Disconto act as the agent of the Philabank in establishing ruble credits for that bank in Russia because it did not establish in Russia any ruble credits independently of its own credits there.

All that the Philabank asked the Disconto to do, and all that the Disconto did, was to sell to the Philabank a participation, or a right to participate, in the Disconto's ruble credits in Russia to the extent of the funds remitted for that purpose, valorized in Russian rubles at the rate of exchange prevailing when it invested those funds in ruble credits in Russia.

As above stated, up to the time of the outbreak of the War between Russia and Germany, the Disconto fulfilled all of its obligations to the Philabank under these arrangements. Indeed it went even beyond its legal obligation in attempting to save the Philabank from anticipated loss on account of war conditions.

The termination of these arrangements and the resulting loss to the Philabank were not due to any negligence or default on the part of the Disconto, nor to any action on the part of the German Government. In these circumstances the relationship of debtor and creditor between the Disconto and the Philabank did not arise. Neither does any question of exceptional war measures in Germa-

ny, within the meaning of the Treaty of Berlin, enter into the case, because the claimant is an American national, and the United States was still a neutral at the time of these transactions.

The termination and frustration of the arrangement between these two banks and the resulting losses were due solely to the action of the Russian authorities in prohibiting further financial transactions between Russia and Germany immediately upon the outbreak of the War between those two countries. It is evident, therefore, that the damages resulting from the termination and frustration of these transactions were a consequence of circumstances for which the Disconto was not responsible, and they do not constitute a financial obligation for which Germany is responsible under the terms of the Treaty of Berlin as interpreted by this Commission.

Done at Washington April 3, 1929.

Chandler P. ANDERSON
American Commissioner

W. KIESSELBACH
German Commissioner

PHILADELPHIA-GIRARD NATIONAL BANK[1] (UNITED STATES) *v.* GERMANY AND DIREKTION DER DISCONTO GESELLSCHAFT, IMPLEADED

(April 21, 1930, pp. 939-948.)

PROCEDURE: REHEARING AFTER FINAL JUDGMENT, ERROR IN FACT OR LAW, NEW EVIDENCE, FINAL AND BINDING CHARACTER OF DECISIONS. Requests for rehearing after final judgment will be considered in case of manifest error: (1) in establishing facts on evidence produced at time when claim submitted for decision, not on ground that, by reason of newly submitted evidence, facts are different: decisions final and binding (art. VI, Agreement of August 10, 1922): (2) in applying principles of law and rules established and applied in Commission's previous decisions.

DEBT: RELATIONSHIP OF CREDITOR AND DEBTOR. — NEGLIGENCE, DEFAULT. — WAR: EXCEPTIONAL WAR MEASURES. See headnote preceding previous decision, p. 67 *supra*.

EVIDENCE: DECISION OF OTHER CLAIMS COMMISSION. *Held* that Commission not bound by decisions of Tripartite Claims Commission under Treaty of Budapest.

Decision on Petition to Reconsider Award

BY THE COMMISSION: —

In this case a final award was entered by the Commission on April 3, 1929. A Petition for the reconsideration of this award, signed by the claimant and presented through its attorneys to the American Agent, has been submitted to the Commission together with certain additional evidence and a printed Memorandum in support thereof, dated August 7, 1929, and prepared by the private counsel for the claimant.

[1] *Bibliography:* Woolsey, A.J.I.L., Vol. 34 (1940), p. 24. See editorial footnote to opinion immediately preceding this.

Although the rules of this Commission, conforming to the practice of international Commissions, make no provision for a rehearing in any case in which a final decree has been made, this Petition and the supporting Memorandum and evidence have been carefully considered by the Commission.

Before taking up the questions raised by this Petition, the Commission desires to announce certain principles having general application to petitions and requests for rehearings as to the claims originally listed, by which the Commission will be guided in dealing with this and other similar applications.

Where it appears that manifestly the Commission committed an error in its findings of fact on the evidence produced by the Agents at the time the claim was submitted for decision, or in applying the principles of law and the rules of the Commission as established and applied in its previous decisions, the Commission will take under consideration the question of reopening or changing the award.

On the other hand, where a rehearing is demanded merely on the ground that by reason of newly submitted evidence the underlying facts were different from those appearing in the record as submitted at the time of the decision, the Commission will not grant a reopening or a reconsideration of the award.

The reconsideration of a claim after a final decision has been rendered would mean that the whole case would have to be dealt with anew. The new evidence submitted would have to be brought to the attention of the opposing party, which would have to be given a reasonable time to investigate and file additional or rebuttal evidence on its side, and also an amended answer or a reply, if that was found to be necessary, and then the whole case would have to be reexamined and decided again. All of these consequences would result from the failure or neglect of the moving party to produce the additional evidence before the claim was originally submitted for the decision of the Commission.

Moreover, if the production of new evidence by a party would give the right to have the whole case reopened, such right would necessarily attach not only to every claimant whose claim had been submitted and decided, but also to the respondent in each case as well.

If such a right were granted and exercised at this advanced stage of the proceedings of the Commission, it would affect awards which have already been paid, and, apart from the confusion resulting from such procedure, it would be clearly contrary to the express wording and manifest purpose of the Agreement of August 10, 1922, between the United States and Germany. According to that Agreement the decisions of the Commission are accepted as final and binding upon both governments, and, inasmuch as the governments are primarily the parties in interest, the private claimant, on whose behalf the Government of the United States has finally submitted a claim for decision, cannot be given the right to alter or nullify this situation by producing new evidence changing the status of the claim as submitted and decided.

It is also pertinent to consider that most of the applications which have been made for rehearing have arisen in cases in which the Commission has pointed out wherein the claimant has failed to furnish evidence sufficient to establish the liability of Germany under the Treaty of Berlin, as interpreted by this Commission, and to grant a rehearing in those cases would mean a great injustice to the great majority of the claimants whose claims were dismissed by the Commission without indicating wherein the evidence submitted was insufficient, and who, therefore, have been unable to discover new points of attack. It may also be noted that in no case, as yet, has the Commission granted an application to reopen a claim in which a final decision has been rendered.

The Commission will not reconsider questions of law, which have been settled in its earlier decisions, as to the jurisdiction of the Commission and the liability of Germany, under the Treaty of Berlin and the Agreements of August 10, 1922, and December 31, 1928, between the United States and Germany, as interpreted by this Commission.

The law of the Commission, as established in its earlier decisions, will control the decisions of the Commission in all later cases.

Turning now to the questions presented by the Petition in this case, it must be noted at the outset that the Petition relates only to the legal effect of the transactions between the claimant and the Disconto Bank concerning ruble credits in Russia.

It will be convenient to recall that the Commission held in its decision on the facts submitted that these transactions did not establish the ordinary banking relationship of creditor and debtor between the claimant and the Disconto Bank so far as these ruble credits were concerned. The Disconto Bank was merely the intermediary through which the orders of the claimant were transmitted in dealing with the ruble credits which had been established in Russia at the claimant's request by the Disconto Bank, in its own name, but for the account, and at the risk of the claimant. Its responsibility for risk generally is questioned by the claimant, but there can be no question as to its responsibility for risk on account of Force Majeure, or restraints imposed by the Russian authorities.

The Petition and brief now presented by the claimant fail to show that the Commission was in error in reaching this conclusion on the facts before it when its decision was made, and the claimant also fails to produce any new evidence which would justify a different conclusion.

The new evidence now offered in support of the claimant's Petition is relied upon to show that the Russian banks in which these ruble credits were established for the claimant's account were not justified by Russian law in refusing to transfer these credits to the claimant, or to its order, when instructed to do so by the Disconto Bank, upon the outbreak of the War between Russia and Germany.

It is established by the uncontested evidence in the record that the refusal of the Russian banks to honor the drawings by the Disconto Bank in favor of the claimant was on account of the state of war existing between Russia and Germany, and it is also established that upon the outbreak of that War the Russian Minister of Finance issued instructions to the Russian banks to discontinue any payments to, or transactions with, enemy banks, and that the Russian banks acted in accordance with these instructions in refusing to carry out the order of the Disconto Bank to transfer to the claimant's credit the rubles carried for its account by the Disconto in the Russian banks.

The claimant now contends, however, that the Russian Minister of Finance was not justified under Russian law in issuing the instructions which prevented the Russian banks from transferring these credits because " it was not until December 2, 1914 (Russian Style November 19, 1914), that Russia promulgated any law, by legislation or Imperial Decree, prohibiting the transfer of money and securities from Russia to German nationals, or preventing the Disconto from carrying out its obligation to make ruble credits available to the claimant in Russia " (Claimant's Memorandum in support of Petition, page 9).

This contention may be accepted without disturbing the conclusion reached by the Commission that Germany was not liable under the Treaty of Berlin for the resulting damages. The fact remains that the Disconto Bank had to its credit in Russian banks sufficient rubles to cover the claimant's ruble account with the Disconto Bank, and that the Russian banks refused to honor the

drawings of the Disconto in favor of the claimant because of the outbreak of war between Russia and Germany. Neither the Disconto Bank nor the German Government was in any way responsible for the refusal of the Russian banks to transfer this credit to the claimant. Moreover, so far as the credit of 500,000 rubles is concerned, the claimant had not asked that this amount be paid to it or its order, or transferred to its credit in the Russian banks, and the Disconto was under no obligation to make such payment or transfer in the absence of a request by the claimant that this be done. The instruction issued by the Disconto Bank to the Russian banks to transfer this credit to the claimant was merely a voluntary effort on the part of the Disconto Bank to protect the interests of the claimant at the outbreak of war between Germany and Russia, and demonstrated the good faith of the Disconto because the claimant had immediately prior thereto neglected the opportunity offered by the Disconto to sell the claimant's rubles credits with only a comparatively small loss. The details of this transaction are set out below.

On the other hand, the claimant's contention that the refusal of the Russian banks to carry out the Disconto Bank's instruction to transfer these credits to the claimant was illegal under Russian law suggests that if the claimant had demanded of the Russian banks, as a matter of right under Russian law, that the transfers ordered by the Disconto be carried out at the time the order was given, the claimant would have received in its own name the entire rubles credit carried for its account in the Russian banks, which would have saved it from whatever loss resulted from the action of the Russian authorities in prohibiting further financial transactions between Russia and Germany upon the outbreak of war.

The claimant also contends in this Petition that even if the relationship of debtor and creditor did not exist between the Disconto Bank and the claimant as to its ruble account in Russia, nevertheless, the Disconto was under obligation to sell rubles, when instructed to do so by the claimant, up to the extent of its ruble credit, and that such instructions were given by the claimant and not carried out by the Disconto. The evidence relied upon in support of this contention consists of a series of cables exchanged between the two banks on July 25, 27, 28 and 29, 1914, the details of which are fully set out in the claimant's supporting Memorandum. This is not new evidence, as it was before the Commission when its decision was made, but it is emphasized here with the view of showing manifest error on the part of the Commission in its findings of fact.

The claimant, by arbitrary assertions, which are inconsistent with the plain meaning of these cables, endeavors to show that they constituted a *firm order* to the Disconto to sell out claimant's rubles account, and, on that ground, challenges the finding of this Commission that " the Disconto acting on its own responsibility did sell at that time for the Philabank 150,000 rubles without any substantial loss, but, although the Philabank accepted this transaction, it failed to respond to the Disconto's specific request for a ' firm order ' as to further sales ".

The circumstances under which the 150,000 rubles above mentioned were sold are plainly shown by the first three of these cables. In its cable of July 25, 1914, the Disconto expressed the wish that the claimant would dispose immediately of its rubles account. The claimant replied in its cable on July 27th, " if advisable sell rubles best ". The Disconto accordingly effected the sale of 150,000 rubles at 210, and cabled to the claimant on the same date reporting this sale, and asking " Shall we continue. Give firm order." On the following day the claimant cabled " We sold at your request only, but if you consider advisable continue selling." This cable justifies the Commission's finding

that Disconto on its own responsibility initiated this sale, and also the Commission's finding that " the claimant failed to respond to the Disconto's specific request for a ' firm order ' as to further sales ". This cable certainly was not a *firm order*, and whatever discretionary power might have been read into the final clause of the cable was nullified by the opening statement that the previous sale was authorized only because requested by the Disconto.

The Disconto accordingly cabled again on July 29th, indicating a desire that the claimant should continue drawing against the ruble account, by again giving quotations, and renewing its request for a *firm order*. The claimant's cable of the same date, in reply, was unresponsive and inadequate, consisting merely of the conditional authority to " sell more rubles if reasonably possible and desirable ".

The claimant's attorneys now allege in their Memorandum that the Commission's finding that the claimant failed to respond to the Disconto's specific request for a *firm order* " obliges us to infer that the Commission was unaware of the three cables authorizing the Disconto to sell rubles in its discretion ". This statement has the appearance of a deliberate distortion of obvious facts, and cannot be excused on the ground of ignorance of the meaning of the expression " firm order ", because the Memorandum says, in the course of the discussion of this point, " When the Disconto asked for a ' firm order ' it was asking for instructions to sell specified quantities at specified prices. It was impossible for the Philabank to give such instructions because of the rapid and progressive decline in the price of rubles as disclosed by the Disconto's cables of July 27 and 28 ".

The claimant being a bank presumably was reasonably well informed about stock market and exchange transactions, and if it was unwilling to give a *firm order* to sell at whatever price could be obtained in the market, it cannot call the Disconto to account for not taking a responsibility on its behalf, which, as shown by its cables, it was unwilling to take for itself. The Disconto explained in a letter written at the time to the claimant, dated July 27, 1914, that its unwillingness to act upon these non-committal orders was because " In the face of such rapid fluctuations we regret we cannot execute discretionary orders and prefer to act only upon firm orders".

The claimant's Memorandum states that " the Disconto for some reason was unwilling to execute the discretionary power given to it by the Philabank to sell ruble exchange for the Philabank's account ", and suggests that " the reason may have been that an effort to sell ruble exchange for the account of the Philabank would have interfered with the sales which the Disconto was making for its own account or for the account of German clients ". This is a mere insinuation, unsupported either by evidence or argument, and the Commission is not favorably impressed by it.

The importance of the point about the legal effect of these cables is unduly magnified by the claimant, and the reasons advanced in the Memorandum in support of it serve to confirm rather than to disturb the conclusions previously arrived at by the Commission.

The claimant has also listed as new evidence supporting its Petition a copy of the decision of the Tripartite Claims Commission between the United States, Austria and Hungary, in the case of Adolfo Stahl, Docket No. 1206.[a] That decision dealt with a claim for the pre-war value of certain Hungarian Treasury notes which were held for the claimant by a German firm in Hamburg, and

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[a] *Note by the Secretariat*, Vol. VI, p. 290.

exchanged by it during the War for a renewal issue without the claimant's sanction, and the Tripartite Claims Commission held that neither the German firm nor the Hungarian Government were liable under the Treaty of Budapest for the loss suffered by the claimant in that transaction.

The submission of this decision of the Tripartite Claims Commission as justification for the reconsideration of this Commission's decision is quite in accord with the general inadequacy of the grounds upon which the claimant's Petition rests. The decision of the Tripartite Claims Commission has a very remote bearing, if any, on the question presented in this case, and, in any event, it is irrelevant and immaterial because this Commission is not bound by the decisions of the Tripartite Claims Commission under the Treaty of Budapest.

The only other arguments presented in support of this Petition, which call for special mention, deal with the meaning of the Treaty of Berlin, and seek to reverse the interpretation of that Treaty on several points which have already been settled by this Commission in its administrative and jurisdictional decisions, and applied in literally thousands of preceding decisions.

For instance, it is contended on behalf of the claimant that even if the relationship of debtor and creditor did not exist between the two banks, the claimant was entitled to recover damages as losses " occasioned as a consequence of the War, or of Exceptional War Measures ".

As to recovering on the ground that the losses were occasioned as a consequence of the War, it is confidently asserted on behalf of the claimant that the Commission was wrong in holding that, under the Treaty of Berlin, Germany is not responsible for damages suffered in consequence of hostilities or operations of war prior to the entry of the United States into the War, unless caused by " the acts of Germany or her agents in the prosecution of the War ". This interpretation of the Treaty was adopted by the Commission in the first decision rendered by it (Administrative Decision No. 1),[b] and has been invariably followed and applied in all of the later decisions of the Commission involving this point. The claimant has not shown that it suffered any loss during the neutrality period of the United States with respect to its rubles credits in Russia which was caused by any action of Germany or her agents in the prosecution of the War, within the meaning of the Treaty of Berlin as interpreted by this Commission.

As to recovering on the ground that the losses were occasioned by the application of Exceptional War Measures, it is asserted with equal confidence on behalf of the claimant that the Commission is wrong in holding that no " question of Exceptional War Measures in Germany within the meaning of the Treaty of Berlin entered into this case because the claimant is an American national and the United States was still a neutral at the time of these transactions."

If the counsel for the Petitioner had taken the trouble to examine the Treaty of Berlin on this point, they would have ascertained that the expression " Exceptional War Measures ", as used in the provisions of the Treaty of Versailles incorporated in the Treaty of Berlin, is distinctly defined therein as meaning measures taken with regard to *enemy property in Germany*, and accordingly, could not apply to measures affecting American property before the United States became an enemy of Germany, or affecting property in Russia or elsewhere outside of Germany. The Petition cites paragraph 13 of the Rules adopted by the Commission on May 7, 1925, as sustaining its contention on this point, but here again an examination of the Treaty would have made it clear that the only Exceptional War Measures mentioned in that Rule were

[b] *Note by the Secretariat*, Vol. VII, p. 21.

those applying during the belligerency period of the United States to American owned property, rights or interests in Germany.

The Commission finds that the Petition for a reconsideration of its final decision in this case is without merit, and it is accordingly dismissed.

Done at Washington April 21, 1930.

Chandler P. ANDERSON
American Commissioner

W. KIESSELBACH
German Commissioner

ADMINISTRATIVE DECISION No. IX

(May 1, 1929, pp. 951-952.)

JURISDICTION: TIME-LIMIT FOR PRESENTATION OF " LATE CLAIMS ". *Held* that, under supplementary Agreement of December 31, 1928, Commission is without jurisdiction to consider claims, notice of which in writing was not received by Department of State prior to July 1, 1928.

BY THE COMMISSION: —

The American Agent by appropriate motion requests of this Commission an administrative ruling with respect to its jurisdiction in a group of claims against Germany put forward on behalf of Emilie Bernhardt and other claimants. The facts upon which the ruling is requested are recited in the motion as follows:

" On June 29, 1928, Max Sturm, an Attorney at Law of 147 Summit Avenue, Union City, New Jersey, mailed a letter by registered mail at the United States Post Office, Union City, New Jersey, addressed to the ' Department of State, Washington, D. C.', which contained notice of a claim against the Government of Germany on behalf of Emilie Bernhardt, *et al.* This letter reached the Department of State on July 2, 1928."

This Commission was established and exists in pursuance of the Agreement between the United States and Germany dated August 10, 1922, as supplemented by the exchange of notes between the two Governments in the nature of a Supplementary Agreement dated December 31, 1928.

Under the original Agreement the Commission was without jurisdiction to consider any claims of American nationals not notified to the Commission on or before April 9, 1923 (Administrative Decision VIII, Decisions and Opinions, page 347 *et seq.*).[a]

Subsection (j) of section 2 of the " Settlement of War Claims Act of 1928 " provided in part as follows:

" The President is requested to enter into an agreement with the German Government by which the Mixed Claims Commission will be given jurisdiction of and authorized to decide claims of the same character as those of which the commission now has jurisdiction, notice of which is filed with the Department of State before July 1, 1928."

That Act came into effect March 10, 1928. It put American nationals on notice that in order to secure the benefit of such Agreement, if any, as might

[a] *Note by the Secretariat*, Vol. VII, p. 252.

be entered into in pursuance of the above-quoted request embodied in the Act, they were required to file notice of their claims with the Department of State prior to July 1, 1928, unless such notice had already been so filed.

The request of the Congress to the President was complied with and the two Governments entered into the Supplementary Agreement of December 31, 1928, above mentioned, which in effect extended the jurisdiction of the Commission to include claims of the same character as those of which the Commission has jurisdiction under the original Agreement, provided notice thereof was filed with the Department of State prior to July 1, 1928.

It follows from the foregoing statement that this Commission is without jurisdiction to consider any claim put forward on behalf of an American national if notice in writing of the claim was not filed with the Department of State prior to July 1, 1928.

This decision, in so far as applicable, will control the disposition of all claims presented to the American Agent for submission to the Commission.

Applying it to the claims dealt with in the motion of the American Agent, notice of which in writing was not filed with the Department of State prior to July 1, 1928, it follows that the Commission is without jurisdiction to consider them.

Done at Washington May 1, 1929.

Edwin B. PARKER
Umpire

Chandler P. ANDERSON
American Commissioner

W. KIESSELBACH
German Commissioner

ELIZABETH A. ACHELIS, MARGARET ACHELIS SANSOME, AND FREDERIC G. ACHELIS (UNITED STATES) *v.* GERMANY

(May 1, 1929, pp. 953-957.)

PROCEDURE: REHEARING AFTER FINAL JUDGMENT. — ESTATE CLAIMS: EXCEPTIONAL WAR MEASURES, DEPRECIATION OF SECURITIES. Death in October, 1916, of claimants' grandmother, whose will provided for postponement of distribution of estate " until peace with England is concluded ". Liquidation, nevertheless, under German exceptional war measure, after United States entered war, including payment in April, 1918, and May, 1919, to *Treuhaender* of securities, inherited by claimants' mother, an American national. Final judgment by Commission refusing compensation for alleged losses through depreciation of securities. Petition for rehearing on ground, that decision contrary to Administrative Decision No. IV (see Vol. VII, p. 117). *Held* that claim did not come under Administrative Decision No. IV, applicable only when obligation arose to transmit money or securities to American nationals: neither under will nor war measure, an obligation to transmit securities to claimants' mother could arise for executor and liquidator, respectively.

DAMAGE: RULE OF PROXIMATE CAUSE. — EVIDENCE: BURDEN OF PROOF, PRESUMPTIONS. *Held* that Administrative Decision No. IV established presumption, that administrators of estates are ordinarily under duty to transmit shares to beneficiaries as soon as estate ready for distribution, and that they

will ordinarily fulfill their duty; and, accordingly, relieved American beneficiaries from burden of proving, that nonfulfillment of duty and loss resulting from depreciation of estate are proximate results of application of German exceptional war measure. *Held* also that, since in present case *no* duty to transmit share existed, claimants had to prove causal connexion between depreciation and war measure, but failed to succeed: had estate not been liquidated, abovementioned provision of will would have prevented distribution.

BY THE COMMISSION: —

A petition has been presented in this case on behalf of the claimants by the Agent of the United States, asking for a reconsideration of their claim and an additional award therein, on the ground that in its decision of February 6, 1929,[1] the Commission failed to render full and complete justice to the claimants because that decision " is not only not in accordance with the Commission's Administrative Decision No. IV, dealing with estate claims (Consolidated Edition of Decisions, p. 141),[a] but is contrary thereto so that the claimants have not been afforded the relief accorded to the claimants in a like position in applying the very same provisions of the Treaty of Berlin ".

The rules of this Commission make no provision for a rehearing of any case in which a final decree has been entered. Nevertheless, this petition and the arguments submitted in support thereof have been carefully examined. No new evidence is submitted in support of this petition, which rests wholly upon arguments questioning the legal effect of the facts previously presented and already considered by this Commission in rendering its decision of February 6, 1929.

The contention of the claimants concerns specifically the refusal of the Commission to award compensation on their behalf for losses resulting from the depreciation in value of certain securities inherited by them from their mother, which losses, they allege, were caused by the application to these securities of exceptional war measures in Germany.

The facts are briefly as follows:

In October, 1916, the claimants' grandmother, Alette Koenig, a German national, died in Germany, leaving her surviving several children and grandchildren, some of whom were of German nationality, others of British, and the remainder, being the claimants herein, of American nationality. The interest of these claimants in Mrs. Koenig's estate is derived through their mother, Bertha Achelis, now deceased, also an American national and the daughter of Mrs. Koenig, whom she survived.

In Mrs. Koenig's Last Will and Testament she provided that:

" In case I die before peace with England is concluded and intercourse with my sons in London is free from all restrictions",

the ultimate disposition of her property should

" be deferred until peace with England is concluded and intercourse with my sons in England is free from all restrictions " (Exhibit 5 A-2, p. 30).

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[1] Award entered by National Commissioners on behalf of claimants jointly in amount of $30,698.86 (with interest at 5% per annum to date of payment of award on $6,987.96 thereof from January 1, 1919, and on remaining $23,710.90 thereof from December 11, 1921).

[a] *Note by the Secretariat*, Vol. VII, p. 117.

Her Will also provided that a " special capital ", as designated " in my books ", but " not less than the sum of 1,000,000 marks out of my entire estate ", shall be constituted " of which other disposition is hereinafter made ".

Under date of March 27, 1917, one George Mosler, a banker, was appointed in accordance with the provisions of the Federal Decree of July 31, 1916, and of an " Instruction regarding the liquidation of British and French enterprises " issued by the Prussian Royal Minister of Commerce, and Trade, compulsory liquidator of the estate of Alette Koenig. The Instruction in so far as the duties of the liquidator are concerned, reads:

" Proceeds of liquidation remaining for the persons interested in the enterprise shall be distributed among them; in so far as they fall to enemy nationals they shall be deposited for the account of the persons interested with the Koenigl. Preussische Seehandlung", subsequently changed to the Treuhänder. (Petition for Rehearing, p. 4).

The Liquidator proceeded promptly with the liquidation of the estate with the result that on or about August 28, 1917, he was able to submit to the Minister of Commerce a proposal for the distribution of certain of the assets of the estate (Exhibit 5 G-2, p. 5). This proposal being approved by the Minister of Commerce on September 29, 1917, the Liquidator, on or about October 30, 1917, distributed to the German heirs the major portion of their share in the estate, but he did not turn over to Bertha Achelis her share, she being then an enemy national residing in the United States. The Liquidator held this share until April 18, 1918, when " he paid to the Treuhaender, for account of the said Bertha Achelis, the bulk of her share in the estate of her mother, Alette Koenig, and in May, 1919, he reported the remainder thereof to the Treuhaender through Mendelssohn and Co.", with whom the securities were deposited. (American Brief, p. 14.)

In these circumstances the claimants contend that their claim comes within the ruling of this Commission in the Estate Claims Decision above mentioned.

This contention was fully discussed in the briefs of both Agents when the claim was submitted, and was carefully considered by the Commission before rendering its decision, and the Commission did not then, and does not now, concur in this contention.

In the Estate Claims Decision the Commission held that "when *an obligation arose* from an heir, administrator, or executor to transmit money or securities to an American national and he was prevented from so doing by an exceptional war measure, liability on the part of Germany for the resulting damages would seem to be established".

The German Agent correctly stated the position of the Commission in rendering this Decision in his brief (p. 9) in this case, from which the following extract is quoted for convenience of reference:

" The Estate Decision is an interpretation of Art. 297 (*e*) of the Treaty of Versailles with special reference to such enemy property, rights, and interests as constitute an estate or a share in an estate. The significance of the Estate Decision within the frame of Art. 297 (*e*) of the Treaty of Versailles consists in the fact that certain presumptions are established which operate to relieve the claimant to a certain extent of the burden of proof ordinarily resting upon him. These presumptions are based on the legal fact that persons in charge of the administration of an estate, such as co-heirs, executors and administrators of an estate, are ordinarily under a duty to transmit to the beneficiaries their respective shares therein as soon as the estate is ready for distribution and that, as a matter of common experience, such persons will ordinarily fulfill their duty. In case this duty arose during the time when the German war legislation concerning the American property was in force and remained unfulfilled at that time, the Estate Decision relieves the American

beneficiary from the burden of proving that the nonfulfillment of the said duty and the loss resulting from the depreciation of the estate were the proximate result of the application of German exceptional war measures. It results that under the Estate Decision Germany's liability to compensate the claimants for the depreciation of Bertha Achelis' share in the estate of Alette Koenig depends on the condition that the liquidator was under a duty to transmit this share to the United States during the time when the German war legislation concerning American property was in force."

In the present case there was no obligation on the part of the Executor of the Will at any time to transmit to the claimants their share of the estate, because the Will in terms postponed the distribution of the estate "until peace with England is concluded ". This provision of the Will was superseded by the Liquidation Decree pursuant to which the Liquidator took possession of the estate and partially distributed it. If the Liquidator had been able and ready to distribute the American owned share of the estate before the United States became a belligerent, the Estate Claims Decision would have been applied, and the claimants would have been entitled to an award under it. The fact was, however, that, as above set forth, the Liquidator was not in a position to distribute any part of this estate, even to the German heirs, until October 30, 1917, and meanwhile the United States had entered the War on April 6, 1917. On that date the American heirs became enemy nationals, and under the terms of the Liquidation Decree the Liquidator was obliged in distributing the estate to deposit the share of the " enemy nationals " for their account with the *Treuhaender*, which was done in so far as the estate was ready for distribution.

It is evident from this sequence of events that the Liquidator was not ready to distribute the American share of the estate before he was prevented from transmitting it to the American heirs by the other provisions of the same Decree which authorized liquidation. He, therefore, never was under an obligation to transmit their share to the American heirs, and it is for that reason that this claim must be distinguished from the ordinary estate claims, and excluded from the application of the Estate Claims Decision, which is based both in principle and in terms on the existence of such obligation.

The Liquidation Decree when originally adopted was not an exceptional war measure within the meaning of the Treaty of Berlin so far as American owned property rights and interests in Germany were concerned, but it did become such an exceptional war measure immediately upon the entry of the United States into the War on April 6, 1917. Accordingly, under Article 297 (e) of the Treaty of Versailles, the claimants would be entitled to an award upon proper proof of damage or injury inflicted upon their property rights or interests in Germany by the application of this exceptional war measure as provided for in that Article.

Inasmuch, however, as the claimants are not entitled to the benefit of the presumption recognized in the Estate Claims Decision, for the reasons above set forth, they are required under the Treaty of Berlin, as interpreted by this Commission, to establish Germany's liability for such damages in accordance with Rule 15 of the Commission's Order of May 7, 1925, before they are entitled to an award, but the evidence submitted by them is not sufficient in the opinion of the Commission to sustain this burden of proof. The record fails to show that the claimants sustained a loss due to the application of the aforesaid Liquidation Decree as an exceptional war measure, and the Commission is of the opinion that such a loss cannot be established within the meaning of the Treaty of Berlin because, had the estate not been liquidated, the provisions of the Will would have prevented its distribution until the end of the War.

The Commission finds nothing either in the petition or in the record of this case which would justify an additional award on behalf of the claimants.

Accordingly, the petition for a rehearing and an additional award is found to be without merit and is hereby dismissed.

Done at Washington May 1, 1929.

Chandler P. ANDERSON
American Commissioner

W. KIESSELBACH
German Commissioner

ELECTRIC BOAT COMPANY (UNITED STATES) *v.* GERMANY

(April 21, 1930, pp. 960-965.)

USE UNDER GERMAN LICENCE OF INVENTION COVERED BY GERMAN PATENT. — PROCEDURE: AGREEMENT BETWEEN AGENTS. — INTEREST: SPECIAL CIRCUMSTANCES, SPECIAL BASIS. *Held* that building in of appliances or arrangements in submarines under construction constitutes use for which, under licence, licence fee must be paid. Agreement between Agents on number of devices for which licence fee due. Special basis adopted for allowance of interest in view of special circumstances.

Bibliography: Woolsey, A.J.I.L., Vol. 35 (1941), p. 283, footnote 4.

BY THE COMMISSION:

The Commission, having carefully considered the issues presented in this claim by the pleadings and the questions of fact and law raised in the briefs on both sides, and having examined the evidence submitted, and after hearing oral argument by counsel on both sides and after due deliberation thereon, finds and decides as follows:

I. The Commission finds, on the evidence submitted, that the claimant's contention that its German patents, No. 147,345 and No. 255,966, have been infringed by the use of certain devices and appliances on German submarine boats, has not been sustained, and decides that the German Government is not liable, under the Treaty of Berlin, for damages for any alleged infringements of these patents.

II. The Commission finds that the rights granted under the compulsory license issued pursuant to German law by the Reichsgericht, by virtue of its Decree of March 13, 1913, to the German Navy and to the Germania Wharf, to use the invention protected by the claimants' German patent No. 133,607, have been exercised by the licensees —

(*a*) In so far as the licensees have used in the construction of submarine boats an arrangement for simultaneously moving a torpedo forward to the expulsion tube, while compensating or balancing water is being moved in the opposite direction to a containing tank or tanks, or for simultaneously moving a mine in one direction and the water in the opposite direction, so as to maintain the trim and equilibrium of the boat during the process, and

(*b*) In so far as the licensees have used in the construction of submarine boats a " zwischen " water tank containing the exact volume of water required

for filling the space left free by the torpedo in the expulsion tube, but only in connection with the loading of reserve torpedoes.

The Commission also finds that the use of these appliances or arrangements, up to the time of the expiration of this patent on August 27, 1916, in the construction of a submarine boat, even before it has been placed in commission, is sufficient to constitute a use under the compulsory license, for which the license fee must be paid.

III. The Commission further decides that the claimant is entitled to compensation at the rate fixed in the compulsory license, namely, 4,000 marks per each expulsion tube on a submarine boat in which either or both of the patented arrangements or appliances covered by the compulsory license were used as above specified. If, however, the use on a boat of either of the protected appliances or arrangements, as above specified, is only in connection with the launching of mines, or only in connection with the launching of torpedoes, then only the mine expulsion tubes, or the torpedo expulsion tubes, as the case may be, are to be counted in computing the compensation under the license.

Under the provisions of the Treaty of Berlin, as interpreted by this Commission in its earlier decisions, the license fees due in this case are to be valorized in American money at the rate, for debts, of sixteen cents to the mark.

IV. The Agents of the two Governments have agreed upon and submitted a tabulation entitled " Summary of Torpedo and Mine Compensation Devices Installed on the German Submarine Boats ", and showing the number of torpedo and mine expulsion tubes on these boats, and also the time of completion of the boats with reference to the date of the expiration of the claimant's patent No. 133,607, to which this summary has reference.

This classification and figures given in this summary are as follows:

" I. *Arrangement (a)*

Older Torpedo Compensating Arrangement having 2 tanks, namely TZT and TAT.

1) Boats in commission prior to expiration of Patent No. 133607 (August 27, 1916)

2 tubes each on following 18 boats, U 1-4 U 9-22	36 tubes
4 tubes each on following 4 boats U 5-8	16 ,,
	52 tubes

2) Boats ordered before, completed after August 27, 1916, 18 boats having 4 tubes each, namely UB 54-71 — 72 tubes

TOTAL ARRANGEMENT (*a*) — 124 tubes

" II. *Arrangement (b)*

Newer torpedo compensating arrangement having one compensating tank (TAT) only.

1) Boats in commission prior to August 27, 1916, 2 tubes each on following 54 boats, U 23-41 U 51-58 U 63-65

UB 18-41	108 tubes
3 tubes each on following 13 boats,	
UC 16-19	
UC 22-30	39 ,,
4 tubes each on following 6 boats,	
U 66-70	
U 81	24 ,,
	171 tubes
2) Boats ordered before, completed after August 27, 1916,	
1 tube each on following 18 boats,	
UB 54-71	18 ,,
2 tubes each on following 4 boats,	
U 59-62	8 ,,
	26 tubes
3 tubes each on following 51 boats	
UC 20-21	
UC 31-79	153 ,,
4 tubes each on following 21 boats,	
U 82-86	
U 99-104	
U 117-126	84 ,,
5 tubes each on following 6 boats,	
UB 48–53	30 ,,
6 tubes each on following 23 boats,	138 ,,
	431 tubes
TOTAL ARRANGEMENT (*b*)	602 tubes

" III. *Arrangement* (*c*)

No compensation tank, but merely tank TZT.

1) Boats in commission prior to August 27, 1916,	
1 tube each on following 5 boats,	
U 66-70	5 tubes
2 tubes each on following 81 boats,	
U 1-4	
U 9-41	
U 51-58	
U 63-65	
U 71-80	
UB 1-17	
UB 42-47	162 tubes
6 tubes each on following 8 boats,	
U 43–50	48 ,,
	215 tubes
2) Boats ordered before, completed after August 27, 1916	
2 tubes each on following 4 boats,	
U 59-62	8 ,,
6 tubes each on following 6 boats,	
U 87-91	36 ,,
	44 tubes
TOTAL ARRANGEMENT (*c*)	259 tubes

" IV. *Mine Compensation Device.*

1) Boats in commission prior to August 27, 1916
2 tubes each on following 10 boats
U 71-80 — 20 tubes

2) Boats ordered before, completed after August 27, 1916
2 tubes each on following 10 boats
U 117-126 — 20 „

TOTAL MINE COMPENSATION DEVICE — 40 tubes

" V. *Torpedo Compensating Device*
on boats ordered prior to August 27, 1916, but never completed.
Character of device not known.
4 tubes each on following 8 boats,
U 42
U 127-134 — 32 tubes"

V. In accordance with the hereinabove stated conclusions of the Commission as to the liability of the licensees under the compulsory license of March 13, 1913, for the use of the appliances or arrangements protected by this patent, the Commission holds that the licensees are under obligation to pay the compulsory license fee of 4,000 marks for each of the 124 expulsion tubes included in the subdivisions of this summary " I. Arrangement (*a*) ", paragraphs (1) and (2), and the 40 expulsion tubes included in subdivision " IV. Mine Compensation Device ". The Commission also holds that the licensees must be held liable for the compulsory license fee for the 32 expulsion tubes on the eight boats included in the subdivision of this summary " V. Torpedo Compensating Device ".

These three groups make a total of 196 expulsion tubes to which the compulsory license fee attaches.

The Commission further holds that the licensees are not liable for compensation to the claimant for a license fee for the use of any of the arrangements or appliances included in the subdivisions of this summary " II. Arrangement (*b*) " and " III. Arrangement (*c*) ".

VI. In view of the special circumstances of this case, the Commission has adopted a special basis for the allowance of interest, which is to be computed as follows: On the compensation for 52 tubes at 4,000 marks each, amounting to 208,000 marks, which, valorized at 16 cents per mark, amounts to $33,280, interest is allowed at the rate of five per cent per annum from January 1, 1910, until the date of payment, and on the compensation for 144 tubes at 4,000 marks each, amounting to 576,000 marks, which, valorized at 16 cents per mark, amounts to $92,160, interest is allowed at the rate of five per cent per annum from January 1, 1916, until the date of payment.

VII. The Commission accordingly decides that under the Treaty of Berlin, and in accordance with its terms, the Government of Germany is obligated to pay to the Government of the United States, on behalf of the claimant herein, as compensation due under the compulsory license above mentioned, the sum of 784,000 marks, valorized at 16 cents to the mark, which amounts to $125,440, with interest as above stated.

Done at Washington April 21, 1930.

Roland W. BOYDEN
Umpire

Chandler P. ANDERSON
American Commissioner

W. KIESSELBACH
German Commissioner

LEHIGH VALLEY RAILROAD COMPANY, AGENCY OF CANADIAN CAR AND FOUNDRY COMPANY, LIMITED, AND VARIOUS UNDERWRITERS (UNITED STATES) *v.* GERMANY

(Sabotage Cases, October 16, 1930, pp. 967-994.)

SABOTAGE DURING PERIOD OF AMERICAN NEUTRALITY. — EVIDENCE: WITNESSES, AFFIDAVITS. — ARBITRATION: GOOD FAITH, OBLIGATION OF PARTIES TO TRY TO ASCERTAIN TRUTH. Fires at "Black Tom Terminal", New York Harbour, of Lehigh Valley Railroad Company, July 29-30, 1916, and in Kingsland, N. J., plant of Agency of Canadian Car and Foundry Company, Limited, January 11, 1917. German sabotage? Analysis of evidence (testimony by witnesses, affidavits). *Held* that in Kingsland case fire not caused by authorized German agent, and that in Black Tom case such cause not sufficiently proved. Governments who agreed to arbitrate are under obligation in entire good faith to try to ascertain truth. (Decision subsequently set aside: see decision of June 15, 1939, p. 225 *infra*.)

Cross-reference: A.J.I.L., Vol. 25 (1931), pp. 147-168.
Bibliography: Witenberg, Vol. VII, pp. 6-9; Woolsey, A.J.I.L., Vol. 33 (1939), p. 738.

These two cases involve claims for damages resulting from fires. The first relates to the fire which occurred on the night of July 29-30, 1916, at the terminal yard of the Lehigh Valley Railroad Company in New York harbor, known as the Black Tom Terminal, and is known as the Black Tom Case. The second relates to the destruction of the Kingsland plant of the Agency of Canadian Car and Foundry Company, Limited, at Kingsland, New Jersey, and is known as the Kingsland Case. This fire started in the late afternoon of January 11, 1917. The two cases have from the beginning been carried along together, both in the taking of the evidence and in the arguments. It will be convenient to deal with them in one opinion.

The questions involved are questions of fact. Germany and the United States, now friendly nations, have entered into an agreement under which Germany accepts liability for such damage during neutrality to citizens of the United States, if the damage resulted from acts of her authorized agents.

The Commission has no difficulty with the question of authority in these cases. The persons alleged to be responsible for causing these two fires to be set — either by participating in the act themselves or by employing sub-agents of their own — were in such relation to the German authorities, and some of them in such special relation to Nadolny and Marguerre, who were in charge of the Political Section of the German General Staff, or to Hinsch, that Germany must be held responsible if they, or some of them, did cause the fires to be set. The Commission does not need direct proof, but on the evidence as submitted we could hold Germany responsible if, but only if, we are reasonably convinced that the fires occurred in some way through the acts of certain German agents.

We have no doubt that authority was so given by Marguerre in February, 1916. Marguerre himself so testifies. Nadolny had on January 26, 1915, sent a cable authorizing such sabotage. Nadolny in his evidence gives the impression that the policy was abandoned shortly after his cable. Marguerre testifies that the authority given by him in 1916 was not to be exercised during neutrality, but only in case the United States entered into the war. We do not believe his evidence with respect to this alleged limitation of the authority, though.

It is well recognized that Governments who have agreed to arbitrate are under obligation in entire good faith to try to ascertain the real truth. Nadolny may have suppressed evidence as to his knowledge of the instructions given by Marguerre, and we think, though of course we may be mistaken, that Marguerre did not tell the truth. Nadolny's examination was confined wholly to his cable, and the Marguerre instructions were not at that time a feature of the case. We cannot be sure of what Nadolny knew, and would not be willing without further evidence to accuse him, but we have felt it necessary to mention the possibility. It is also apparent that von Strempel of the German Legation in Chile, in another connection, failed to communicate to the Commission statements made to him by Herrmann, which tended strongly to cast doubt upon an affidavit of Herrmann which von Strempel was forwarding to the Commission, though it should be added that we can easily understand that von Strempel did not believe these boasting tales of Herrmann, who even then, apparently, did not admit complicity of himself or Hinsch in Black Tom or Kingsland. Marguerre's personality does not seem important, but Nadolny and von Strempel are diplomatic representatives of Germany. Von Strempel was a young man, unfamiliar with the case, and probably did not fully realize his obligation as a diplomatic representative to the Commission and to his own Government.

In speaking as we have of Nadolny, Marguerre, and von Strempel we have not the least intention to raise any doubt as to the entire good faith of the present German Government in its management and presentation of these cases, nor of the Agent who has represented Germany as counsel. And in order that this last statement may not be construed as merely conventional courtesy, we state specifically that we have no such doubts. We believe that the present German Government was entirely prepared to bring out the truth and to take the consequences, whatever they might be.

It is unnecessary to go further and determine whether such sabotage was the general policy of the then German Government. The Foreign Office did specifically authorize the cable, already referred to, which Nadolny sent to the Embassy in Washington. We are inclined to think that the diplomatic representatives in the United States were not in accord with the idea and did nothing in the way of exercising this particular authority. There was an admitted policy to destroy and damage property of the nations at war with Germany at this time and later, and it is obvious that such acts if committed in or from the United States were serious violations of neutrality, that agents engaged therein were not likely to discriminate very carefully between acts on United States territory and acts outside the United States, or between property belonging to Germany's enemies and property not yet delivered, but intended for Germany's enemies. But in general we are all inclined to the opinion that Germany's diplomatic representatives in the United States were averse to attacks on American property, that their opposition to such a policy, so far as they, possibly, knew or suspected that it was being carried out, became stronger as the relations between the United States and Germany became more and more acute. We see no evidence in these cases, however, that such authority as the Political Section of the General Staff gave was ever modified. And up to the entry of the United States into the war there were in the United States certain German agents who were, or at least pretended to be, active in sabotage work. But we are also convinced that the number of agents so engaged was always small in proportion to the field to be covered, that they were never organized effectively, and that their numbers and effectiveness continually decreased, partly because of difficulty of communicating with Germany and other difficulties inherent in their situation, and even more

because of efficient counter-work by the United States Secret Service and prosecuting officers. We are convinced also that their pretensions in such reports as they may have made and in their talk with each other were for the most part gross exaggerations of their actual accomplishments.

With this background, which renders inferences against Germany easier than they would otherwise be, we approach the evidence as to the German agents and their alleged tools. We found ourselves absolutely in agreement as to this background upon our first consultation after the close of the arguments and before we had considered at all the responsibility of any of the German agents.

These cases have been argued twice, the second argument having been necessitated by the production of new evidence. The second argument has occupied the most of ten days, and it has not been too long in view of the enormous record of evidence and the details which the counsel were obliged to cover. We have no intention of covering all these details in our opinion, but it seems desirable that we should indicate as briefly as possible our views as to some of the more prominent features of the evidence, although we will begin by stating our final conclusions, viz.:

In the Kingsland Case we find upon the evidence that the fire was not caused by any German agent.

In the Black Tom case we are not convinced that the fire was not attributable to Hinsch and Kristoff, though we are convinced that it was not attributable to Witzke or Jahnke. But we are quite a long way from being convinced that the fire was caused by any German agent.

We therefore decide both cases in favor of Germany.

In the Kingsland Case the persons possibly involved as participants are Witzke, Jahnke, Hinsch, Herrmann, Wozniak, Rodriguez, and Thorne. The evidence relating to Witzke and Jahnke is mainly in the shape of alleged admissions by Witzke and is intermingled with his alleged admissions in connection with the Black Tom Case. This evidence makes no impresson whatever upon us with respect to the Kingsland Case, but the fact that it does refer to the Kingsland fire as well as to the Black Tom fire tends to weaken the effect of the alleged admissions as to the Black Tom Case. On the evidence we are satisfied that Witzke and Jahnke were not in the east at the time of the Kingsland fire, and eliminate them from further consideration in connection with Kingsland.

The Kingsland fire of January 11, 1917, started in a building devoted to the cleaning of shells. It started at the bench of a workman named Wozniak. The case against Germany in substance depends upon whether Wozniak started this fire, under Herrmann's direction.

Until Herrmann, who was undoubtedly a German agent and had previously testified that he had nothing whatever to do with the Kingsland fire, changed his attitude and testified that he employed Wozniak to start the fire there was nothing from which we could reasonably infer either that Wozniak was a German agent or that he caused the fire. Hilken, another German agent, since Herrmann changed his testimony, has testified that Herrmann told him long ago the same story that Herrmann now tells. Hinsch, the man whom Herrmann connects with himself in the story, has denied it. His denial contains plausible details, but we could not rely on it if we felt that Herrmann was now telling the truth, for though we have no evidence that Hinsch is a liar, there is a strong presumption that he might be under circumstances which pointed to his guilt.

Hilken and Herrmann are both liars, not presumptive but proven. No one could in the light of all their evidence believe anything either says unless

something other than his own assertion confirmed his statements. Hilken's first long and detailed statement in these cases contained nothing of what he now says in respect to Kingsland. He had previously testified before the Alien Property Custodian and had lied continuously. In his first statement for the Commission he professes his willingness to tell the entire truth. If he did, there can be no truth either in his or Herrmann's present story. Later he admits that he did not earlier tell the whole truth, and explains his failure to do so by his unwillingness to implicate others. But after this first testimony to the Commission he was sent by counsel for the claimants to Chile to persuade Herrmann to testify, in which mission he failed. On his return he made an affidavit covering his conversations in Chile with Herrmann. In this affidavit it is evident that he had no further desire to shield Herrmann, if he ever really had such a desire. He tells of various things which Herrmann said to him which he knew were not true, and pretends to tell what he knows to the contrary. But he says nothing about his knowledge of the story Herrmann now tells about Kingsland. If Hilken had not mentioned Kingsland in this affidavit, his present story would be more credible. But he says that he asked Herrmann about Kingsland and that Herrmann in Chile denied all knowledge of it. Instead of reporting that Herrmann had previously told him all about it, as he now testifies, he adds to Herrmann's denial merely the statement that Herrmann had previously told him that he and one Gerdts once rode over to look at Kingsland after the fire.

Herrmann's present story has in its favor whatever presumption arises, even after repeated denials, from the fact that he is confessing his own participation in a crime of serious importance. We know also that some of the things he previously denied are true. We know, or at least believe, that he was authorized in Berlin by Marguerre to commit sabotage during neutrality, and we know that he was supplied by Marguerre with inflammatory devices in the form of pencils, containing glass tubes. Appropriately manipulated the chemicals in the tubes would mix after an interval of from 15 to 30 minutes and cause a flame. But his testimony now with respect to Kingsland and Black Tom is not at all that of a witness who for reasons of conscience desires to make a clean breast. Whether he now means to tell the truth or means to lie, he is testifying solely because of the fact that he has lost his position in Chile, that the German Government has not taken care of him, and that by testifying he has secured the chance to get back to the United States with a guaranty of immunity. We do not imply or think that anything improper was done to induce him to testify, merely that it is sufficiently obvious that Herrmann would not have turned his coat if the German Government or the German Legation in Chile had offered him appropriate inducements, and that having turned his coat because of advantage to himself he is pretty sure to be in a mental attitude in which hostility to Germany and desire to make good with the claimants play a substantial part. And there is nothing about Herrmann of which we feel so sure as that he will lie if he thinks lying worth-while from his own point of view.

His story is, in brief, that he planned in accordance with instructions from Nadolny and Marguerre to commit sabotage in Kingsland, that he applied to Hinsch to furnish a man, that Hinsch said he would and brought Wozniak to him, that he learned from Wozniak, not from Hinsch, that Wozniak was working in the Kingsland plant and that Wozniak thought he could accomplish something, that after one or two interviews he got distrustful of Wozniak, who seemed to him like a " nut ", told Hinsch so and asked him for another man. Hinsch then brought Rodriguez to him. Herrmann then brought Wozniak and Rodriguez together and asked Wozniak if he could get Rodriguez a job

at Kingsland. Wozniak said he could as he had a pull with the employment bureau. Still later he met the two and learned that Rodriguez had the job. He then gave them each some of the inflammatory pencils, told them how to fix them up, and instructed them to put one in a coat pocket somewhere, standing up straight. The chemicals would do the rest. He paid them not over $40 a week — he did not seem very sure how much — during this short period. After the fire he saw Rodriguez once, but he never saw Wozniak again. He asked no questions whatever of Rodriguez, but paid him $500, gave him a fictitious address and never saw him again.

Herrmann's story is somewhat confirmed by the fact that probably Rodriguez was employed about the time Herrmann says, shortly before the fire, and by the fact that Wozniak has peculiarities which might lead Herrmann to characterize him as a " nut ", though the word " crank " would really be more accurate. On the other hand, Herrmann before he had told this Wozniak story had seen enough of the early arguments, briefs, and affidavits in the case to know of Wozniak, to suspect him of being a bit queer, to know that the fire started at his bench, to know that Rodriguez was supposed to have usually worked next to Wozniak. But there is nothing to show that Herrmann could have learned beforehand that Rodriguez had been employed only a short time, though this is not impossible. Herrmann's attention would before his testimony have been focussed somewhat on Rodriguez because in the early stages of the case Herrmann himself was suspected of having been the Rodriguez who worked at the plant. This suspicion was probably due to the fact that Herrmann used the name Rodriguez when he was in Mexico before going to Chile. It is argued that the fact that he used this name is a confirmation of his present story, that the name came into his head because he had employed Rodriguez. But it seems to us unlikely that Herrmann would take in Mexico the name of someone whom he had employed to set the Kingsland plant on fire, and Rodriguez is a common enough name in Spanish countries. In fact there were 20 different men named Rodriguez on the payroll at Kingsland at different times.

Herrmann's story, as stated above, appears at its best, but there are internal difficulties in the story itself. A man named Thorne plays an important part in the theory relating to Wozniak and Rodriguez. Thorne was in the employment office of the Kingsland plant, and the theory is that he was well known to Hinsch, that Hinsch had Wozniak and Rodriguez at his command, and that Rodriguez must have obtained his employment through Thorne. There is a good deal of evidence that throws suspicion of some sort on Thorne, so far as sympathy with Germany, general lack of morals and willingness to do shady things are concerned, but nothing convincing to show Thorne's acquaintance with Hinsch. Hinsch denies acquaintance with Thorne, but it was certainly possible that he did know him. Herrmann says he did not know Thorne, though there is some evidence that he did. Wozniak had been in the plant six months at least, and so had been there several months when Thorne was employed as an assistant in the employment office. If Hinsch had had Wozniak at his command and in the plant, there was no very good reason why Herrmann should have taken part in the scheme to have Wozniak do the work. If these other allegations are true, Herrmann would not have asked Wozniak where he was working, as he says he did the first time he saw him. He would not have asked Wozniak, as he says he did, if Wozniak could get Rodriguez a job. And Hinsch would not have assented without any discussion, as Herrmann says he did, to Herrmann's estimate of Wozniak as unsuitable for his purpose. Herrmann's story of his conversations with Wozniak and Rodriguez is strangely lacking in the details which would be inevitable in such conver-

sations, if he ever employed these men for the purpose and in the way he says he did. He was pressed by German counsel for any further details of these conversations, but we get no talk as to how or where they could set the fire, or whether a fire was likely to be effective if set in Wozniak's building, no discussion of particulars with either of them except the instructions as to the pencils which were quite explicit. This lack of detail might have been explained by the fact of which we are convinced that Wozniak's knowledge of either English or German was extremely limited. But Herrmann says that the conversations were in English and that Wozniak spoke English freely though with an accent, a statement which in view of our judgment as to Wozniak's ability to speak English at that time arouses further distrust.

And the job, according to Herrmann's story, seems to have been turned over by Herrmann to Rodriguez after he came on the scene. Rodriguez, not Wozniak, was the man relied on. Rodriguez was the only one of the two who turned up after the fire, and Herrmann explicitly says that he asked him no questions at all but paid him $500 and never saw him again. And yet Wozniak set the fire if anyone did. And Rodriguez, the only man Herrmann saw after the fire, the only man he paid after the fire, was not at the Kingsland plant at all on the day of the fire.

If there is one thing sure about Wozniak, it is that Wozniak was keen for money. That he would not have come after his money himself is inconceivable to us with our knowledge of Wozniak's previous and contemporary life and habits. We have a great deal of evidence about Wozniak's earnings and his use of his money, but we get no indication whatever that he actually got any of the money that Herrmann said he paid.

Again, Herrmann's description of Wozniak corresponds exactly with a poor photograph of him which, we think, Herrmann had seen before he told his story, and differs in two quite important particulars from the real Wozniak. Herrmann's story of Wozniak's presence later in Mexico also arouses our suspicion, partly because we are quite certain that Wozniak never was in Mexico, partly because it is improbable that, if he had turned up in Mexico, Herrmann would not have seen him, and partly because, whether Herrmann saw him or not, his talk there in Mexico with Hinsch about Wozniak's presence in Mexico could not possibly have been so casual and inconsequential as Herrmann states that it was.

The discrepancies and improbabilities of Herrmann's story tend to strengthen our very strong impression from Wozniak's acts and statements at the time of the fire and shortly thereafter and from the circumstances of the fire that Wozniak was not guilty. In the same way our impression of Wozniak, derived from careful study of these acts and statements and circumstances, tends to increase our doubt of Herrmann's sincerity in his latest evidence.

Our impression that Wozniak is innocent is not due to his own protestations of innocence. Any man, however guilty, might claim innocence, and Wozniak has shown in connection with matters having nothing to do with the fire that he would not let a little thing like truth stand in his way.

Our impression is derived first from the circumstances connected with the fire itself. Gasoline was used in cleaning the shells and the fire spread quickly, so that there was great excitement and confusion. The interval between the time when the first small flame was seen and the time when everyone present ran for his life was very short. The pan of gasoline close to Wozniak's machine (as in the case of all the 48 machines) would account for this, but in addition one workman says that one of the men threw a pail of water on the bench where the flame first appeared. (The fire buckets in the building contained water instead of sand.) Wozniak says he made an effort to stifle the fire, and

there is evidence of another workman that he saw Wozniak make some such effort. If we were called upon to guess what caused the fire from the evidence of the circumstances, we should without hesitation turn to the machine which held the shell which Wozniak was cleaning. There is strongly persuasive evidence that these machines required constant watching, that when out of order they squeaked and threw out sparks, and that fires, quickly extinguished, had previously occurred from this source, and there is some evidence from a workman close by of squeaking and of sparks from Wozniak's machine just at the time of the starting of the fire. Wozniak himself does not mention this in his contemporaneous statements, though he later mentioned it merely as a possible explanation. In fact he says that his machine was running well that day, though it had sometimes run very hot. To Wozniak the fire seemed to originate in the rapidly revolving shellcase itself and to follow the rag wound around a stick with which he was drying the shellcase when he withdrew the rag. It is interesting to find that his own statement is the only one which bears any resemblance to what would have happened if he had used one of the inflammatory pencils with which Herrmann says he supplied him.

Wozniak, as we have said, is not a " nut ", but a crank. He is in a way smart, though naive, and thinks he is smarter than he really is. How could such a man, or any man who had for some time been studying and planning how to set fire to the plant, start the fire at his own bench, where attention would necessarily be directed to him, to say nothing of the fact that the particular place and the particular building would not, to persons planning beforehand to set a fire, seem to be places where a fire once started would be particularly likely to be effective, as this fire certainly was? And that a smart crank like Wozniak should after starting the fire with an inflammatory pencil describe its beginning in a way which had even a slight resemblance to a pencil fire is equally incomprehensible. Also incomprehensible is the fact that a man like Wozniak should not have had ready, when he was examined a day or two later, some plausible explanation of the cause of the fire, but he certainly had no explanation at hand, though later he made various suggestions and possibilities.

Although, as we have said, Wozniak's description of the starting of the fire bears some resemblance to what might have happened if a pencil had been used, the resemblance is not close enough to make us suspect that a pencil was actually used. But more important is the fact that Wozniak, if he used a pencil, must have abandoned completely Herrmann's instructions as to how to use the pencils. The pencil was intended to enable an incendiary to start the fire at a time and place when and where he could not be connected with it. The pencil was devised to operate only after the lapse of from 15 to 30 minutes. It was not at all adapted to starting a fire at the place where the incendiary intended to remain. Besides, the pencil needed to stand upright, and the shell from which Wozniak said the fire seemed to start was in a horizontal position revolving in Wozniak's machine in the process of cleaning and drying. The shells seem to have passed through the various phases of this process at the rate of about three every two minutes, an average of about 40 seconds each. Even if we assume that Wozniak had found some way — Herrmann evidently had not — to make the pencil work faster, we cannot adapt the pencil idea to the actual process, and cannot imagine that anyone planning the fire in advance would have considered it possible to use the pencil there under the eyes of the other workmen close by. Rodriguez and Wozniak are supposed to be working together on this plot. They are instructed by Herrmann and provided with pencils. They talk and plan together — supposedly — how to do the job. There are toilets available; there are workmen's coats somewhere; there are even coats hanging about that particular room; there are

cases of clean rags; there are dirty, gasoline-soaked rags; there must be other opportunities of which we have no evidence. And yet we are asked to believe that Wozniak started the fire with a pencil in a dry shellcase, which was revolving in his own machine at the end of this process which as a whole lasted about 40 seconds. And Rodriguez, the man really relied upon, was not there that day.

The evidence as to Wozniak's conduct at the moment, his examinations, his conduct during the weeks immediately succeeding, his relations with the representatives of Russia, his life before the fire and afterwards almost to the present, his disappearance, his reappearance and his subsequent testimony, his alleged appearance in Mexico among the German agents there, occupy many pages of the record and could be discussed here ad infinitum, as they have properly been discussed almost ad infinitum by counsel in their briefs and arguments. Suffice it to say that we do not believe that he was in Mexico; that the letters he wrote the Russian Embassy before the fire are in our judgment not a blind, but exactly such letters as Wozniak would compose, and indicate to us that he really, as he says, was at heart Russian, intended to go to Russia, and was shocked at the carelessness and, as he thought, corruption of the inspectors at this plant which was assembling shells for Russia; that without relying at all on his honesty of statement he nevertheless seems to us to act and talk like a man who is really innocent in respect to this fire. It is of some significance that through the Russian Consulate he sent $90 to Russia the day after the fire — not the act of a man who the previous day had destroyed this supply plant for Russian munitions, and whose money or part of it came as pay for such destruction. The picture of him which one gets from reading the reports of the four detectives who watched him night and day for about four weeks following the fire is a picture of a man frugal in the extreme, living at the Russian Immigrants' Home, buying and cooking his own meals, milk, bread, occasionally a little fish or meat or fruit, reading Russian papers or books a good deal, quiet, with no luxuries or dissipations, almost no acquaintances, no suspicious actions, no suspicious meetings, no indication whatever that he had anything to do with his supposed co-conspirator Rodriguez or anybody connected with Germany.

And so, despite Herrmann's confession, the evidence in the Kingsland Case has convinced us that Wozniak did not set the Kingsland fire, and that Germany cannot be held responsible for it.

In connection with Black Tom we shall not mention some possibilities which have practically been abandoned by the claimants, or some agents who have not been abandoned in argument, like Sauerbeck for instance. We have not ignored them, but we do not think them worth talking about in connection with Black Tom.

The picture of the fire itself, which we have in our minds as the result of our study of the voluminous, detailed, and often contradictory evidence, shows a large railroad terminal on the Black Tom promontory which stretches out from the Jersey side into New York harbor not far from Ellis Island. This terminal is full of railroad cars, many of them loaded with ammunition. At one point is a dock to which on that night were tied up a number of barges, some of which, like the cars, were loaded with shells and TNT. The yard was guarded and watched, but access to it by intentional incendiaries, particularly from the New York harbor, was certainly not impossible, perhaps not difficult. The fire started in the middle of a clear, fairly calm night at about 12:45 a.m., in the form of a small blaze which was discovered by the watchmen, breaking out around the door of a wooden boxcar which probably contained explosive shells filled with smokeless powder. There is some claim of more than one

fire, but we do not believe there was. The fire spread, the explosions occurred, and the damage was great. It is somewhat difficult to understand how incendiaries under the circumstances as we picture them could have secured access to this car, broken into it, and set the fire without being seen or heard. Nor does it seem likely that careful planning beforehand would have resulted in setting fire at this part of the yard, or in one car, or in this particular car. There were other points of approach and other methods which in advance would have seemed more likely to produce results. But there is nothing in the circumstances which excludes incendiarism. The fact that smokeless powder, properly prepared, is conceded by experts not to be subject to spontaneous combustion is a strong argument in favor of incendiarism. But the Lehigh Valley Railroad Company in its defense to the suits brought against it for negligence relied largely upon spontaneous combustion, and we get the impression that their counsel had real faith in this particular defense. And yet they then had in their possession a good deal of the evidence which we now have which tends to implicate Kristoff.

So far as we can see, the circumstances of the fire leave the question of its cause open. It may have been some fault in the preparation of the powder in the shells in this car; it may have come from some other cause connected with explosives, for though we know of no cause which would naturally be suggested by the supposed contents of this car we are suspicious of explosives in general; it may have come from some other accident of which no evidence appears; of course the fire may have been of incendiary origin, and in this connection it may be noted that all incendiaries are not German agents. We can be sure, however, that any German agent seeking for a chance to destroy munitions would have looked upon Black Tom with the keenest interest.

Leaving out of account some alleged suspects who are not worth attention, there are two theories which attribute the fire to German agents. One of these theories centers about Witzke and Jahnke; the other around Kristoff. Both theories have been urged upon us strongly. The two theories may be combined into one theory, viz., that all three took part. The two theories never have been, in fact, so definitely separated in the arguments or in the evidence as our statement above would imply. But we insist upon the separation. We are sure that if Witzke and Jahnke were concerned in Black Tom no person like Kristoff would have been needed or used. He would have been not only a superfluity but a nuisance, even a menace. Witzke and Jahnke strike us as capable, capable where German interests were involved of desperate measures not in the least in need of assistance from an individual like Kristoff. We do not believe that they would even have trusted Kristoff to row a boat, much less to take a real part in any Black Tom expedition.

Witzke took part in an expedition from Mexico into Arizona after the United States entered the war. He was betrayed by his companion, Altendorf, who was in the employ of the United States as well of the Germans, convicted as a spy by court-martial, sentenced to death. He was a spy and the sentence was appropriate, but it was later commuted to life imprisonment and still later he was released. The evidence of participation in Black Tom by Witzke and Jahnke consists chiefly of admissions alleged to have been made by Witzke to his companion Altendorf before he was captured, with some confirmation by another companion, Gleaves, and by others including one or two guards who talked to him during his confinement. The alleged admissions cover not only Black Tom but also Kingsland. Witzke has consistently denied these admissions during his trial and confinement and since his release. As we have so definite an impression about Kingsland, the inclusion of Kingsland in his supposed admissions would of itself make it almost impossible for us to accept the admis-

sion so far as concerns Black Tom. Altendorf, the chief witness as to admissions by Witzke, is also the chief liar who has appeared in the cases before us, a chief among competitors of no mean qualifications. The details, so far as any details appear in the supposed admissions, have little relation to probability, even if we assume that Witzke and Jahnke were actually involved in Black Tom. It is perhaps unnecessary to add anything to the above, but we are also satisfied from the evidence that Witzke and Jahnke were not in the east at the time of the Black Tom fire.

The only effect which all the evidence and argument with respect to Witzke and Jahnke has had upon us is to add considerably to the doubts which we would in any event have had with respect to the evidence implicating Kristoff. Kristoff never set the Black Tom fire alone. Witzke and Jahnke being eliminated, there are no persons in the evidence who seem at all likely to have been his companions, a fact which is nowhere near conclusive but which adds to our doubts. And the actual evidence against Kristoff is so nearly of the same nature as these categorical admissions attributed to Witzke that when we find ourselves satisfied that Witzke's alleged admissions mean nothing to us our doubts as to analogous admissions and other analogous testimony are strengthened.

Suspicion was focussed very early on Kristoff in connection with Black Tom. He lived at the time at Bayonne, N. J , with an aunt, Mrs. Rushnak, whose daughter was Mrs. Chapman at whose house Kristoff had sometimes roomed earlier. A day or two after Black Tom Mrs. Chapman reported to Lieutenant Rigney, a police officer of Bayonne whom she knew well, that Kristoff had reached home on the night of the fire at about four o'clock in the morning, that he was greatly excited, and that her mother heard him walking in his room and heard him say " What I do! What I do! " and that they suspected him of being responsible for the Black Tom fire. We feel sure that this is all they reported. Both Rigney and Charlock, a detective who was assigned to the case and followed it assiduously, say so, and we take pleasure in adding that we believe them. We also believe what Mrs. Chapman then reported to Rigney, and we believe that the two women really suspected Kristoff. Later Mrs. Chapman said that she at some earlier time saw something like a blueprint or blueprints in Kristoff's room, when he was in her house, and that in his absence she once read a letter, which he had written but had not yet sent, to a man named Grandson or Grandor, demanding a large sum of money. We do not believe that Kristoff had a blueprint, certainly not for his own use, for we do not believe that he could use one. His own story about Graentsor makes it possible that he wrote a letter such as Mrs. Chapman described, but we doubt any story told by her after Kristoff's own story to the police came to her knowledge. The value of any evidence by Mrs. Rushnak and Mrs. Chapman, except as to Kristoff's late arrival, his excitement, and the " What I do! ", will appear from their later statements. Mrs. Chapman said later that Kristoff was in the habit of going away on trips and that wherever he went there was always an explosion, and they both said later, some ten years or more later, that Kristoff told Mrs. Rushnak the morning after the fire that he had set the fire. We feel quite sure that they really suspected Kristoff in spite of the fact that Mrs. Chapman's husband later told Green in Charlock's presence that his wife had reported the matter to Rigney merely because she was in a family way and thought she might get some money from the Lehigh Valley Railroad. As to the reasonableness of their then suspicion, we can judge only by our own guess from the late arrival, the excitement, and the " What I do ". Mrs. Chapman's and Mrs. Rushnak's judgments on a given state of facts are worthless. At this stage of the evidence we can only add that Kristoff was a man who

probably returned late at night at other times, that excitement whether for a good reason or for a trivial reason was probably not an unusual event for Kristoff, and that if he was excited it is unlikely that he expressed his excitement in the English language. The " What I do! What I do! " is probably Mrs. Rushnak's translation of what she heard Kristoff say. But at the same time it is hardly likely that it is not a substantially correct translation.

The name Grantnor is of great significance in this case. The connection between Kristoff and Hinsch, who was a German agent and who is alleged to have used Kristoff as his tool in Black Tom, depends substantially on whether Hinsch used the name Grantnor as an alias. One Frank Oscar Granson seems to have been actually an individual who later was a witness in the Rintelen case, whom Hinsch is supposed to have known. The theory pressed upon us is that Hinsch in seeking aliases was accustomed to adopt names familiar to him and so adopted Granson. Why he should have changed it to Grantnor, or Graentnor, as it is more commonly spelled in the evidence, and why he should have changed Frank to Francis, is not explained. The actual spelling is of importance, for Grantnor is an English name and Graentnor is not, and Grantnor and Graentnor are pronounced differently. The significance of the spelling applies particularly to Herrmann's evidence, for Herrmann was obviously in doubt as to the spelling. Herrmann to corroborate his testimony that Hinsch used the name Grantnor says that he laughed at Hinsch for using the name because it was an English name and Hinsch, as was obvious to anyone, was a German. There is no sense in this testimony of Herrmann if the name was spelled Graentnor or if Herrmann thought it might have been so spelled. Herrmann, though born in the United States, was a thorough German — knew the German language thoroughly. He could not have called Graentnor an English name, and he could not have imagined that a name, which he had heard often pronounced and was accustomed himself to pronounce Grantnor, might possibly be spelled Graentnor.

The name, whatever it is, appeared first in Kristoff's story to the police on his arrest in 1916. We have a verbatim report of one of these examinations. As Kristoff first used the name here, it is spelled Graentsor. In the other places in this report it appears as Graentor and many times. How it was then pronounced we do not know. In the police examination of Kristoff later in 1921, the name appears as Gramshaw, indicating that Kristoff when using the name himself always insisted on the " s ". Kristoff does not seem to have raised any question in his first police examination as to the dropping of the " s " by his examiners, or as to the pronunciation, whatever it may have been. But Kristoff was not the kind of man to worry about such changes so long as he understood what man they were asking him about. And Kristoff was not the kind of man to invent the name, whatever the name was. He must have known some man who called himself either Grantsor, Grantnor, Graentnor, Grandor, or perhaps Gramshaw.

Rigney and Charlock were of the Bayonne police force. As Black Tom was in the jurisdiction of the Jersey City police, Rigney reported Mrs. Chapman's story to them. At their request Rigney arrested Kristoff about 30 days after the fire and turned him over to the Jersey City police. The case was in charge of one Green, now dead, but Charlock kept in close touch with it. Kristoff was committed as a suspicious person on a disorderly-conduct charge, held for about 25 days, and then discharged. During this time the police became convinced that he ought to be examined for insanity, and he was so examined by Dr. King of the prison where he was confined. King, who seems to have had substantial experience in this line, reported that his intelligence was of low order, that his talk was rambling and he could not keep his mind on any given

line, but that he was not in his opinion dangerous. King made up his mind that Kristoff had nothing to do with Black Tom. Rigney and Charlock came definitely to the same conclusion. We do not know what Green thought, but the fact that Kristoff was discharged makes it certain that at the least the Jersey City police had not sufficient evidence to make the charge against him, and it is significant also that they did not keep Kristoff under surveillance or do anything else towards pushing the matter further. Their judgment is important, for they certainly had a good deal of the evidence now so strongly relied upon.

One of the main points now relied upon is the breaking-down of Kristoff's alibi. But that alibi broke down at once. Kristoff on being questioned by the police said he was at the time of the fire at the house of his aunt at Yonkers. Green apparently went to his aunt's house and was told he had not been there that night. It does not definitely appear that Green made further investigation on this point.

But we can have no doubt that the police, before letting go of Kristoff, not only cross-examined him thoroughly about this broken-down alibi but that they catechized Kristoff time and again about this and everything else suspicious or doubtful in his statements or his actions so far as they could learn of them; his returning late, why he was excited, why he said " What I do! What I do! ", his Graentsor story — everything they could possibly think of. Rigney said he did his best before turning him over to the Jersey City police. Charlock said he examined him many times, the last time when he was discharged. Green and others of the Jersey police must have done the same thing. Green particularly could not have dropped the alibi *after* he had broken it down, or dropped Kristoff until he had tried to get some explanation. They must have got everything they could. We do not know whether Green was satisfied of Kristoff's innocence, but Rigney and Charlock were. We cannot help giving weight to the fact that they discharged Kristoff when it would have been the great glory of any of these men to find and convict the culprit in this great disaster. And we might even suggest that the gentlemen of the press doubtless knew everything that the police knew, that many people who knew Kristoff knew that he was arrested and why, that reporters were questioning and hunting, and that any well-intentioned person who knew anything suspicious about Kristoff would have been likely to bring it to the attention of reporters or police authorities. The Black Tom disaster and Kristoff were certainly in the limelight.

The most extraordinary part of Kristoff's story to the police was with respect to the man with the kaleidoscopic name, whom we will for convenience call Grantnor. According to Kristoff, Grantnor met him in the Pennsylvania Station in New York, asked him the time, got to talking, and then and there employed him to take with him a long trip, covering many cities, including cities as far west as Chicago, Kansas City, and St. Louis, staying from one to three days in these various places. He lent Grantnor $275, for which Grantnor was to pay him $5,000. He received from Grantnor only a few cents at a time, but at St. Louis Grantnor gave him a dollar to go to the theatre, and when Kristoff came back Grantnor was gone, and Kristoff never saw him again except once when he met him by chance on the street in New York, when Grantnor agreed to get him a job and being in a hurry made an appointment for that night at the McAlpin Hotel, where, strangely enough, he was not to be found when Kristoff went there to get the job. Kristoff knew nothing whatever about what Grantnor did on these trips, except that Grantnor told him he was trying to get contracts. Grantnor had two suitcases which Kristoff said contained plans and blueprints. Kristoff's sole duties were to carry the suitcases and to watch them when Grantnor was not in his room. Kristoff

did not go out with Grantnor in any of these cities, except for a casual ride or two, and did not see any of the people with whom Grantnor talked. He had asked Grantnor for his regular address but never got it. When first employed he was supposed to be paid $20 per week, but he never got even that.

The story is suspicious enough in all conscience. If Grantnor can be shown to be Hinsch, we can easily get a good deal of truth out of the story and add a good deal of detail. Hinsch himself testifies that he never went further west than Gettysburg.

But the first thing the story shows us is Kristoff himself. There is no danger that the story represents real facts, but it does represent Kristoff. Whether Kristoff was trying to tell the truth and couldn't, or whether he was trying to make up a good-looking lie and couldn't, we get a vivid picture of a simpleton, almost a plain fool, and we know that King is complimenting him when he speaks of him as a man of a low order of intellect.

That is in substance all the direct testimony we have at that time from Kristoff himself. The police had it and did their best with it. Charlock was particularly interested in Grantnor and asked Kristoff to try to find him and let Charlock know. Kristoff is now dead.

In the course of the later investigations of Kristoff we have alleged admissions by him, which are seriously important testimony, whatever doubts we may have regarding them.

These admissions are reported by a detective named Kassman, one of the men of the Burns Detective Agency, which was employed by the Lehigh Valley Railroad Company to shadow Kristoff. From October or November, 1916, to April, 1917, Kassman devoted himself to Kristoff, working in the same factory, getting intimate with him, eating with him, convincing Kristoff that Kassman was an anarchist and so acquiring his confidence, talking to Kristoff about the Black Tom fire and about the possibility of damaging other munition plants, which Kassman professed to Kristoff to be very anxious to do. The evidence shows that Kassman, whether a compatriot or not, could speak some language which Kristoff spoke naturally, and spoke little English himself. We judge therefore that their talk was not in English and that Kassman's reports which in the evidence are in English must be translations of what Kassman reported in the language which he used in talking with Kristoff.

We have not all of Kassman's reports. Why we do not know. We get the impression that the reports we have, which run along from the beginning of his employment to the end with varying intervals between the reports, were selected and put together in the shape submitted to us; not selected for the purpose of submission to us but for some other purpose. Very likely they were so selected because they seemed to the person making the selection to be the only important reports in a long series. Whatever the explanation, the reports as submitted to us omit much that seems important to us. We cannot accept at face value admissions appearing in reports from a detective when other reports from the same detective are lacking, which may conceivably contain denials, or explanations, or sidelights, or statements of fact which are inconsistent with other circumstances which we know or with the alleged admissions.

And Kassman, entirely unconsciously, discredits every admission by Kristoff which appears in his reports. In his affidavit to the Commission stating that the attached are some of his reports and that they are true, Kassman undertakes to state, again in English, what Kristoff admitted to him, and this statement not only changes the language of the admissions in the reports but also changes the substance very materially. Where Kristoff in the alleged admissions speaks of " steamboats " at Black Tom upon which he and his companions set fires, Kassman in his affidavit speaks of " barges ". There were no " steamboats "

at Black Tom, but there were "barges ". Again, the admissions in the reports speak only of setting fires on " steamboats ", and we see no reason to believe that any fires were set on any boats, whether steamboats or barges. Kassman in his affidavit says that Kristoff said not only that a fire was set on a barge, but also that one man set a fire among the cars. The affidavit is made about 10 years later than the reports, but the difference is not forgetfulness. It is the conscious effort of Kassman to say what the immediate necessity seems to him to call for. If the admissions do not fit, he is prepared to make them fit and does his best.

Kassman's reports were in the hands of the Lehigh Valley Railroad Company when the cases against the company, arising out of Black Tom, were tried. So far as we can ascertain, the evidence was not used. We can see reasons for this from the point of view of successful defense, and we are not inclined to attach great weight to this point or to the fact that they urged spontaneous combustion so persistently. The only weight we would give to the last point arises from the impression of sincerity which the language used by the railroad's counsel makes on us. It is somewhat singular that it makes this impression, for we are all used to pleadings and openings and arguments, and in most cases would not get any impression one way or the other from them. But of course there is no estoppel here, and the opinions of counsel in other cases, however sincere, do not establish facts for the cases before us.

Nor were these reports made the basis for any criminal action against Kristoff. This would be of some importance if they had been in the possession of the police, but we can understand that the railroad company or the present claimants would not be particularly interested in punishing Kristoff but might be hoping to supplement whatever evidence Kassman supplied so as to reach whatever influences were behind him.

The language of the confessions is not in itself persuasive of their truth. They sound as do the admissions alleged to have been made in Mexico, more like a reproduction of gossip current in the circles of the man who used the language — whether that man was really Kristoff or whether the language comes from Kassman only and not from Kristoff — than they do like statements of fact made by or quoted from a man who is telling what he himself did. More important still, they do not correspond to the facts and circumstances of the fire. Nor do we like the fact that the language of the admissions is always substantially exactly the same and is very brief, whether it is quoted from Kristoff or (in one instance) from Grossman, who is alleged, after having emphatically told Kristoff in Kassman's presence that he must never under any circumstances say anything about Black Tom, to have told Kassman at a later interview alone just what Kristoff told Kassman and in the same brief, crisp language. We are more than suspicious, we disbelieve, in fact, when Kristoff is alleged to have introduced Kassman to Grossman's favor by telling him that Kassman is an anarchist. Grossman is not an anarchist. The evidence convinces us that he is a respectable citizen. He has been a member of the Republican County Committee in his county for 15 years. Rigney tells us that his father-in-law lived in Grossman's house with him about 10 years and always spoke in the highest terms of him. Grossman is a cautious man. And he is easily scared. We attribute much of the confusion and contradiction in his testimony partly to the fact that he was scared — not because of conscious complicity with a criminal, but by the nature of the occasion — and partly to the fact that he is deaf. We get no unfavorable impression from Grossman's testimony, and we are particularly impressed by the fact that he refused to testify until assured that some representative of the United States Government would be present.

But to return to Kassman. The admission in each case is that Kristoff worked with some German group. Kristoff never naturally used such an expression as " German group ". This is Kassman's language; he was employed, as he says, to find Kristoff's connection with some German group, and this is language which he puts in Kristoff's mouth, though of course it may be a substantially accurate transposition of something Kristoff said. Kassman pressed Kristoff for names, and says that Kristoff said he would tell him later, but Kristoff never did.

The omissions in the reports are very remarkable. In substance the reports are composed of anarchists, lunches, and suppers, and brief categorical statements about Kassman's desire to destroy, Kristoff's unwillingness to join Kassman in sabotage because of police, and Kristoff's admissions about Black Tom.

One singular omission is that Kristoff does not congregate with other German agents. The urge to congregate is in all the other testimony the most marked characteristic of all German agents. But we hear nothing of Kristoff's meeting other German agents or even sympathizers. No name appears even of all the various Germans mentioned in our other testimony. And the admissions are brief and rare episodes in a long series of uneventful, common-place stuff. We even doubt whether " anarchists " as used by Kassman really means " anarchists " in any accurate sense.

Another doubt — the most important perhaps — arises from the absence of conversations about Mrs. Rushnak, Mrs. Chapman, about Kristoff's supposed travels in the west, about Grantnor, about Kristoff's alibi, etc. We can feel sure that Kassman was not put on this job without being supplied with all the information the people who employed him already had. His natural approach towards getting information from Kristoff would not be this anarchistic talk and the ridiculously crude, unskillful talk — from the point of view of a man supposed to be a detective — about munitions and about Black Tom itself. He would naturally begin on Kristoff with talk about the west, the cities where Kristoff told the police he had been, to see if Kristoff really knew about the cities and said anything about the trip, whom he was with, what he did. After Kristoff began talking about his arrest by the police, Kassman would have a perfect opening for talking over the whole story, the trip, Grantnor, whom Kristoff and Grantnor saw on the trip, Mrs. Rushnak, Mrs. Chapman, the alibi, what he really did the night of the fire, whether he was excited when he got home and why, and the " What I do ". It is inconceivable that Kassman did not go into all these subjects with Kristoff in the course of the six months he followed him up. Either Kassman was a fool, or he had those talks and made reports about them which we have not got. If he got so intimate with Kristoff as to get confessions about Black Tom, he would have found no difficulty in getting Kristoff to talk over his whole story to the police. Kristoff would have been rather proud that he got away from the police, would have enjoyed his cleverness in producing a story from which they could make nothing, would have talked freely about Rigney, King, Charlock, and Green, who had examined him and tried to get him to confess. We hear nothing about any of these things.

Kristoff's experience with detectives was not at an end, even when Kassman was taken off his track. In 1921 he was arrested in Albany and while in jail there another detective was placed with him in the guise of a prisoner and attempted to gain his confidence and secure admissions. Nothing came of this. At the same time he was examined with great thoroughness by counsel for the Lehigh Valley and by others. Kristoff seems to have professed willingness to help them in every way, probably with the idea of thereby securing his

release from jail, but we get nothing whatever except that he was ready, he could be taken to Philadelphia, to point out a house which he thought was used as a rendezvous by German agents. The court granted an order for his removal from jail under guard to visit Philadelphia, but we do not even learn that they took him there. They did at least take him to New York where he was confronted with Mrs. Rushnak and Mrs. Chapman, and a strenuous effort was made by all concerned to get him to admit Black Tom. He denied all connection with Black Tom. It also appears in close connection with this story that Mrs. Rushnak was in 1918 under surveillance of a woman detective in the guise of a lodger in her house. This was evidently done for the purpose of securing evidence from Mrs. Rushnak that Kristoff came home late the night of the fire. It seems singular that this should have been necessary, but doubtless Mrs. Rushnak had in the interval between 1916 and 1918 denied this story. The woman detective did report that Mrs. Rushnak finally admitted to her that Kristoff came home late, but she insisted at the same time that Kristoff not infrequently came home late, and that he was absolutely innocent, and added that she had merely made it easier for him to secure his release from the police in 1916 by denying that he came home late.

Apart from Kristoff's supposed statement that he worked in some unidentified German group, we have no connection of Kristoff with Germans except his possible connection with Hinsch. His group statement certainly is not enough for us. We have to be convinced that Hinsch was Grantnor or Grantsor or Graentnor in order to get a good start on the idea that Hinsch through Kristoff was responsible for Black Tom. His Grantsor story must be connected up with Hinsch. In his own evidence there is no such connection except his meeting Grantnor later in New York when Grantnor told Kristoff he could find him at the McAlpin Hotel. This is where German agents sometimes roomed, and it is argued that this statement connected him with Hinsch. But it seems hardly likely that Hinsch would have mentioned the McAlpin if he was trying to get rid of Kristoff. He would have given him some fictitious address or some address which had no relation to Germans.

The only evidence worth considering that Hinsch was Grantnor is the evidence that Hinsch called himself Grantnor. This comes from Herrmann and Hadler. It seems possible, but we regard the evidence of Herrmann as wholly unreliable.

When Herrmann appeared before the American and German Agents at Washington he told the Agents that he could not remember any Grantsor or Gransor. This was on his arrival from Chile after he had decided to testify in behalf of the claimants, but before his formal examination. He was then asked to write out his own story which he did that night, and in this story he speaks of Hinsch calling himself Grantnor, and corroborates it by relating that as a joke Hinsch called him Rodriguez just after the Kingsland fire, and that he retorted by calling Hinsch Grantnor. In his cross-examination about his complete failure to remember Grantnor or Grantsor at first, it seems plainly apparent that he had been reminded of Grantnor in conversation after his failure to remember, and also that the question of Grantnor had been the subject of discussion on his journey from Chile. Grantnor, as we have said, is the missing link in this part of the story, and this failure of Herrmann to remember the name at all is a stumbling block to believing what he later says on this point.

Herrmann also was very doubtful about the spelling of the name. He tries twice to spell it and each time gives alternatives, Grantnor and Graentnor, though no German could think that the name, if pronounced in English fashion, could possibly be spelled Graentnor.

Herrmann also says he had heard Hilken call Hinsch Grantnor, but Hilken, one thing to his credit, does not even testify that Hinsch used the name Grantnor, and Hilken knew Hinsch better than anyone else. Hilken even testifies that he never heard of Grantnor.

Hadler's testimony as a whole is unconvincing. If he had told only about Hinsch's claims in Mexico to credit for Black Tom and Kingsland we would be more inclined to believe him. But his identification of Wozniak is nonsense in itself, and particularly so as we think that Wozniak never was in Mexico. And we take no stock in his story of the frequent repetition of the Rodriguez-Grantnor joke. It would not have been a joke at all in Mexico for there seems to be no doubt that Herrmann called himself Rodriguez there. But the most convincing point about this evidence by Hadler is that this joke, if it ever happened, was first made in the United States immediately after the Kingsland fire. We do not believe that both Herrmann and Hinsch were so lacking in humor that they continued to work this joke after they got to Mexico, and in the presence of such a person as Hadler. It is the kind of joke that they would keep for their own amusement, even if one can imagine that it continued to amuse them. Hadler carried this joke too far.

One is rather inclined to regard Hinsch's story that he gave up sabotage when he took over the *Deutschland* work as quite likely to be true. He may not have done this at once, but it seems more than likely that he would not while the *Deutschland* was at Baltimore have been active in sabotage. We do not regard the question whether Hinsch was absent from Baltimore during the two days before Black Tom as important in itself. He did not need to be absent, if they had been planning Black Tom for some time. Its importance relates only to Hinsch's credibility, and it does not have much importance from this point of view. It has some bearing on the credibility of other witnesses also. Our impression is that Hinsch was not absent from Baltimore at this time.

The fact that Hinsch let Herrmann stay around Baltimore, and that Herrmann probably did some things or talked of some things in connection with sabotage at this time, and the talk about the pencils which Herrmann seems to have had with him at this time, tends against Hinsch's claim that he cut loose from sabotage. We would guess that Herrmann was not really doing much but talk and plan, and that Herrmann himself, particularly when the *Deutschland* was there, was doing nothing but work about her. And it is of course conceivable that we are wrong in disbelieving Marguerre's evidence that Herrmann was to take no action against munition plants or American property unless the United States entered the war. We do not believe that Hinsch would have mixed up sabotage so closely with the *Deutschland*, either by taking part in it himself or by letting Herrmann work on the *Deutschland* if Herrmann was then active in sabotage.

In certain cases an accumulation of items, each in itself too doubtful to be relied upon but all leading in the same direction, results in reasonable certainty. The evidence of fact in this case has pointed in a number of different directions, but even when some special part of the evidence has pointed in some one direction it has failed to carry conviction. The Kristoff evidence with which we have dealt comes the nearest to leading somewhere.

We cannot be sure that Kristoff did not set fire to Black Tom or take some part in so doing. We cannot be sure that Graentsor, or Grantnor, or Graentnor was not Hinsch, and that Hinsch did not employ Kristoff and others who are unknown. But it will sufficiently appear from the foregoing that, as we have said, the evidence falls far short of enabling us to reach the point, not merely

of holding Germany responsible for the fire, but of thinking that her agents must have been the cause, even though the proof is lacking.

Done at Hamburg October 16, 1930.

Roland W. BOYDEN
Umpire

Chandler P. ANDERSON
American Commissioner

W. KIESSELBACH
German Commissioner

[Extract from the Minutes of the Meeting of the Commission held on January 9, 1931]

The American Commissioner instructed the Joint Secretaries to record in the minutes of this meeting (the first held since October 20, 1930) that the Commission had rendered its decision dismissing the claims of the United States of America on behalf of the Lehigh Valley Railroad Company, Agency of Canadian Car and Foundry Company, Limited, and Various Underwriters, Docket Nos. 8103, 8117, et al., against Germany, which had been finally submitted by the American and German Agents on September 30, 1930, after oral arguments at The Hague, that the said decision, dated at Hamburg, October 16, 1930, and signed by the Umpire, the American Commissioner, and the German Commissioner had been, by prearrangement of the National Commissioners, simultaneously communicated on November 13, 1930, in duplicate originals to the Government of the United States and the Government of Germany, and had been made public by the two Governments, at Washington and Berlin respectively, on November 14, 1930, and that a third signed copy had been filed in the records of the Commission on November 15, 1930.

LEHIGH VALLEY RAILROAD COMPANY, AGENCY OF CANADIAN CAR AND FOUNDRY COMPANY, LIMITED, AND VARIOUS UNDERWRITERS (UNITED STATES) *v.* GERMANY

(Sabotage Cases, March 30, 1931, pp. 995-997.)

PROCEDURE: REHEARING AFTER FINAL JUDGMENT, NEW EVIDENCE, FINAL DATE FOR FURTHER PETITIONS. — IRREGULAR RENDERING OF DECISION: DELIBERATIONS, ROLE OF UMPIRE, COMMISSION'S PRACTICE. Requests filed January 12 and 22, 1931, for rehearing after final judgment of October 16, 1930. *Held* that final judgment not irregularly rendered because of Umpire's participation in National Commissioners' deliberations and in opinion of Commission: usual practice in important cases since Commission's foundation. Reference made to decision of April 21, 1930, in Philadelphia-Girard National Bank case, p. 69 *supra*, with regard to new evidence in sabotage cases to be submitted in future supplementary petitions for rehearing. Final date set for submission of any further matter.

EVIDENCE, PROCEDURE: AFFIRMATIVE PROOF, PRIMA FACIE CASE, PRESUMPTIONS, WITNESSES, SUBPOENA, OATH, ORAL TESTIMONY. — JURISDICTION: EXTENSION BY (MUNICIPAL) STATUTE. *Held* that (1) Treaty of Berlin requires

affirmative proof (as distinguished from *prima facie* case or presumption from refusal or destruction of documents) that damages were result of act of Germany or agents, (2) Commission may not subpoena witnesses, administer oaths, and take oral testimony: Agreement of August 10, 1922, does not authorize Commission to do so, and Act of Congress of July 3, 1930, applicable to international commissions, cannot extend Commission's jurisdiction. *Cross-reference:* A.J.I.L., Vol. 27 (1933), pp. 339-341.

Bibliography: Witenberg, Vol. III, pp. 10-11; Woolsey, A.J.I.L., Vol. 34 (1940), pp. 24-27; Annual Digest, 1931-32, pp. 421, 425-426, 427.

Decision on Petitions for Rehearing

Petitions for a rehearing have been filed by the American Agent in the so-called Black Tom Case on January 12, 1931, and in the so-called Kingsland Case on January 22, 1931. No new evidence is filed with these petitions. Although the rules of this Commission, conforming to the practice of international commissions, make no provision for a rehearing in any case in which a final decree has been entered, these petitions have been carefully considered by the Commission.

The briefs previously filed in behalf of the United States and the detailed argument of its Agent at The Hague in September, 1930, were marked by ability and thoroughness to which was added the force of his sincere conviction. It is therefore not surprising that the present petitions for rehearing bring out no new argument. We have studied them carefully to see if we have misinterpreted or misunderstood anything or failed to consider or to give due weight to any of the considerations now urged as a basis for rehearing. We are satisfied that we had a clear understanding of the Agent's position with respect to every point now presented and that every one of these facts or arguments was given careful consideration by us.

The terms of the Treaty of Berlin determine the financial obligations of Germany so far as this Commission is concerned. Both Governments and the Commission from the outset have recognized that in order to hold Germany liable for damages incurred during the period of neutrality this Treaty requires affirmative proof that such damages were the result of an act of the Imperial German Government or of its agents. The previous decisions of the Commission invariably have been based on this requirement. In the instant cases our conclusions were that the evidence did not convince us that the damages were the result of such acts. The substance of the petitions is that our conclusions were wrong. They may be, as we make no claim to infallibility, but they were and are our conclusions and nothing in the present petitions impairs our confidence in their correctness.

We think it futile to criticize the Agent's criticisms of our judgment, even of our good faith. One of his criticisms, however, which involves a jurisdictional question, calls for comment.

This question is raised by the American Agent's claim that the decision was irregularly rendered because the Umpire participated in the deliberations of the National Commissioners and in the opinion of the Commission. The Umpire participated in the deliberations of the Commissioners and in the opinion in accordance with the usual practice of the Commission in cases of importance since its foundation in 1922, a practice never before questioned and not in our judgment of doubtful validity even if it had not so long been accepted by all concerned.

These petitions for rehearing are dismissed.

A new jurisdictional question is raised in these petitions by the requests that subpoenas be issued by the Commission for the purpose of taking the oral testimony of certain witnesses. This suggestion is contrary to the unbroken practice of the Commission. The Agreement of August 10, 1922, between Germany and the United States, which established this Commission and is the foundation of its jurisdiction, does not authorize it to issue subpoenas for witnesses or to administer oaths and take the oral testimony of witnesses. The requests that subpoenas be now issued by the Commission for the purpose of taking oral testimony are based upon an Act of Congress approved July 3, 1930, having general application to international commissions, which the American Agent contends applies to this Commission and authorizes it to take this procedure. The Commission is of the opinion that the jurisdiction conferred upon it by the two Governments in their Agreement of August 10, 1922, cannot be extended by this later statute of the United States. Even if it had authority, the Commission would not change its practice at this stage of these cases, when the evidence has been formally closed, the arguments made, and the decisions rendered.

Accordingly, the requests in these petitions that the Commission issue subpoenas for the oral examination of witnesses are also denied.

In these petitions the American Agent states that he is collecting new evidence the submission of which will be the subject of supplementary petitions. Apart from the objection above noted to the taking of oral testimony, the Commission has pointed out in its decision denying the petition for rehearing filed by the American Agent in the Philadelphia-Girard National Bank case a number of objections to the submission of new evidence by either party as a basis for reopening or reconsidering decisions rendered in cases finally submitted. Some of these objections involve serious jurisdictional questions. The questions to be presented in the proposed supplementary petitions, however, are not dealt with by the Commission in this order, which deals only with the present petitions for rehearing on the basis of the evidence filed at the time these cases were submitted for decision.

Each of the two Governments has expressed a desire that the Commission wind up its labors as soon as practicable. All but a very few of the cases having been decided and there being only a comparatively small amount of work remaining to be done, it is necessary to set a final date by which each Agent should tender any further matter he may intend to ask the Commission to consider. That date is fixed as May 1, 1931.

Done at Washington March 30, 1931.

ROLAND W. BOYDEN
Umpire

Chandler P. ANDERSON
American Commissioner

W. KIESSELBACH
German Commissioner

LEHIGH VALLEY RAILROAD COMPANY, AGENCY OF CANADIAN CAR AND FOUNDRY COMPANY, LIMITED, AND VARIOUS UNDERWRITERS (UNITED STATES) *v.* GERMANY

(Sabotage Cases, December 3, 1932, pp. 1004-1029; Certificate of Disagreement by the two National Commissioners, November 28, 1932, pp. 999-1004; Separate Opinion on the Kingsland Case by the American Commissioner, December 2, 1932, pp. 1029-1036.)

PROCEDURE: REHEARING AFTER FINAL JUDGMENT, NEW EVIDENCE. — EVIDENCE: WITNESSES, AFFIDAVITS, CROSS-EXAMINATION; EXPERT OPINIONS ON AUTHENTICITY OF LETTERS AND DOCUMENT, VALUE OF EXPERT OPINIONS IN GENERAL; DIARY, CHECKBOOKS. — JURISDICTION: REHEARING. Request filed July 1, 1931, for rehearing after final judgment of October 16, 1930. Analysis of new evidence (see *supra*). *Held* that expert evidence is often and at best only an aid to judgment, but far from an infallible guide. Unnecessary, in view of negative result of analysis, to decide on Commission's jurisdiction te reopen claim, despite opposition from national Commissioner, once it has been formally passed upon and decided. (Decision subsequently set aside: see decision of June 3, 1936, p. 222 *infra*.)

Cross-reference: A.J.I.L., Vol. 27 (1933), pp. 345-364.

Bibliography: Witenberg, Vol. III, pp. 12-16; Woolsey, A.J.I.L., Vol. 33 (1939), p. 739, and Vol. 34 (1940), p. 29; Annual Digest, 1931-32, p. 425.

Certificate of Disagreement by the two National Commissioners on Supplemental Petition for Rehearing

A supplemental petition for a rehearing, based on newly-submitted evidence, was filed on July 1, 1931, by the American Agent in the so-called Black Tom and Kingsland cases, asking the Commission to reopen and reconsider its decision of October 16, 1930, dismissing those claims.

This supplemental petition was preceded by petitions for a rehearing filed respectively on January 12 and January 22, 1931, which were based on the grounds that the Commission, in rendering its original decision, " committed manifest errors in its findings of fact on the evidence submitted and in failing to apply important established principles of law and the rules of the Commission ", and also made the point " that the decision was irregularly rendered because the Umpire participated in the deliberations of the national Commissioners and in the opinion of the Commission ".

On March 30, 1931, the Commission, in its decision on the questions raised by those petitions, overruled the objections to the participation by the Umpire in the deliberations and decision of the Commission, and dismissed, for reasons stated, the petitions in so far as they were based on the evidence contained in the record at the time the cases were submitted at the conclusion of the oral argument at The Hague. The Commission reserved, however, for later decision the question of reopening and reconsidering its original decision on new evidence which the American Agent had already announced he intended to submit by supplemental petition.

The question thus reserved is now presented by the pending supplemental petition, on which the present proceedings come before the Commission. In these circumstances the only questions now to be dealt with are those raised by the submission of new evidence, and the Commission, accordingly, will

not re-examine the findings of fact made in its original decision of October 16, 1930, unless the Commission decides that it has jurisdiction to reopen these cases and the new evidence now submitted requires reversal or modification of such findings of fact.

The Commission has already heard, at its session held in Boston on July 30—August 1, 1931, oral argument by both Agents on some of the issues involved. No decision was rendered at that time because the German Agent was authorized to submit some additional information in regard to his contention that certain documentary evidence presented by the American Agent was not authentic. In consequence much additional evidence has been submitted on both sides since the Boston meeting. For a considerable time during that period the Commission was without an Umpire, but on April 8, 1932, when the Commission was again fully organized, it held a meeting in Washington and entered an order fixing definite time limits for the submission of any further evidence by either Agent. This order was amended, in agreement with both Agents, at a meeting held in Washington on November 1, 1932, and, as amended, required that the submission of evidence on both sides be finally closed on November 15, 1932, and fixed November 21, 1932, and succeeding days for oral argument on both sides, and the final submission of these cases at the close of such argument.

In order to make the record complete, mention must be made of a motion presented by the American Agent on February 5, 1932, for the production by subpoena of the Commission of certain witnesses for oral examination. The Commission had already dismissed, in its decision of March 30, 1931, a similar motion by the American Agent, on the ground of lack of authority to subpoena witnesses without the consent of both Governments. The new motion, renewing this request, was opposed by the German Agent on behalf of his Government and, accordingly, the matter was referred, at the suggestion of the Commission, to the two Governments for direct action between themselves if they wished to confer the proposed authority on the Commission. Such authority has not been conferred by the two Governments, and accordingly, this new motion has not been and cannot be considered by the Commission.

The foregoing brief review of the proceedings hitherto taken since the decision of October 16, 1930, brings the history of these cases down to the recent session which closed on November 25, 1932, when all the pending questions presented by this supplemental petition and the accompanying evidence were finally submitted.

A preliminary objection to the reconsideration by the Commission of its original decision has been raised by the German Agent on the jurisdictional ground that the Commission is without authority to admit the further evidence now offered for consideration by the Agent of the United States, or to grant a rehearing on the basis of such evidence, or any other evidence, after these claims had been dismissed by the Commission in its decision of October 16, 1930.

The Commission has taken note of this objection, but did not feel called upon to make a ruling on its validity at the outset. In all similar cases, including the proceedings on the original petitions for rehearing in these cases filed in January, 1931, the Commission has invariably taken the position that, as stated in its decision of March 30, 1931, " although the rules of this Commission, conforming to the practice of international commissions, make no provision for a rehearing in any case in which a final decree has been entered, these petitions have been carefully considered by the Commission ". The Commission has, accordingly, followed in the present proceedings the precedent thus established.

Coming now to the issues raised by the newly-submitted evidence, it must be noted, before discussing this evidence, that, as stated in the Commission's decision on the former petitions for rehearing.

" The terms of the Treaty of Berlin determine the financial obligations of Germany so far as this Commission is concerned. Both Governments and the Commission from the outset have recognized that in order to hold Germany liable for damages incurred during the period of neutrality this Treaty requires affirmative proof that such damages were the result of an act of the Imperial German Government or of its agents. The previous decisions of the Commission invariably have been based on this requirement. In the instant cases our conclusions were that the evidence did not convince us that the damages were the result of such acts."

It must also be noted that the Commission in its original decision of October 16, 1930, stated that " The Commission does not need direct proof but on the evidence as submitted we could hold Germany responsible if, but only if, we are reasonably convinced that the fires occurred in some way through the acts of certain German agents." In that decision the Commission also stated that in view of the background established in these cases, which showed authorized sabotage activities in the United States by a group of German agents, " inferences against Germany were rendered easier than they otherwise would be", which means, in application to the present proceedings, that if the two men who are now presented by the claimants as responsible for the Kingsland and Black Tom fires respectively, namely, Theodore Wozniak and Michael Kristoff, are shown to have been German agents, or employed by German agents, at the time of those fires, the Commission might feel justified in inferring, unless such inferences were prohibited by other evidence, that Germany was responsible under the Treaty of Berlin for those fires and liable for the resulting damages.

The new evidence now submitted by the American Agent is intended to establish such agency on the part of Wozniak and Kristoff.

As to the Kingsland case, the Commission in its original decision found as a fact that " despite Herrmann's confession the evidence in the Kingsland case has convinced us that Wozniak did not set the Kingsland fire ", and the Commission held as its final conclusion, from all the evidence, " that the fire was not caused by any German agent " and, accordingly, that " Germany cannot be held responsible for it ".

In reaching its conclusion the Commission found, among other facts, that another employee of the Agency of Canadian Car and Foundry Company, Limited, named Rodriguez, who also was alleged to be a German agent acting in cooperation with Wozniak in starting the fire, and to whom it was alleged that $500 was paid as compensation by Herrmann after the fire, " was not at the Kingsland plant at all on the day of the fire ". The Commission also found that the description of the starting of the fire, as presented in the evidence, did not justify the belief that it was started by one of the incendiary pencils alleged to have been furnished to Wozniak and Rodriguez for that purpose, and, further, the Commission disbelieved that Wozniak was in Mexico after the fire, where the evidence submitted by the claimants represented that he had gone and consorted with admitted German agents.

As to the Black Tom case, the Commission was unable to find definitely, from the evidence filed prior to its original decision, just how or by what agency that fire started.

As a result of its examination of the record, the Commission found that there was " a good deal of evidence which tends to implicate Kristoff ". This

evidence related to his conduct on the night of the fire, his false alibi, his association and trips with a man whose name the Commission described as " kaleidoscopic " but, for convenience, called Grantnor, as it appeared in the record with many variations of that spelling, and it was attempted in the claimants' evidence to identify this man with a man named Hinsch, an admitted German agent. The record also contained some alleged admissions by Kristoff reported by a private detective named Kassman, employed by the Lehigh Valley Railroad Company.

The Commission examined had analyzed at some length all of the evidence and reached the conclusion, stated in its decision, that " We cannot be sure that Kristoff did not set fire to Black Tom or take some part in so doing. We cannot be sure that Graentsor, or Grantnor, or Graentnor was not Hinsch, and that Hinsch did not employ Kristoff and others who are unknown. But it will sufficiently appear from the foregoing that, as we have said, the evidence falls far short of enabling us to reach the point, not merely of holding Germany responsible for the fire, but of thinking that her agents must have been the cause, even though the proof is lacking."

The new evidence now submitted on behalf of the claimants is addressed to all of these points in each of these cases, and is intended to show that the Commission was wrong in its findings and conclusions.

The American Commissioner and the German Commissioner have been unable to agree upon the decision of the questions presented in these cases as aforesaid, and their respective opinions having been stated to the Umpire they accordingly certify the above mentioned cases and all the questions arising under the supplemental petition therein to the Umpire of the Commission for decision, except that the German Commissioner takes the position that the question of the jurisdiction of the Commission to re-examine any case after a final decision has been rendered is not a proper question to be certified to the Umpire on disagreement of the National Commissioners and reserves that question from this certificate.

Done at Washington November 28, 1932.

Chandler P. ANDERSON
American Commissioner

W. KIESSELBACH
German Commissioner

Decision of the Commission
rendered by the Umpire, Honorable Owen J. Roberts

These cases are before the Umpire for decision on a certificate of the two National Commissioners, certifying their disagreement.

The certificate of the Commissioners briefly describes the pleadings and the purpose of the new evidence submitted. It is unnecessary to repeat what is there set out. I proceed, therefore, without preliminary discussion to deal with the cases in the situation in which I find them. I have had the aid of the transcripts of the very full arguments made before the Commission at The Hague and at Boston and of full and satisfactory briefs filed in connection with the various arguments, especially the present one. I have examined large portions of the evidence filed prior to the decision of October 16, 1930, with the object of comparing it with the new evidence in order to appraise the new evidence and its effect in connection with the old.

Kingsland

Much new evidence has been submitted for the claimants tending to exclude the theory of industrial accident. It goes far to negative the belief that the fire occurred as a result of sparking of machines, undue friction, or disarrangement of electrical apparatus. The Commission is asked to draw from these proofs the conclusion that Wozniak intentionally caused the conflagration. The antithesis is between an accidental fire and an incendiary fire set by a German agent. Nothing offered has changed or elaborated the account originally given and steadfastly adhered to by Wozniak. While there is now much contradiction of the alleged improper functioning of the machinery (not testified to by Wozniak, but by others), there is some additional corroboration of Wozniak's story. What was meant in the former opinion by " industrial accident " was one arising from any cause, whether or not accurately ascertainable. other than the purposeful act of an incendiary. While the new evidence makes more difficult the inference that the fire was due to one of the causes suggested by Germany, it does not render easier the conclusion that it was intentionally kindled by Wozniak.

In the original record Herrmann detailed the instructions he claimed to have given Wozniak. He says he told Wozniak to break the point of the incendiary pencil and set it upright in a coat-pocket or elsewhere and that it would burst into flame within approximately 30 minutes. It is now suggested, as a deduction from expert testimony submitted, that if the pencil were laid on its side in the shellcase and crushed a flame would immediately be generated. But there is no evidence that Wozniak knew this or was told that the pencil could be so used. The new evidence as to conditions in the plant and the happenings just before the conflagration, when added to the old, does not warrant a finding that the fire was due to the intentional act of Wozniak.

In the decision of the Commission of October 16, 1930, it was found that there was no sufficient proof that Wozniak was a German agent or in the pay of German agents. New evidence has been produced which is said to require a reversal of this finding. It may best be considered in relation to the state of the case as it stood prior to the Commission's decision.

Then it was claimed that Hinsch, a German agent, had introduced Wozniak to Herrmann, another German agent, who had given Wozniak incendiary pencils and instructed him in the use of them; that Herrmann doubted Wozniak's ability and requested that another man be added to the force of incendiaries, whereupon Hinsch produced a man named Rodriguez, who worked at the next bench to that of Wozniak; that after the fire Rodriguez got into touch with Herrmann and was paid $500; that Wozniak disappeared and never claimed any pay but was ultimately taken or went to Mexico, where during the summer of 1917, under the name of Karowski or similar name, he consorted with German agents and was known as a German agent.

This version of the transaction depended for its validity in the first place on Herrmann's testimony, which was disbelieved by the Commission, and secondly on that of some six witnesses who said they had either seen or heard of Wozniak in Mexico, under the name Karowski, or Karowsky or Karnowski, and knew him to be a German agent. The Commission disbelieved this testimony. In April, 1929, Wozniak came forward and gave testimony in affidavit form; and was examined and rigorously cross-examined in July, 1930, and gave what the Commission thought a truthful account of the fire and his subsequent conduct. His statements were carefully investigated by the Agents of both countries, and not only by his testimony but by corroborative evidence obtained by the Agents the following facts are indisputably established. After the fire

he submitted to an examination by the officials of the Agency of Canadian Car and Foundry Company, and also reported the nature and circumstances of the accident to Russian officials; he held himself available for further questioning. From the time of the fire to July 23, 1917, he was in New York City, using his own name, boarding where he had previously been known, and part of the time a patient and a watchman in a hospital.

He says that about August 1 he went to Tupper Lake, N.Y., and worked as a lumberman, returning to New York City sometime about October, 1917. This the American Agent disputes. Contemporaneous records are lacking, and testimony other than that of Wozniak is unsatisfactory as to this period. It is certain, however, that sometime after January 1, 1916, and before December 31, 1921, Wozniak did work at Tupper Lake during a portion of a summer. From contemporaneous records and his own testimony it is clear that this was not in 1916. By the weight of the evidence his employment as lumberman was not in the summer of 1918, 1919, 1920, or 1921. If he was not in Tupper Lake in the summer of 1917 my judgment is that he was never there. Yet it is conceded by the American Agent that it is possible he did do summer work there at some time during the period of years mentioned.

For reasons which will sufficiently appear from its original opinion the Commission definitely found that Wozniak was not in Mexico in the summer of 1917. Some of the affidavits to that effect presented by the claimants were wholly unsatisfactory in character, and others, while made by persons of the utmost probity, were proved obviously wrong by contemporaneous records. Wozniak was in New York, living with his friends the Perrys and working in Schall's restaurant, early in November, 1917; and from that date forward his whereabouts are accounted for, not alone by his testimony but by undisputed proofs. There is no evidence, except that which the Commission disbelieved on the former hearing, that Wozniak ever used any other than his own name or that, as claimants assert, he purposely disappeared or that claimants could not at any time prior to April, 1929, have located him.

With this background, I come to consider the new evidence. This falls under three categories: (1) certain affidavits intended to prove that Wozniak was in fact a German agent; (2) certain letters alleged to have been written by him from St. Louis, Mo., and Mexico City in August and September, 1917, and testimony as to the writing of three other letters by him from Mexico in the summer of that year and as to his taking the name Karowski; (3) the so-called Herrmann message, which will subsequently be described and discussed. I shall consider these items in the order stated.

1. The affidavit of Capitula is to the effect that in July or August, 1929, Wozniak endeavored to persuade the affiant that he knew Wozniak in Tupper Lake in " 1917 and 1918 "; and that the affiant refused so to state and informed Wozniak that the affiant had been in Tupper Lake in 1920 and 1921. The effect of this deposition is purely negative. The evidence amounts to no more than that the affiant could not say that he had seen Wozniak in Tupper Lake at any time. The witness does, however, add that Wozniak told him he had been in Mexico in " 1917 and 1918." We know nothing of the witness Capitula; his affidavit is barely a page long, lacks any collateral support; it attributes to Wozniak statements which he certainly would never have made as to the year 1918. The witness adds the somewhat surprising information that Wozniak told him he had been " brought back " from Mexico. Is the inference to be drawn that German agents brought him back?

The affidavit of one Nolan is produced, dated February 6, 1931, in which he says that he knew Wozniak in 1916 and 1917 as a man " used by different German Agents "; that the witness saw Wozniak at Meyer's Hotel, Hoboken,

in company with Captain Hinsch. It contains an account of an incredible conversation said to have taken place between Hinsch and Wozniak overheard by the affiant. This witness was presumably always available to the claimants, and it is not clear why his testimony, if favorable, could not have been obtained long before the case was originally submitted. I do not regard this evidence seriously. The same may be said of the affidavit of one King, offered in support of that of Nolan.

An additional affidavit by one Palmer was filed. He was in the employ of the British Secret Service during the war and had, prior to the earlier hearing, given evidence apparently quite irrelevant to any issue then or now in the case. And, surprising to relate, he says not a word therein as to the matters to which he now testifies. I must assume that he was thoroughly examined on the former occasion. He now offers a most circumstantial account as to Wozniak and various German agents' activities. He explains that these matters are not disclosed by contemporaneous British Secret Service reports because the custom was to condense them and exclude hearsay; yet the very reports to which he refers do contain hearsay information and on much less important matters than those of which, at this late day, he speaks solely from memory. No explanation is offered for his failure to disclose such vitally relevant details on his former appearance as a witness.

One Clucas now furnishes an affidavit in addition to the one he gave originally. He greatly elaborates what he previously said and adds new matter which he says he previously withheld as he thought that the claimants had adequate information on the subjects about which he was interrogated, and so did not need his testimony. His explanations do not satisfy me of his candor.

These affidavits are all made with the purpose of attributing to Wozniak the character and designation of a German agent. They are not persuasive, not only for the reasons mentioned, but because I find that, save for the summer of 1917, as to which I shall speak in a moment, Wozniak, though open to surveillance and for a part of the time under actual surveillance, has not in a single instance subsequent to the fire been found in the company of anyone who might by the remotest stretch of the imagination be found to be a German agent.

2. The new evidence indicates that in May, 1931, a Ukrainian named Baran went to Mr. Peto, vice president of the Agency of Canadian Car and Foundry Company, and exhibited to him three letters, addressed to Baran, written and signed by Wozniak dated respectively St. Louis August 10, 1917, and Mexico City August 28 and September 16, 1917. In connection with the production and examination of these letters the claimants paid Baran $2,500, and procured assent to a condition named by him that the American Agent should give assurance that Wozniak would not be prosecuted for perjury. The American Agent insisted upon an expert examination of the letters before he would accept them as evidence. The claimants consequently had them examined and satisfied themselves and the American Agent that they were in Wozniak's handwriting. Expert opinion indicated also that they were old and had probably been written when they bore date. The letters were submitted to the Commission. If genuine they establish that Wozniak was consorting with Germans in Mexico in the summer of 1917 and destroy his testimony to the effect that he was then in Tupper Lake. If they are not manufactured evidence the Commission was wrong in disbelieving the witnesses offered at the earlier hearing and in finding that Wozniak did not go to Mexico.

In my opinion the letters are not authentic. I should arrive at this conclusion without the aid of expert testimony. But my finding is enforced by what I deem convincing expert opinions that they were prepared for the purpose of the case.

They purport to have been written at a time when war had been declared between the United States and Germany, and two of them must have been sent across the border, which was then under strict guard; one of them stated that the Germans did not want Wozniak to write to anyone; two enjoin secrecy on the addressee; one refers to " my Germans ", another to the " damned Germans ", — strange expressions to be used by a German agent consorting with his fellows and seeking to conceal his whereabouts after fleeing the scene of his crime! They are written in Ukrainian, but one of them contains the name Karowsky written in Roman letters and suggests that Baran write to Wozniak by that name, to the general delivery address in Mexico City. Most noteworthy is the fact that in one Wozniak says that he will soon be back in New York near to " King". This is the sort of admission that Wozniak, above all men, in my judgment, would not naturally or normally have made. The references to Karowski and the Germans and to " King " too well piece out the claimants' theory of the case.

I am persuaded from photostats and photographs submitted that when Baran first showed the letters to the claimants they were not in the condition in which they now are. The various photostats prove that subsequent to such exhibition Baran cut a piece out of one of them. After this fact was noticed, the explanation was offered that he did this so that he could have the paper analyzed in an effort to prove the age of the letters because he had heard some discussion between the interested parties as to their authenticity. But Baran, by supposition, had had the letters since 1917; he needed no confirmation of their age. Moreover, photostats of the letters were attached to the affidavit of Baran identifying them, and the photostat of that of August 28, 1917, fails to show certain distinctive stains which are now quite apparent not only on the letter but on all later photostats and photographs of it. The conclusion is irresistible that either Baran or someone else tampered with this letter, in an effort to give it the appearance of age, after it was first shown to claimants and before it was delivered to them by Baran to be used as evidence. These stains are relied upon by claimants' experts as evidence of the age of the letters.

Certain foldings of two of the letters (those of August 10, 1917, and September 16, 1917) are totally inconsistent with the claim that these were written on the dates they bear and separately mailed from the places they bear date.

Baran, who produced the documents, is an intimate friend of Wozniak. The record before the Commission at the previous hearing discloses that he was repeatedly in touch with Wozniak. His identity was fully disclosed prior to July 30, 1930, by Wozniak's testimony. From the cross-examination for the claimants it is evident that they knew of this relationship at that time. It is incredible that Baran was not interviewed between the summer of 1930 and May, 1931, when he appeared and offered the letters. If he had such letters, that fact could have been long before ascertained.

The expert evidence and my own inspection convince me that the letters show all the characteristics of artificially aged documents and that the explanation offered by claimants' experts of accidental staining is not credible.

The letter of August 28, 1917, was written upon a watermarked paper sold by Kiperman, a merchant of Warsaw. As early as June, 1931, the claimants had observed the watermark and had procured a transmitted-light photograph which showed it with great clearness and definition of detail. During the summer and autumn of 1931 they made investigations in Poland, and in France where a dandy-roll for the production of such a watermark had been manufactured, to ascertain the date of the manufacture of the paper. The investigation was not exhaustive, and made at best but a *prima facie* case for a date of the watermarked paper earlier than 1926. Kiperman's unsworn statement

went no farther than that he had for many years sold paper with a similar watermark; it is quite indefinite as to when such paper was manufactured. Much detailed evidence submitted by the German Agent demonstrates that the watermarked paper in question was not manufactured prior to 1926. Some confusion has been created, due to the fact that two manufacturers made paper for Kiperman with dandy-rolls procured from different makers, but non-expert inspection demonstrates to my satisfaction that the watermark in question is that made by the Mirkow factory from a dandy-roll made in Paris. The paper made by the use of that dandy-roll was delivered to Kiperman not earlier than 1926. The expert testimony supports my own independent conclusion on this point. The watermark, therefore, strongly corroborates the other matters which make against the authenticity of the documents.

In June, 1932, there was filed an affidavit by one Golka, of Scranton, Pa., dated December 9, 1931, in which he states that he received a letter from Wozniak in Mexico in 1917. At the same time two affidavits by one Panas and his wife of about the same date were filed, in which they recount the receipt of two letters from Wozniak postmarked in Mexico. Supporting affidavits state that the names of these witnesses were obtained in Europe by Mr. McLain, one of the attorneys for claimants, and that Mr. McCloy, another attorney for claimants, secured the same names by independent investigation in this country. But the record contains references to both of these persons. In the cross-examination of Wozniak he was questioned and testified at length with respect to them. It appears from his affidavit and oral testimony that he worked under Golka in Scranton before going to New York in 1916, that during the same period he lived in the house of Panas in Scranton and that Panas was a witness to his marriage. It is somewhat difficult, therefore, to understand the necessity for all this investigation to disclose these two persons, who perhaps are as close to Wozniak and know him as well as Baran and who would be the natural persons to whom he and Baran would turn for statements in support of the Baran letters. Let it be here noted that, though unquestionably Wozniak wrote the Baran letters, he has testified that he was not in Mexico in 1917, has not vouched for the letters, and is not to be prosecuted for perjury. If the affidavits of Golka and Panas had been submitted independently, not merely as corroboration of the fraudulent Baran letters, I might, perhaps, give greater credence to the evidence of Wozniak's friends. These affidavits contain erroneous statements of fact; and, moreover, both recite that Wozniak was anxious to have his letters from Mexico destroyed. In one case he is said so to have requested in the letter; in another case to have visited the addressee, obtained the letters, and destroyed them in the presence of his friends. The reason Golka says he gave was that he wished to conceal whence he was writing. These are remarkable statements, when contrasted with the facts as to the fraudulent letters produced by Baran, which contain no such request but in fact give the name and address in Mexico to which letters may be sent to Wozniak. If he were so anxious that his correspondence be destroyed, I can not understand why he did not make a similar and effective request of his friend Baran, if the Baran letters were genuine and the Golka and Panas affidavits exhibit his true attitude.

Some of the witnesses who, prior to the decision of October 16, 1930, testified to Wozniak's presence in Mexico in 1917 identified a photograph of him as that of a man they knew as Karowski. Others stated they knew of the presence of a German agent known as Kurowski, Karnowski, etc., without identifying Wozniak as the one who bore that name. In the new evidence there is a certificate by a police official in Poland to the effect that bordering on Wozniak's old home in Rawa Russka there is a forest in which Wozniak once worked,

called the " Karowski " forest; that in *Poland* it is common to take a name additional to the surname, and to derive it from one's surroundings; that it is therefore *probable* that Wozniak did this, in which case he might have called himself Wozniak-Karowski or Karowski-Wozniak. This evidence is pressed upon me as confirmatory of the testimony that Wozniak was in Mexico under the *alias* of Karowski. But it rises no higher than proof that such a thing is neither improbable nor impossible.

On the other hand, testimony produced by Germany tends to prove that in the tongue used in Rawa Russka the forest in question was, prior to Polish domination at least, called " Kariw " (thus its derivative would be " Karifski " or " Karivsky "); that an intimate friend never knew of Wozniak's living in Kariw or working in the forest in question and never heard him use or anyone else call him or his family Karowsky or any similar name. This state of the proofs does not give me any real light upon the question of Wozniak's presence in Mexico.

I am of opinion the matters above discussed are insufficient, when taken with the proofs offered before the final hearing, to alter the finding that there is no credible evidence that Wozniak was a German agent, was connected and consorted with German agents, or that he was in Mexico in 1917.

3. If the so-called Herrmann message is authentic, that document alone would compel a finding contrary to that I have just stated so far as concerns Wozniak's being a German agent. Since, however, that message applies equally to Kingsland and to Black Tom, I may postpone discussion of it until after I have considered the other new evidence relating to Black Tom.

Black Tom

With respect to this catastrophe the decision of October 16, 1930, held that while not satisfied that Kristoff did not have a part in causing the fire and explosions, neither was the Commission convinced that he did have such part or that he was a German agent or an employee of German agents. The opinion states that the Black Tom Terminal was a shining mark for the activities of agents of destruction and that Hinsch might well have desired its destruction; but the only matter from which the Commission thought it might infer a connection between Kristoff and Hinsch was the former's story of a journey made by him with a man named Graentnor (or some similar name) early in 1916 and the promise of a large payment from this person. The Commission was unable from the record to identify Hinsch with Graentnor which it felt it must do in order to hold that Kristoff acted for Germany in causing the explosion.

The new evidence offered in the endeavor to clarify the situation and to induce an affirmative finding falls into two classes: (1) the 1916 diary and certain checkbooks of Hilken; (2) the Herrmann message.

1. It is said that the entries in the diary are consistent with Hinsch's having been absent from Baltimore on a trip with Kristoff in the spring of 1916. In the earlier arguments it was contended that, as Kristoff claimed to have made a trip at the time in question with a man he called Graentsor and as Fesmire testified that Hinsch had once told him about having made a trip west, the Commission should conclude that Hinsch was Graentnor. Hinsch, on the other hand, testified that he had never been west of Gettysburg and never made such a trip as the one described and had never visited some of the cities mentioned by Kristoff. In this state of the record the Commission refused to draw the conclusion suggested. In the light of these facts, I find merely that the entries in Hilken's diary are not inconsistent with Hinsch's having made the

trip but they add nothing affirmative to the evidence as contained in the record before and are insufficient to induce the affirmative finding asked by the claimants.

With respect to Hilken's checkbook it is urged that this now makes certain what has heretofore been a matter of dispute, namely, that in August, 1916, shortly after the Black Tom explosion, Hilken paid $2,000 to Hinsch; that this fact destroys Hinsch's testimony that no such payment was made and casts discredit on the whole of his evidence. The check stub shows that on August 10, 1916, Hilken drew $2,000 in cash; on the stub is noted " Capt H — Lewis, etc."

Herrmann used the alias Lewis. It is undoubted that about August 6 or 7 Hilken, Hinsch, and Herrmann went to New London to inspect the harbor preparatory to making it a merchant-submarine base. I think that if Hilken was in New York on August 10 he was on his return trip from New London. The new harbor project undoubtedly required disbursements of money. Hinsch states that the did not get $2,000 at this time and that the only explanation he can give of the entry on the check stub is that part of the money may have been used for the expenses of the trip to New London, but he concedes that these would not require anything like $2,000. This testimony is said to brand him as untruthful. I can not adopt this view. The use to which the money was to be put still must be derived by the claimants from Hilken's testimony, heretofore given, contradicted as it is by Hinsch. I am asked to conclude that as Kristoff said that he was to go to the Hotel McAlpin and meet Graentnor about August 10 to receive a payment of a large sum of money this entry connects Hinsch and Kristoff's travelling companion Graentnor. But here again we are taken into the realm of conjecture. Kristoff, moreover, said he did not receive any money, and there is nothing else, unless the check stub be evidence of the fact, to show that he did. I find that the diary entries and the check stubs do not warrant the inferences I am asked to draw from them.

The Herrmann Message

2. On July 1, 1931, there was filed with the Commission a Blue Book magazine of the January, 1917, issue, containing upon four printed pages lines of writing running crosswise of the print. This, we are told, is a code message forwarded by Fred Herrmann in Mexico to Paul Hilken in Baltimore in April 1917; names being referred to by numbers in the script, the numbers referring to other pages of the magazine where the names were indicated by pin pricks through printed letters in the text. The writing fluid is said to be lemon-juice made visible by the application of heat. As decoded by Hilken the message reads:

> Have seen Eckhardt he is suspicious of me Can't convince him I come from Maguerre and Nadolny Have told him all reference Hinsch and I Deutschland, Jersey City Terminal, Kingsland, Savannah, and Tony's Lab. he doubts me on account of my bum German Confirm to him thru your channels all O.K. and my mission here I have no funds Eckhardt claims he is short of money send ly [by] bearer U.S. 25000.— Have you heard from Willie Have wired Hildegard but no answer Be careful of her and connections Where are Hinsch and Carl Ahrendt Tell Hinsch to come here I expect to go north but he can locate me thru Eckhardt I dont trust Carl Ahrendt, Kristoff, Wolfgang and that Hoboken bunch If cornered they might get us in Dutch with authorities See that Hinsch brings with him all who might implicate us tell him Siegel is with me. Where is Carl D. he worries me remember past experience Has Hinsch seen Wozniak Tell him to fix that up. If you have any difficulties see Phil Wirth Nat Arts Club Tell

Hinsch his plan O. K. Am in close touch with major and influential Mexicans Can obtain old cruiser for 50000 West Coast What will you do now with America in the war Are you coming here or going to South America Advise you drop every thing and leave the States Regards to Hoppenberg Sei nicht dum mach doch wieder bumm bumm bumm. Most important send funds Bearer will relate experiencies and details Greetings.

A glance through this translation will indicate that, without reference to any other evidence, it is conclusive proof to any reasonable man that (*a*) Herrmann and Hilken knew the Kingsland fire and the Black Tom explosion were the work of German agents and (*b*) that Hinsch, Hilken, and Herrmann, undoubted agents, were privy thereto, and (in the light of the record before the Commission) (*c*) that Kristoff and Wozniak were active participants in these events. As the American Agent has well said, I may utterly disregard all the new evidence produced and still, if I deem this message genuine, hold Germany responsible in both of the cases.

The authenticity of the message is sharply challenged. A narrow and very difficult issue of fact, upon which alone these cases now turn, is thus raised, which challenges and has had my careful and painstaking study in an effort to reach a right solution. As in the case of the Wozniak letters, the elements which affect the problem of authenticity fall into three general classes: (1) the testimony concerning the document, (2) the conditions known to exist when the message is claimed to have been transmitted, and (3) expert testimony with regard tho the probable date of the writing.

(1) The magazine was produced by Paul Hilken, who, in an affidavit of May 8, 1931, states that he discovered it recently in his old home in Baltimore. The document comes, therefore, from a source which the former opinion of the Commission entirely discredited. Hilken, though an American citizen, is a former German agent. His attitude at first was that of loyalty to Germany. In December, 1928, he changed his position and testified at great length on behalf of the claimants. He then produced, upon request, diaries for 1915 and 1917 and part of 1916 and other documents which were made a part of his deposition. He then expressed his willingness to search for other contemporaneous documents and indicated that they would be found either in his desk or at this former home in Baltimore. The record leaves no doubt that the American Agent and his counsel for a period of two years prior to the production of the magazine had urged Hilken to search out further data in substantiation of his testimony. Notwithstanding this he did not do so, and the Commission made its finding of October 16, 1930, branding him unworthy of belief. Thereafter counsel to the American Agent renewed his request and apparently hoped that Hilken might find further documents to reestablish him in the eyes of the Commission. Nothing came of this until April 26, 1931, on or about which date, we are told, Hilken brought the Blue Book to Mr. Peto, vice president of the Agency of Canadian Car and Foundry Company, and not, be it noted, to the American Agent or his counsel who had requested further data. Mr. Peto advised the American Agent of the existence of the document. Not until long after the German Agent had attacked the authenticity of the message was further testimony of Hilken filed as to the time and manner of the discovery of the magazine.

In an affidavit made November 15, 1932, Hilken states that on Christmas Day, 1930, he made a search of the attic of his old home in Baltimore and unearthed the magazine at the bottom of a wooden box in a closet under the eaves, and at the same time discovered a large amount of correspondence bearing on his wartime activities. Apparently none of this other matter was

delivered to the claimants with the magazine, but was filed with a later affidavit of Hilken dated June 29, 1931. Along with Hilken's affidavit of November 15, 1932, were filed affidavits bearing date November 12 and 15, by Mrs. Hilken, Hilken's daughter, and Elizabeth Braun. Mrs. Hilken states "she knows" that on Christmas Day, 1930, Hilken found the magazine, though did not tell her of the message, but did inform her daughter as to it. She does not say that she ever saw the document. The daughter simply underwrites her mother's deposition; fails to state that she ever saw the document; and simply narrates by proxy of her mother's affidavit what her father told her. Elizabeth Braun, who is in no way identified to the Commission, — about whom we know nothing except for her name and address, that she is an old friend of the Hilkens, and that she entertained Hilken the Sunday following Christmas, 1930, — says that Hilken told her of the finding of an important message and described it; she does not say that she saw it. All of these witnesses seem to have communicated the contents of their affidavits to the claimants during early or late 1931, but their testimony was not submitted to the Commission until November 15, 1932.

Hilken, in his deposition of November 15, 1932, and not before, gives as his reason for not promptly producing the message on its discovery, that he feared publicity as he knew that certain articles were being prepared on the sabotage cases to appear in the Liberty magazine; also that he was being urged by von Rintelen, then in this country, not to give any further evidence for the United States. It is quite evident that Hilken had fully determined to aid the claimants as early as December, 1928. I do not believe that his attitude in that respect had undergone any change. The von Rintelen advice is in my judgment a belated excuse. Equally unsatisfactory is the suggestion as to avoidance of publicity. It is quite evident that Hilken could promptly have confidentially exhibited or delivered the magazine to the American Agent or his counsel, and that his confidence would have been respected.

As respects the production of the message, I find that it comes from a source which the Commission has held unworthy of belief, and under circumstances which at least cause me to hesitate to give full faith and credit to the account of its discovery.

In addition to Hilken's several depositions, there is a substantial amount of other testimony to be considered. Raoul Gerdts, a young man who associated with Fred Herrmann in New York in 1916-1917 and who, while not a German agent, was an employee of Herrmann and did various errands and services for him, accompanied the latter from the United States to Mexico in February, 1917. Gerdts separated from Herrmann in 1917 and returned to his mother's home in Colombia, South America. About January, 1929, the claimants located him there and submitted a questionnaire or series of interrogatories to him, which he answered in writing. Amongst other things, he was interrogated as to whether he knew Hinsch and Hilken. In his answers he said that he had met them in Baltimore in the spring of 1917 when he delivered the message or order with which he had been dispatched by Herrmann who was then in Mexico. His testimony convinces me that he knew neither of them prior to the Baltimore meeting. He said that he carried two messages, one for Hoppenberg (of the Eastern Forwarding Company in New York) and another to be delivered to Hilken in case he should not find Hoppenberg; that these were written in lemon-juice in a book of poetry. When his testimony was given and filed apparently the parties, and certainly the Commission, attached no importance to the message, which seemed to be of a date insignificant in respect of the issues in these cases.

In 1930, after Fred Herrmann had decided to give evidence in support of the claims and to return from Chile for that purpose, he remarked during the

course of his evidence that he had sent " a couple of letters " from Mexico to Hilken in Baltimore. Nothing further transpired in this connection until the production by Hilken of the Blue Book magazine on April 26, 1931. Thereupon Herrmann testified that he recognized it as " the message " which he had sent by the hands of Gerdts to Hilken in April, 1917. We need only note in passing the Commission's former finding that Herrmann is a liar not presumptive but proved.

A German named Siegel was interned in Russia at the outbreak of the war. He escaped through Siberia and may have crossed the Pacific and been in the United States for some time. He was then apparently unknown to Herrmann. He made his way to Cuba, and when Herrmann and Gerdts, after leaving the United States, stopped at Havana and thence took passage for Mexico they made his acquaintance, and he accompanied them into Mexico and remained with them. Siegel had not theretofore been a German agent but professed his desire to do something for Germany and volunteered to cooperate with Herrmann. Herrmann offered him employment in behalf of Germany. Siegel was present when a secret message was written by Herrmann to be dispatched by Gerdts. It seems that Herrmann prepared a draft of a message and had Siegel read it to him while he wrote it in invisible fluid. After the war Siegel returned to Europe and is now engaged in a mercantile business in Estonia.

It will be noted that the Herrmann message contains the phrase " Siegel is with me ". In March, 1932, the claimants sent Herrmann, who was cooperating with them, to Europe to obtain a statement from Siegel. Although an American lawyer for the claimants, Mr. McLain, accompanied Herrmann to Tallinn for this purpose, neither Mr. McLain's presence nor his identity was disclosed to Siegel, and the negotiations were left entirely to Herrmann. There is no question that Herrmann failed to make a full and frank disclosure of the situation in which Siegel's testimony was desired. So much both he and McLain admit. How much Herrmann concealed and what he actually told Siegel is a matter of serious dispute between him and Siegel. That he purported to refresh Siegel's memory as to details I think there is no doubt.

As a result of the interviews, Siegel prepared in his own hand a statement in which he said that he had been shown a Blue Book magazine; that he recognized the volume as similar to that in which the message of 1917 had been written; had been shown a photostat of the alleged secret message as developed; that he dictated the same to Herrmann and that Herrmann dispatched it by the hands of Gerdts.

Siegel was subsequently examined on behalf of Germany and then gave a sworn statement in which he says that he thought the paper which he had written was merely to be used in negotiation by the German Foreign Office; that he understood that Herrmann was still in the German service, was being paid by the German Foreign Office, and that it would help Herrmann if he made the statement as he did; that he relied largely upon Herrmann for details and that as a matter of fact he does not carry the details in his memory at the present time.

Finally, upon November 15, 1932, an affidavit of date October 28, 1932, by one van Emmerik was filed. In this the witness states that Gerdts arrived in New York City in April, 1917, as Gerdts says in his testimony, on the day after the death of Hoppenberg; that Gerdts inquired for Hoppenberg and on learning that he was dead stated that he would now have to find Hilken; that Gerdts was dressed in a raincoat and was carrying a magazine which he said contained a message for Hoppenberg. The implication is that the magazine was open and exposed to the elements. The witness says he, Gerdts, and one Weber had a meal together in a restaurant in New York, where Gerdts

laid the magazine on the table and a waiter picked it up and tore the cover (the front cover is now missing), and that Weber got greatly excited about the incident and insisted on checking the magazine.

With respect to what happened in Baltimore the claimants' evidence is to this effect: Gerdts who had arrived by devious ways in order to avoid surveillance says he found that Hilken's home was then being inspected by special investigators and was sent away for a time until that inspection should be completed; he returned and met Hilken; Hilken went alone to the cellar and developed the message. Hilken says that upon reading the message he made a translation of it by the use of the code and took this to New London and showed it to Hinsch, that Hinsch returned to Baltimore with him, and there they discussed the situation with Gerdts. All agree that this conference between these three took place. In the upshot, Gerdts was given about $1,000 and was told that Hinsch would bring additional money when he went to Mexico, and Gerdts was sent back to Herrmann. Hinsch did, in May, 1917, go to Mexico carrying some $24,000.

The German evidence in contradiction to this testimony is that of Hinsch, who says that a secret message was sent by Herrmann to Hilken, that he was summoned to Baltimore by Hilken to consider the matter, that there he met Gerdts, and that he and Hilken questioned Gerdts and learned from him about the situation in Mexico and that it was determined that Gerdts should be given a comparatively small sum and that Hinsch would take further funds to Mexico later when he went. Hinsch says that the message was in a bound book in stiff covers, was written in a secret ink which was then known to German agents, was developed by bathing in a known solution, and was on but a single page which was the fly-leaf from the front or back of the book and contained no print. He says that the message was of but two or three sentences, — as well as he can now remember, somewhat to the following effect: " The bearer of this message is Raoul Gerdts who carries a personal message to you. You can trust him in full." And then followed the request that Hilken give Gerdts a considerable sum (the witness thinks it was twenty or twenty-five thousand dollars) and also a statement that Gerdts would verbally report about everything else.

(2) As to the circumstances and the internal evidence: It is to be borne in mind that the conceded purpose of the message was to obtain funds. So far as I am advised it had no other. It is further to be noted that at the time of its dispatch the United States had entered the war; most of the secret agents of Germany had left the country and were known in many instances to have fled to Mexico; the border was being watched for secret correspondence; the situation was so tense that Hilken was under actual surveillance and his home was being searched. Again, the missive was written in lemon-juice, a medium well-known and for many years used for secret messages, was in a code which could be discovered and the text read by any agent of the United States or of the Allies in perhaps an hour after its capture, contained a sentence in German which would have been indicative of its origin and destination. The document comprises 254 words. Those that have to do with the request for money amount to only 20. All the remainder are wholly irrelevant to the purpose in hand. The names of 21 separate persons and places appear; all but two admittedly names of alleged German agents, asserted by the claimants in these cases to be such, or of places where acts of sabotage are said by the claimants to have been committed by German agents.

The two persons on whom principal reliance is placed for the identification and substantiation of the message are Herrmann and Hilken, who in the spring of 1931 unquestionably were thoroughly familiar with all of the facts and data

developed before the Commission. The record contains a cablegram from von Eckhardt, German Minister to Mexico, to the German Foreign Office stating that he distrusted Herrmann and requesting confirmation of Herrmann's capacity and personality. This fact is referred to at the opening of the Herrmann message and is made the occasion, wholly unnecessarily, for the recital of the substance of the argument made by Herrmann to convince von Eckhardt. In this narration Marguerre and Nadolny, Hinsch and Herrmann are mentioned, as are the Deutschland, the Jersey City Terminal (obviously Black Tom), Kingsland, Savannah (where acts of sabotage against horses and mules are shown by claimants' evidence to have been committed), and Tony's Lab. (the name of Anton Dilger's laboratory for producing toxic germs, all as explained in other evidence in the record). It was surely unnecessary after having said Eckhardt distrusted him to append a biography and history of German agents and sabotage activities in the United States as detailed to von Eckhardt.

The message names Kristoff, but Herrmann has testified he did not know any such person and did not recognize his photograph. It names Wozniak, and tells Hilken to tell Hinsch to see Wozniak and " fix that up "; this comports with Herrmann's previous testimony that Wozniak failed to show up and claim his reward after the Kingsland fire. It refers to Hildegard. We find that long before the message was produced there was evidence before the Commission that Hildegard Jacobson had received a telegram from Herrmann in Mexico, endeavored to reply and failed to get through to him. It goes on to inquire what Hilken will do, now that America is in the war, inquires if he were coming to Mexico or going to South America, advises him to leave the United States and to get all German agents out of the United States. It mentions " Carl D." and says that from past experience the writer does not trust him; this refers to an incident long before exposed in the record, namely, that during 1916 Hilken became distrustful of Carl Dilger and sent him to Germany in 1916 carrying a secret written request to the German authorities to detain him there, but that Dilger, supposing the message to contain military secrets, became alarmed and threw the message into the sea, thus defeating Hilken's purpose.

There are other references equally significant to one familiar with the evidence and the arguments based thereon, previously submitted to the Commission. But enough has been said to show in how extraordinary a manner this document dovetails with all the important and disputed points of claimants' case and how pat all these references are, not to the request for funds but to the claimants' points of proof, — this aside from the absurdity of sending this unnecessary information into an enemy country to a suspected spy then under surveillance.

I come now to a new fact which is of importance. When the Blue Book was filed with the Commission the last page of reading matter had been torn out. Apparently Hilken took no note of this fact, nor did Herrmann. Apparently the American Agent failed to note the condition. So far as we can determine, this excision of the last page was not discovered until the summer of 1932. When Herrmann and Hilken were originally examined respecting what the magazine had contained, they definitely gave the impression that there was but one message. Hilken, in the affidavit originally filed with the Blue Book, definitely states that the code in which the message was written was one which he knew and which had been prearranged between him and Herrmann for their communications. After the discovery of the missing page, Hilken testified that it contained an additional message which gave the key to the code and that he accordingly destroyed it immediately; but, remarkable to relate, he retained the main message, which he had made legible, in his files and went so far, as above stated, as to make a fair copy of it which he carried

to New London to show Hinsch. Siegel does not mention any second message. It is difficult from the testimony to draw any conclusion as to whether there was an additional message and what it in fact contained if it ever existed.

Another matter of note is that the January, 1917, Blue Book, when filed with the Commission, concededly bore certain marks in lead pencil opposite some of the titles of the stories on the index pages. These apparently went unnoticed by Hilken or Herrmann or the American Agent. Some time after the submission of the magazine the German Agent observed them. He subsequently bought a number of other issues of the Blue Book for other months of the year 1917 to be used for comparison and for the use of his expert. These he procured from Abraham's Book Store in New York. They contained similar marks. In several of them were found bills which indicated that the magazines had been delivered by a newsdealer in Brooklyn to a house at 756 Madison Street in Brooklyn. Further investigation developed that one Qualters lived in that house and had in 1930 sold a large number of Blue Book, Red Book, and Adventure magazines to Abraham's Book Store and had received a check for $12 in payment therefor.

The evidence, in my judgment, is entirely conclusive that Qualters did make such a sale, but it is not clear that he sold complete sets of all three magazines covering the years from 1911 to 1929 as he states. Subsequently both Agents purchased at Abraham's Book Store numerous magazines of the kinds mentioned. Sixteen of all those purchased contained horizontal marks and cross-marks on the index pages; some 53 of them contained only horizontal marks. The German Agent seeks to prove by the Qualters' testimony that these marks were made by Horace Qualters and John Qualters, his brother, when and as they read the articles marked. He seeks also to account for the absence of marks during a certain period by the fact that Horace was absent during the war and was not reading the magazines currently. Qualters identifies the horizontal marks in the January issue as so like his that he believes he made them.

It appears that sometime prior to April 30, 1931, two persons purchased January, 1917, Blue Books at Abraham's Book Store. One of them is now identified as Mr. Traynor, who bought a copy on April 29, 1931, for the claimants, in order to obtain a magazine to compare with the one produced by Hilken. This copy contains no marks whatever on the index pages. The other was bought by someone who cannot be identified, whose description is most vague, the time of whose appearance at the store cannot be definitely fixed, but who, according to the testimony, did not ask for the issue of any particular month but merely for a Blue Book of 1917 and was handed a January number only because the store had two copies of that issue and could better afford to sell one of the copies for that month than to break the set by taking one of another month. Meyers and Abraham, of the bookstore, who had to do with the sales in question, do not identify Hilken or Herrmann as the purchaser of the January, 1917, Blue Book. There is no specific evidence that Herrmann, Hilken, or any agent employed by them or either of them purchased the January, 1917, number of the magazine at the Abraham Book Store.

Expert evidence which is not effectively challenged is to the effect that the marks as exhibited in the 1917 Blue Books and in that containing the message were not made in the order and in the manner described by the two Qualters brothers. The German Agent, however, insists that the markings found on the table of contents of the magazine containing the Herrmann message are so similar to the markings in the other magazines, some of which indubitably and concededly come from the lot purchased by the bookstore from Horace Qualters, that I may draw the conclusion that the January, 1917, magazine

containing the message came from Qualters. He further animadverts upon the tardy explanations of Hilken that German agents were in the habit of using marks as keys to their codes, and of Herrmann that he believes he made the marks in the table of contents in the magazine in connection with the message to Hilken but cannot at this time determine their significance.

If I were to draw the conclusion the German Agent desires, this would end the controversy with respect to the authenticity of the message. While the evidence arouses suspicion, I can not find in it alone enough to reach a certain conclusion. It does, however, add to the doubts which all the other facts and circumstances recited have raised concerning the document.

(3) It remains to consider whether these doubts can be resolved by recourse to the expert testimony. This consists of about one thousand pages. The questions submitted to the experts are in my belief novel. They involve at the foundation certain known qualities of ink and paper. But as one reads the testimony on both sides one is impressed with the fact that the experts themselves had to resort to experiments with lemon-juice writing on new and old paper in order to reach their conclusions. Many of the opinions of the experts on the one side are countered by diametrically opposite results stated by those on the other. I agree with the arguments of both Agents that certain of the experiments and tests which they criticize are not beyond fair criticism and fail to carry conviction. I entertain no doubt that all the experts retained by both litigants were inspired by a desire to do their honest best with a very difficult problem. Both sets of experts evidently believe in the soundness of their conclusions, for they challenge the Commission to make certain experiments and examinations for itself, and it is hardly conceivable that they would do so unless they felt that the results of such experimentation by laymen would justify their confidence. My experience in this behalf has, however, been most unsatisfactory and has only tended to confirm the feeling that on the expert evidence alone my judgment would be left in balance as to the authenticity of the document. Expert evidence is often an aid in determining questions of the sort here presented; but is it far from an infallible guide, as witness the fact that several of the experts for the claimants convinced themselves of the authenticity of the Wozniak letters. This comment does not by any means apply to all of the experts who testify about the Herrmann message, and it is not to be taken as indicating that I have the slightest doubt that all of the expert's opinions are honestly entertained. It is mentioned merely as an illustration of the fact above stated, that, at best, expert evidence can usually be only an aid to judgment, and not always in and of itself so conclusive as to carry conviction.

I need only add in summary that the most careful study and consideration of the expert evidence with respect to the Blue Book message convinces me that upon that evidence alone I should not be justified in affirming the authenticity of the document. I am therefore compelled to revert to the other evidence.

As has been indicated, the testimony offered on both sides with respect to the message, to say the least, raises grave doubts with regard to it. The sources from which it comes, the circumstances of its production, the evidence as to the time and circumstances in which it was written, and the silent but persuasive intrinsic evidence which is drawn from its contents, make impossible an affirmative conclusion in favor of the claimants and against Germany. The claimants have the burden to establish, by a fair preponderance of evidence, that this document was written and sent at the time claimed. With every disposition to avoid technicality, to be liberal as to the interpretation and effect of evidence, and to regard the great difficulties under which the claimants have labored in the production of their proofs, I yet find myself unable to

overcome the natural doubts and misgivings which cluster about this document. I am not, therefore, prepared to make a finding that this is the missive which Herrmann dispatched to Hilken in 1917.

It results from what has been said that with respect to the Black Tom explosion the new proof, when taken in connection with the old, fails to support any finding that Kristoff was a German agent or the employee of any German agent or agents; and fails also to justify a finding that Hinsch is the same person as Graentnor.

As respects the Kingsland case, the evidence does not, in my judgment, justify a finding that Wozniak was a German agent or employed by any German agent; does not justify a finding that excludes accident and affirms incendiarism. It leaves me still of the opinion that Wozniak was not in Mexico in the summer of 1917. There is therefore no sufficient basis for a finding against Germany.

It must be borne in mind that whatever may be the belief of any Member of the Commission with respect to Germany's general attitude and the motives or purposes of its agents, or with respect to the equities of the claimants, or that Germany is disentitled to favorable consideration by reason of her general policy as to American-made munitions and supplies for the Allies, this tribunal sits as a court with the obligation to ignore any such considerations and, however liberally construing rules of evidence, is still bound to act only upon proof which reasonably leads to the conclusions upon which liability is consequent.

A matter upon which the Commissioners disagree is that of the jurisdiction of the Commission ever under any circumstances or for any reason to reopen a claim made under the international agreement of August 10, 1922, which created the Commission, once that claim has been formally passed upon and decided. The German Commissioner's position is that while the two Commissioners by mutual agreement may reopen in such a situation they may not do so where, as here, one of the Commissioners opposes the reopening. The German Commissioner does so oppose in this case.

The conclusions I have expressed make it unnecessary to pass upon the question just stated. Equally unnecessary is it, in view of the foregoing, to discuss whether the evidence offered, or some of it, falls within the class of evidence properly denominated after-discovered.

As it is my opinion that if the new evidence were formally placed on file and considered in connection with the whole body of evidence submitted prior to the Commission's opinion of October 16, 1930, the findings then made and the conclusions then reached would not be reversed or materially modified, the question as to our jurisdiction need not be answered.

The supplemental petition for rehearing is dismissed.

Done at Washinghton December 3, 1932.

Owen J. ROBERTS
Umpire

Concurring:
W. KIESSELBACH
German Commissioner

Dec. 3, 1932.

December 2, 1932

Separate Opinion on the Kingsland Case by the American Commissioner

As to the Kingsland Case, I agree with the finding of the Commission that the three so-called Wozniak letters are manufactured evidence fabricated after the dates when they purport to have been written, and have no value as evidence for the purposes for which they were produced. Nevertheless, I draw from the production of these letters certain conclusions which have an important bearing on some of the other evidence in this case.

Wozniak's authorship of these letters, although not admitted by him so far as the record discloses, can be taken as established for the purposes of this case. They are admittedly in his handwriting and they came to the American Agent through his closest friend, one Ivan Baran, who refused to surrender them until he had received an assurance from the American Agent granting Wozniak immunity from prosecution for incendiarism or perjury.

This whole transaction shows a degree of cleverness and subtlety on the part of Wozniak which was not suspected by the Commission at the time of its original decision. Considering that these letters were so skillfully fabricated that they deceived several of the American Agent's most experienced and trusted experts as to their date of production, judged by physical condition and appearance, and also deceived the American Agent and his counsel as to their trustworthiness, judged by their textual contents, and considering also that the claimants paid $2,500 for them without Wozniak himself having vouched for their authenticity, while Wozniak at the same time obtained an assurance of immunity from prosecution on account of their bearing on the Kingsland fire or perjury charges, it is evident that the Commission's earlier estimate of Wozniak's mentality, as described in its original decision, must be revised. The Commission then said of Wozniak, "He is in a way smart, though naive, and thinks he is smarter than he really is." He has now demonstrated that he is really smarter than the Commission thought he was, and also that he is even less trustworthy and more formidable and mercenary as a witness than the Commission then assumed him to be. It follows from this conclusion that Wozniak's testimony before the Commission, at the time of the original decision, was given more weight than was justified. In fact, Wozniak has disclosed by his present performance that he is thoroughly untrustworthy as a witness.

The Commission's original finding that Wozniak was not in Mexico at the time he was alleged by other witnesses to have been there in association with German agents rests wholly on Wozniak's own statements. So, also, his alibi story that he was at Tupper Lake, New York, at the time he was reported by other witnesses to have been in Mexico, cannot be accepted if his own statements about it are not accepted. The Commission accepted his statements on these points in reliance upon his assumed credibility. If, however, his credibility is now destroyed by the newly submitted evidence, both of these points are open for reexamination, and the examination should be unprejudiced by the earlier findings of the Commission.

In the original decision, the question of whether or not Wozniak was in Mexico was really a minor issue and immaterial for the decision of the case, in view of the facts found by the Commission as to the cause of the Kingsland fire. In the present proceedings, however, the question whether or not Wozniak was in Mexico in 1917 is one of the essential issues in its bearing upon his status

as a German agent, the decision of which may determine the validity of the claim.

In its earlier decision the Commission adopted the theory that the Kingsland fire was the result of an accident, and was not purposely set by Wozniak, so that whether or not he was a German agent was unimportant. In that decision the Commission stated, " Despite Herrmann's confession, the evidence in the Kingsland case has convinced us that Wozniak did not set the Kingsland fire ", and expressed the opinion that the fire was caused by sparks from the machine which held the shell Wozniak was cleaning, in other words, that the fire was an industrial accident. The basis of this finding was Wozniak's own story taken in connection with the evidence embodied in the so-called Johnson report.

The new evidence submitted in the present proceeding shows that this Johnson report, like the Wozniak letters, was fabricated and must now be rejected. It was put into the record by the German Agent only shortly before the Hague argument, too late to be investigated by the American Agent before the Commission's decision, and both the German Agent and the Commission unwittingly relied upon its authenticity. By a curious coincidence, that report, like one of the Wozniak letters, was written on paper which, by its watermark, was proved not to have been manufactured until after the date on which it purported to have been written.

This report being spurious, and Wozniak himself having been discredited, there is nothing in the record, as the case now stands, to support a finding that the Kingsland fire was the result of an industrial accident. On the contrary, voluminous affidavits and reports have now been submitted negativing the possibility of an industrial accident. Accordingly, the question of whether or not Wozniak was a German agent or employed by a German agent at the time the fire started at his work bench becomes a decisive question in this case. Its importance appears from the statement in the Commission's original decision that, in view of the background established in the sabotage cases which showed authorized sabotage activities in the United States by an organized group of German agents, " inferences against Germany were rendered easier than they otherwise would be ", which means, in application to the present case, that if Wozniak is shown to have been a German agent at the time of the Kingsland fire, the Commission would be justified in inferring that Germany was responsible, under the Treaty of Berlin, for that fire unless such inference was prohibited by other evidence. The Commission's theory in the earlier decision that this fire was the result of an industrial accident precluded any such inference because in that situation it was immaterial whether or not Wozniak was a German agent, but, inasmuch as now the fire is no longer regarded as an industrial accident, the inference above indicated can be drawn if it be shown that Wozniak was a German agent. The national Commissioners are in agreement on this point, as stated in their certificate of disagreement.

It is evident from the foregoing brief analysis of the situation that in examining the new evidence we may proceed on the basis that Wozniak's testimony and the Johnson report are wholly discredited, and that the findings of the Commission based on that evidence may be disregarded.

There is much new evidence now before the Commission which is intended to show that Wozniak was a German agent at the time of the Kingsland fire, not only by reason of new facts presented but also by giving a new meaning and value to some of the old evidence on that point which was discredited in the original decision.

Some of the new facts presented to establish Wozniak's presence in Mexico in 1917 are embodied in the affidavits of Sylvester Golka (December 9, 1931)

and Peter Panas and his wife (November 14, 1931). Exhibits 929, 930-1, 930-2.

Golka and Panas and his wife were old friends of Wozniak, and were on intimate terms with him in 1917. They are highly reputable and trustworthy people. They set forth in their affidavits, with some convincing detail, the receipt by them of three letters in all, written by Wozniak to them from Mexico in the Summer of 1917. The only ground on which it has been sought to discredit their receipt of these letters is that in the letter to Golka he requested that it be destroyed upon receipt, which was done, and that later he followed up the letters to Panas and destroyed them himself. It is argued that it was wholly inconsistent that he should be so anxious to have those letters destroyed and at the same time should have made no such request in his letters written contemporaneously to Baran, especially in view of the fact that the Golka and Panas letters were clearly innocent in character, whereas the Baran letters were distinctly incriminating, taken in connection with other facts in the record. This argument obviously is based on a false premise, because having admitted that the Baran letters are forgeries, they cannot be accepted as a basis for discrediting this other evidence. Naturally they did not contain a request that they be destroyed because that would have been inconsistent with the purpose for which they were forged, which was to be produced in this case to prove that Wozniak was in Mexico in 1917. There is nothing in the record which throws any discredit upon these Golka and Panas affidavits, and there is no reason why they should not be believed. They stand, therefore, as credible evidence that Wozniak was in Mexico in 1917, and his desire to have his letters destroyed shows that he wished to conceal his presence in Mexico at the time they were written. It will be noted that by these spurious letters fabricated by Wozniak, he in effect represents himself to have been in Mexico in 1917, and makes himself out a perjurer when he swore to the contrary in his previous testimony.

An item in the new evidence, which gives new meaning and value to some of the old evidence, is the report of the police official in Poland. Exhibit No. 936. This report is to the effect that in the neighborhood of Wozniak's old home in Rawa Russka there was a forest in which Wozniak once worked, known as the " Karow " forest, and that it was customary in Poland to add to the family name a second name either as a prefix or suffix, descriptive of the person's occupation or place of residence. He says, accordingly, that Wozniak, as a workman in this forest, would have been known as Karowsky-Wozniak, or Wozniak-Karowsky perhaps the added name might have been Karifsky instead of Karowsky. This, however, is an unimportant detail. The old evidence, to which this new evidence gives new value, is found in the affidavits of several witnesses who identified Wozniak as a man known as Karowsky, or Karnowsky, or a phonetically similar name, in the Summer of 1917, as an associate of admitted German agents in Mexico. In its original decision the Commission mistrusted this attempted identification largely because there was at that time nothing in the record to show that Wozniak had ever used such a name as Karowsky. In view of this new evidence, however, the name sounding like " Karowsky " no longer appears out of a clear sky and without any connection with Wozniak. Consequently, the earlier affidavits, identifying Wozniak as the man known by such a name, who was the associate of German agents in Mexico, are entitled to be regarded as seriously important evidence.

Furthermore, the explanation about Wozniak's earlier occupation as a lumberman in the Karow forest has the further value, in connection with his Tupper Lake story, of showing that even if he had never been to Tupper Lake, he knew enough about the life and work in a lumber camp to enable him to

invent the rather meager details which he gives in his affidavit about his life there. The information in his affidavit about the wages and terms of employment, and the distance of the camp from the railroad station, and the name of the camp, could have been obtained without going to the camp at all. Most of it was obtainable from the Lumber Company's employment agency in New York, and would be contained in the usual employment application form supplied to applicants. With this information, supplemented by his early experiences in lumber camps, he was clever enough, as a fabricator, to make an affidavit sufficiently accurate in detail to persuade the American Agent that, as he conceded in oral argument, it was certainly possible that Wozniak had been at Tupper Lake at some time before his trip there as a witness in 1929.

Wozniak's status as a German agent is further supported by new evidence in the affidavits of the witnesses Capitula (Exh. No. 902), Nolan (Exh. No. 890), King (Exh. No. 891), Palmer (Exh. No. 896 (*a*)). and Clucas (Exh. Nos. 822 and 895). This testimony leaves much to be desired, but, if Wozniak's own testimony in conflict with it be disregarded for the reasons above stated, it stands undisputed, and, taken together with the above mentioned Golka and Panas affidavits and the earlier affidavits identifying Wozniak as the German agent known as Karowsky in Mexico in 1917, a *prima facie* case, at least, has been made establishing that Wozniak actually was a German agent at the time of the Kingsland fire.

With Wozniak's status as a German agent established, it is not necessary to prove that he purposely or actually started the fire, because, for the reasons already stated, the Commission, in these circumstances, is justified in drawing the inference that Wozniak was responsible for it, even though proof is lacking as to exactly how it was done.

It may be noted on this point, however, that the Commission is not bound to accept either Wozniak's statement of how it was started or Herrmann's explanation of what his instructions to Wozniak were about the use of incendiary pencils, because in the present view of the value of the testimony of these witnesses, the Commission is at liberty to disregard everything they have said on this subject, and, so far as the record shows, the real truth as to how this fire was started has never been disclosed.

We do know, however, from thoroughly dependable testimony, that, as found in our original decision, the Imperial German Government had authorized the destruction of ammunition plants in the United States during the period of our neutrality, and that an organization of German sabotage agents had been established for that purpose and had been supplied with funds and implements to be used in sabotage activities. We also know, as a settled fact in this case, that the Kingsland fire started at Wozniak's work bench, and we now find that a *prima facie* case has been made against Wozniak as a German agent himself at that time. The purpose, the opportunity, the means, and the agent were all there.

In view of these considerations and conclusions, the Commission is justified in holding that on the record, as it stands, the German Government must be held responsible, under the terms of the Treaty of Berlin, for the damages resulting to the claimants by reason of the Kingsland fire.

Chandler P. ANDERSON

Note: The so-called Herrmann secret message, embodied in the Blue Book Magazine for January, 1917 (Exhibit No. 904), if accepted as authentic, would conclusively prove the liability of Germany in both the Kingsland and the Black Tom cases. Inasmuch, however, as the authenticity of that message is questioned, no reference has been made to it in reaching the conclusions

stated in the foregoing opinion, which demonstrates that Germany should be held liable in the Kingsland case independently of that evidence, and even if its authenticity should not be accepted.

As appears from the Certificate of Disagreement by the National Commissioners referring both of these cases to the Umpire for decision, the American Commissioner disagreed in the Black Tom case as well as in the Kingsland case.

C. P. A.

KATHARINE M. DRIER (UNITED STATES) *v.* GERMANY

(July 29, 1935, pp. 1075-1080; Certificate of Disagreement by the National Commissioners, June 18, 1935, pp. 1037-1074.)

WAR: PROPERTY IN ENEMY COUNTRY, COMPULSORY SEQUESTRATION, UNAUTHORIZED SALE. — DAMAGE, DAMAGES: FAIR VALUE, MANIFEST ERROR IN REACHING AMOUNT OF DAMAGES. — PROCEDURE: CONFIRMATION BY COMMISSION OF AGREEMENT BETWEEN AGENTS; FINALITY OF AWARD: VALUE OF RESERVATION BY CLAIMANT, OF NEGOTIATIONS AFTER AWARD; ADDITIONAL AWARDS; REHEARING AFTER FINAL JUDGMENT, INJUSTICE, ERROR IN FACT; TIMELINESS OF PETITION: ADEQUATE REASONS FOR DELAY. — EVIDENCE: DISCRETIONARY APPRAISAL OF UNCHALLENGED EXPERT EVIDENCE. Compulsory sequestration of country estate in Germany belonging to claimant, an American national. Sale of estate by claimant's attorney, allegedly unauthorised, in November 1919. Consummation of sale on May 10, 1920, after consent of compulsory administrator. Claim presented to Commission for difference between sale price and fair value as of 1919. Award entered on January 14, 1925, for amount jointly recommended by Agents in agreed statement filed with Commission. Award not final: under reservation agreed upon between claimant and Agents, she applied for additional award when recovery denied in Germany against attorney and purchaser. Additional award on April 5, 1929, for amount deemed insufficient by claimant, but accepted beforehand on account of her destitute condition, with reservation, however, of all possible remedies before Commission or through diplomatic channels for further compensation. Execution of both awards under War Claims Settlement Act of 1928. Request for third award filed on November 18, 1932, on ground that (1) claimant deprived of rights under Treaty of Berlin, (2) awards conflicted with Commission's previous rulings, and (3) contained manifest error in determination of measure of damage. Negotiations, between date of request and date of German answer thereto, between parties to arrive at compromise for supplementary amount. *Held* that petition timely, if well founded in fact and law (adequate reasons for delay), but should be dismissed since Commission without power to redress (*a*) alleged injustice, or (*b*) errors of fact, particularly when involving opinion as to value (no obligation to award full amount shown by expert evidence, even if unchallenged, no abuse of discretion in appraising evidence, no manifest error in reaching amount of award), and (*c*) not bound by second reservation (statement by claimant that he accepts award under protest and will apply further to Commission is without legal force) or negotiations for compromise (not on record, extrajudicial).

Certificate of Disagreement by the National Commissioners

The American Commissioner and the German Commissioner have been unable to agree as to the action to be taken on the question presented by the Petition filed by the American Agent on behalf of the claimant for an award for additional damages in this case, their respective opinions being as follows:

Opinion of Mr. Anderson, the American Commissioner

This claim is for damages alleged to have been suffered by the claimant through the unauthorized disposition of certain property in Germany belonging to her by action of the German authorities in a manner which, she claims, rendered the German Government liable for resulting damages under the Treaty of Berlin.

The basis of the claim is that the claimant was deprived of her property by action of the German authorities without just compensation, and should be paid the full value of such property less certain amounts already paid on account under previous awards by this Commission.

On January 14, 1925, this Commission made its first award on account of this claim for the amount of $48,000, with interest until the date of payment, which was August 1, 1928, when $68,782.70 was paid on account of principal and interest.

This award admittedly was not final, and in accepting it the claimant reserved " the right to pursue her claims against Mittag & Rost, and in the event of failure to recover from them, to apply again to the Commission for an additional award " (Paragraph II of the Memorandum of the German Agent filed March 20, 1928, in reply to the American Agent's Motion for an Additional Award). In that Memorandum the German Agent made no objection to the " admission of the Motion by the Commission " (Id., Paragraph I), and stated that " the facts as set forth in the Motion will not be contested " (Id., Paragraph III). He added, " The German Agent has no knowledge or information sufficient to form a belief as to the actual value of the estate, the equipment of the castle, etc. at the time of the sale " (Id., Paragraph IV).

The American Commissioner understands that the position of the German Agent, as set forth in Paragraphs III and IV of his Memorandum, above quoted, is that all the facts alleged in the Petition are admitted except the allegations as to the actual value of the estate and its equipment.

Inasmuch as the question now presented to the Commission for its decision involves to some extent the value of the aforesaid estate and its equipment, it is necessary to examine the allegations of the American Agent's Motion (Petition filed March 19, 1929), which are referred to in the extracts quoted from the German Agent's Memorandum in response to that Petition.

This Petition is in full as follows:

" In the above matter the Mixed Claims Commission, United States and Germany, on January 14, 1925 rendered an award for $48,000.— plus interest in favor of the claimant.

" This award was based upon an agreed statement the basis of which was an understanding reached between the two Agencies in Berlin on September 4, 1924. Mr. Alexander Otis was at that time in charge of the claim.

" When this settlement was arrived at it was the understanding of the claimant that it was not to be final but that she reserved the right first to pursue her claims against certain German nationals who by their acts had caused her great injury and in the event that she would fail in these efforts to take the matter up once more before the Mixed Claims Commission and ask for an additional award. That this

was the condition precedent to her acceptance of the compromise will not be disputed. Compare also Exhibit H attached hereto.

" The claimant in pursuance of this understanding has brought suit against the above mentioned German nationals, but has not been successful because the German domestic law did not provide for a remedy. She is forced therefor now to apply to the Commission and to rely on the protection assured to her by the Treaty of Berlin.

" The facts in the case are as follows:

" The claimant, Mrs. Katharine von Rosenberg-Drier was the sole owner of the estate of Bonnewitz in the neighborhood of Dresden, Germany, which she had inherited from her first husband Baron von Rosenberg, who died in 1913. A description of this estate is contained in Exhibit A attached hereto. After the United States had entered the war this estate was placed under compulsory administration and on May 10, 1918, one Dr. Spiess, attorney at law in Dresden-Pirna, was appointed administrator. Mrs. Drier was at that time absent from Germany having left in 1917 together with her second husband, U.S. Consul Drier. She returned to Dresden after the armistice in the first part of 1919. Upon this occasion she called at the Ministry in Dresden and conferred with the Counsellor of Ministry Dr. Hast who was in charge of sequestered enemy property. At this conference the question of disposing of the estate by sale was discussed and Mrs. Drier who had in former times received various offers — among others one from the brother of the King of Saxony — and had invariably refused considering them, told Dr. Hast that she was absolutely opposed to any sale of the property. The same statement was by claimant to the administrator Dr. Spiess.

" In June 1919 the claimant went to Stockholm, Sweden, because, as an enemy national, she was not permitted to remain longer in Germany. Before she left she gave power of attorney to one Mr. Rost, who had been a friend of the Rosenberg family for years. This power was upon the request of Rost made out in general terms; the claimant made it quite clear however that Rost was merely to take care of the estate and under no circumstances to dispose of it. While the claimant was in Stockholm Mr. Rost wrote her that certain debts (mostly for taxes and upkeep) had to be paid, that the income from the estate would not be sufficient to cover them and that he thought it necessary therefore to sell the estate. The claimant upon receiving Rost's letter wrote to him in August 1919, that he was not to sell the estate because she would soon be able to settle those debts without such a sale. In September 1919 the claimant left Sweden for the United States and on December 1919 she returned to Stockholm arriving at that place on the 24th of said month. During her absence Mr. Rost had on November 21, 1919 concluded a contract of sale with one Mittag. The price agreed upon was 570.000,— Paper marks for the estate and its entire inventory including the furniture, household goods and works of art belonging thereto. Of this amount M 169,845.— were to be paid in cash, the rest to be secured by a mortgage. Since the estate was still under compulsory administration at the time Mr. Rost requested the administrator, to give his consent to the sale. The administrator, although fully aware that Mrs. Drier was absolutely opposed to such a transaction reported the matter to the Ministry, stating in this report that he had no objections to the sale if Mr. Rost declared that certain things enumerated in a special list would be returned to Mrs. Drier, if Mrs. Drier would agree to paying a certain sum for administration expenses incurred by him and if Mrs. Drier, through Mr. Rost, would waive all claims against the State of Saxony which might possibly arise from the sequestration of the property.

" The Ministry, after at first refusing to give its consent to the sale, agreed to it in the beginning of January 1920.

" The claimant learned of the contract of December 26th immediately after her return to Stockholm and protested at once in two telegrams to Mr. Rost of December 26th and 27th. In spite of these protests Mr. Rost executed the sale on January 5, 1920 by causing its entry in the ground books of the competent court at Pirna and by delivering the estate to Mittag. It turned out however that the entry was legally not affective because Rost in applying for it had made a certain reservation which is not admissible in transactions of that kind under

German law. The court therefore advised him that the execution of the sale must be repeated in order to become valid. In the meantime the claimant had arrived in Dresden and had withdrawn Rost's power of attorney which was returned to her on January 24, 1920. This being done the claimant who had been informed that the sale had not been validly executed returned to Stockholm toward the end of February where she learned that Rost, although no more in possession of the power of attorney, intended to repeat the execution of the sale. Thereupon she wired again in the first days of May forbidding him strictly to carry out his intention. Rost answered by telegram of May 6, 1920 that decent people were not used to acting on withdrawn powers of attorney. In spite of this he repeated the execution of the sale finally on May 10, 1920 and Mittag was registered as owner of the estate on the same day.

" In March 1922 the claimant brought suit before the competent court in Dresden against Mittag asking for the retransfer of the estate to her. The suit was dismissed on June 19, 1924 upon the ground that Mittag had been without knowledge of Rost's lack of authority and was, accordingly, entitled to the protection of law as 'purchaser in good faith'. The claimant then brought suit against Rost in December 1924 asking for an order to compel him to restore the estate to her. This suit was likewise dismissed on May 8, 1925 upon the ground that the claimant had not been able to prove that she expressly forbade Rost to sell the estate before he concluded the contract of sale on November 21, 1919.

" This decision being final the condition prerequisite for applying once more to the Commission has now arisen.

" The present claim is based on Article 297 e of the Treaty of Versailles as incorporated into the Treaty of Berlin. Under this provision the claimant, as an American national, is entitled to compensation in respect of damage or injury inflicted upon her property by the application of exceptional war-measures or measures of transfer. According to Par. 3 of the Annex to Article 298 measures of that kind comprise measures of all kinds, legislative, administrative, judicial or others, that have been taken with regard to enemy property, and which have had the effect from removing from the proprietor the power of disposition over their property, such as measures of supervision, of compulsory administration and of sequestration, or measures which have had as an object the seizure of, the use of, or the interference with enemy assets, for whatsoever motive, under whatsoever form or in whatsoever place. Acts in the execution of these measures include all detentions, instructions, orders or decrees of Government departments or courts applying these measures on enemy property.

" It is claimant's contention that under these provisions the Government of Germany is obligated to compensate her for the damage caused to her by the unauthorized sale of her estate.

" In 1918 her estate was subjected to compulsory administration which in itself was undoubtedly an exceptional war-measure. The administrator who was appointed under the German war-legislation was, by virtue of that very legislation, obligated to protect the interests of the claimant. He knew that she was opposed to and had actually forbidden the sale of her estate. In spite of this he applied, upon Rost's request, to the Ministry for the consent to have the sale executed. The Ministry which was likewise informed of claimant's attitude, granted this consent and, in fact, made the contract of sale effective by removing the administration, fulfilling thereby one of the conditions prerequisite to the validity of the contract. If the administrator, as was clearly his duty under the circumstances, had opposed the sale in conformity with the claimant's wishes, Rost would not have been able to carry out his intention and the same would have been true if the Ministry instead of removing its 'protection' at the critical moment had prevented the administrator and through him Mr. Rost from acting against the express orders of the proprietor. There can be no doubt that the sale of the estate became only possible 'by the acts of persons connected with the administration' of the property, namely, Mr. Spiess, the administrator, and Dr. Hast, the Government's Official in charge of sequestration-matters. For the acts and in legal contemplation, for the omissions of these persons, when they had been obligated to act, Germany is responsible.

" The damage suffered by claimant consists in the difference between the reasonable value of the estate at the time of the sale and the sale's price.

" The estate was sold to Mittag for the absurd sum of $570.000,— Paper-Marks, which at that time equalled approximately $11,400.00. He paid in cash the amount of 169.845,— Paper-Marks or $3400.00 which was all the claimant received at that time in consideration of her estate. The rest of 400.000,— Paper-Marks was secured by mortgages. These mortgages have since been attached by Mittag who reimbursed himself in this for the court and lawyers' expenses incurred by him in connection with the claimant's lawsuit against him. Therefore, while the claimant appears to have received the equivalent of approximately $12,000.00, as a matter of fact all but $3400.00, duly credited below, has been taken away from her as a result of the general scheme and its consequences.

" The actual value of the estate at the time of the sale is shown by the Exhibits B to G attached hereto.

" It appears from these Exhibits that the value of the estate without the forest and without the equipment of the castle was in 1919

" Goldmarks: 385 000,—

" It appears furthermore that the value of the forest standing on the estate at that time was at least:

" Goldmarks: 1 000 000,—

" It appears finally that the value of the equipment of claimant's castle at that time was at least

" Goldmarks: 2 800 000,—

This brings the total value of the estate as sold to Mittag in 1919 to Goldmarks 4 185 000,— or approximately one Million Dollars.

" There are to be deducted herefrom the sums received by the claimant from Mittag, namely 3400 Dollars and the award rendered to claimant in partial compensation of her claim, namely 48 000 Dollars.

" Claim will therefor be made for an additional award in the amount of 948 600 Dollars."

On account of this Petition, and the evidence submitted therewith, the National Commissioners on April 5, 1929, made an additional award to the claimant for $250,000, with interest thereon at five per cent from May 10, 1918, to the date of payment.

The claimant was dissatisfied with the amount of this award, and on November 18, 1932, the American Agent, on her behalf, filed another Petition for a further award. The German Agent, on July 2, 1934, filed a reply requesting that, for the reasons stated therein, this Petition be dismissed. The German Agent, although all the evidence filed in support of the claim had been turned over to him informally by the attorney for claimant on June 1, 1927 (see Annex B, p. 41, of the Memorandum Brief of American Agent filed January 9, 1933), indicated in this reply that he did not desire to file any evidence at that stage of these proceedings. The reason alleged for this position was that " in the present stage of the procedure the Commission is only concerned with the preliminary question of whether or not the case shall be reopened and a retrial be granted. The examination of this question has to be related to the record as it stood when the award of April 5, 1925 [1929], was rendered."

On August 15, 1934, the American Agent filed a reply to the German Agent's Reply, and also a Memorandum Brief in support of the Petition, to which reference is made for the purpose of calling it to the attention of the Umpire, and stating the concurrence of the American Commissioner in the contentions therein made.

At the same time, August 15, 1934, the American Agent, on the understanding that the German Agent did not desire to file any additional evidence, submitted " this claim for final adjudication " by the Commission. So, also,

the German Agent, on September 28, 1934, filed a Memorandum, stating that he "joins the American Agent in submitting the Petition for further award for decision by this Honorable Commission". The German Agent added, however, that this submission was made on the same understanding as already stated in his Reply that "in the present stage of the proceedings the Commission is only concerned with the question of whether or not the case shall be reopened and that no trial on the merits will ensue without previous opportunity for him to file evidence".

It appears from the foregoing review of the proceedings down to this point that the only question now submitted for the decision of the Commission is whether or not the Commission should exercise its discretionary right to reconsider its previous award.

Before proceedings to an examination of the situation presented by this Petition, it will be convenient to note three points which have an important bearing on the questions to be considered.

In the first place, the German Agent did not present any evidence in opposition to the two preceding Petitions, although, as above set out, he was fully advised as to all of claimant's evidence on valuation of the property involved as early as June 1, 1927, and he has not presented any in support of his objections to the question raised by the present Petition. Indeed, he has frankly stated, as above quoted, that "the examination of this question has to be related to the record as it stood when the award of April 5, 1925 [1929], was rendered." It is true that in his Reply he alleges:

> "Investigations recently carried out in Germany in connection with a plan eventually to settle this case by an agreement, have disclosed that the material filed by Claimant in 1929 and on the basis of which the Commission granted an additional award of $250,000, is not above suspicion. The investigations, furthermore, convinced the German Government that the two awards totaling $298,000 greatly exceed the damages actually sustained by Claimant."

Apart from the inconsistency of referring to this alleged evidence after expressly stating that he did not desire to submit any new evidence at this time, this reference to some vague evidence outside of the record should be disregarded by the Commission.

In the second place, it must be noted that, although the German Agent did not expressly admit the facts presented in the second Petition by the American Agent as to the value of the property taken, he did not deny those facts, and has made no effort to refute them, merely contenting himself with the allegation that he had no knowledge or information sufficient to form a belief as to their correctness.

In the third place, the second award of the Commission was not based on an agreed statement signed by the Agents as to the value of the property taken. The only agreement by the Agents before the Commission when the second award was made was furnished by the admissions of the German Agent as to the undisputed status of the evidence offered by the American Agent in support of that Petition.

Turning now to the present Petition, the pertinent parts of it are as follows:

> "The second award, it is respectfully submitted, did not, however, purport to be, nor was it in fact, in any way related to the amount of the loss proven by the evidence to have been suffered by the claimant. The amount was arrived at in the following manner: The petition of your claimant, dated March 19, 1919 [1929] (Docket No. 11485), showed that she was entitled upon particularized and competent evidence submitted therewith to recover nine hundred and forty-eight thousand six hundred dollars ($948,600.), together with interest from the 10th day of May, 1918. Reference is made to the petition for further award, copy of

which is hereto annexed and made a part hereof, and to the evidence accompanying said petition. Said petition was duly countersigned and filed with the Commission on the 19th day of March, 1929, by the American Agent. The claimant thereafter had a conference with the American Commissioner at the offices of the Mixed Claims Commission, United States and Germany in the City of Washington. During this conference the American Commissioner stated that the German Commissioner would consent to a further award on behalf of claimant in the amount of two hundred thousand dollars ($200,000). The claimant stated her inability to accept the same. At a later conference the American Commissioner stated that he had procured the consent of the German Commissioner to increase the further award to two hundred and fifty thousand dollars ($250,000.), and to allow interest thereon from the 10th day of May, 1918. At this time the claimant was in destitute circumstances. Upon inquiry as to what would be the result if she declined the award she was informed that the claim would then probably be certified to the Umpire and that considerable delay might ensue before final decision in the matter would be entered. The claimant thereupon stated that if the amount of two hundred and fifty thousand dollars ($250,000.) was the maximum which she would receive, without such prolonged delay, she had no choice in view of her stark necessities to do other than let it go through. It was, however, then and there stated, and later restated to the German Agent, that the claimant was dissatisfied with the proposed award and she expressly said she was reserving the right to bring before the Commission or other appropriate tribunal or governmental agency the wrong she had suffered in not being awarded the full measure of compensation as provided for in the Treaty of Berlin, namely, the value of her property taken and not returned to her through the action of the officials of the Government of Germany. (See Administrative Decision No. III, Opinions and Decisions of Commission, p. 62.)[a] No evidence was at any time presented to the Commission by the German Agent which called in question the proof of loss submitted by the claimant and the two awards in the total amount of two hundred and ninety-eight thousand dollars ($298,000.) had no relation whatever to the amount of her loss and were not in accordance with the evidence and proof before the Commission. She further stated at the time personally and through her attorney that her acquiescence in and acceptance of the awards was due only to her necessitous circumstances and that she intended to insist further on her right to recover the full compensation provided her by the Treaty of Berlin.

" Upon these grounds therefore the claimant prays that this Honorable Commission will increase the awards to an amount commensurate to the undisputed proof of loss; first, that a grave injustice has been done to the claimant and she has been deprived of rights accorded her by the Treaty of Berlin; second, that the awards made are contrary to the rulings of this Honorable Commission as set out in Administrative Decision No. III, in that they do not afford her the full measure of compensation therein provided for; third, the awards as made are juridically wrong in that this Honorable Commission was without authority to reduce the awards made by it to an amount less than the sum shown by the undisputed proof and records of the Commission to be amount of the loss suffered in this instance.

" In conclusion, the claimant respectfully refers to the prior decisions of this Honorable Commission to show that her petition for a further award is grantable squarely within the language of the Commission in the claim of the United States of America, on behalf of Philadelphia National Bank v. Direction der Diskonto Gesellschaft, Germany, dated April 21, 1930 (Docket No. 7531), to the effect that the Commission will take under consideration, the question of reopening or changing the award, ' where it appears that manifestly the Commission committed an error on its findings of fact on the evidence produced by the agents at the time the claim was submitted for decision'." (Filed November 18, 1932.)

There was filed along with this Petition affidavit of claimant of November 10, 1932, explaining the circumstances under which she made the preliminary

[a] *Note by the Secretariat*, Vol. VII, p. 64.

estimate of $500,000 contained in her affidavit of March 9, 1923, as the value of her property involved.

On December 7, 1932, there was filed affidavit of claimant executed on December 2, 1932, stating that the second award was never accepted by her in full settlement of her claim, and that at the time it was made she expressly reserved her right, and so notified the German Agent, to make demand for an additional award, and that the delay in presenting the new petition was because she had been arrested in Germany in a civil process " in a fictitious suit " after the second award was made. She stated further," As soon as released from prison on this civil process, she was forced to flee from Germany surreptitiously, to escape arrest under a criminal charge that in procuring an award from the Commission she had defrauded the German Government. The State Department of the United States of America was promptly informed thereof, and since the fall of 1930, the matter of the injustice done to this petitioner in the second award and the violations of her person and liberty by her civil arrests and criminal prosecution have been before that Department and the Government of Germany has been informed thereof for more than a year."

In addition to these affidavits, three annexes, A, B, and C, were filed with a printed brief on her behalf, under date of January 12, 1933. These annexes do not seem to be of present importance in relation to the questions now under consideration, except that Annex B shows that the claimant's attorney transmitted to the German Agent on June 1, 1927, all the valuation evidence which was later filed on March 19, 1929, in support of the Petition.

The Reply of the German Agent to this Petition was filed July 2, 1934. The German Agent contends, briefly:

(1) That the Petition presents no facts or reasons furnishing a justification for reopening the second award because, in effect, there can be " no ground for the contention that it (the Commission) misinterpreted the evidence, or that in any other respect its decision involved an error prejudicial to claimant ". He contends further that, in view of the evidence and the circumstances of the case, the Commission had the right to go below the figures set forth in the evidence as to the damages incurred, and acted in accordance with its best judgment in fixing a lower amount than the valuation shown in the evidence.

(2) That the evidence as to value was not undisputed but was challenged by the German Agent's Reply, with the effect of leaving it to the Commission to decide its probative value.

(3) That the claimant, having acquiesced in and accepted the award, was thereby barred from charging the Commission with error or misinterpretation, notwithstanding her express reservation as to pursuing her rights in further proceedings.

The remaining contentions presented in the Reply of the German Agent are argumentative conclusions, based on the points above noted.

On August 15, 1934, the American Agent, as above stated, filed a Reply to the German Agent's Reply of July 2, 1934, together with a Memorandum Brief in support of the Petition.

In the opinion of the American Commissioner, this Reply and Brief of the American Agent ably and satisfactorily dispose of the objections raised by the German Agent, and as these documents form part of the record which will come before the Umpire with this Certificate of Disagreement, the American Commissioner simply repeats his previously expressed concurrence with the contentions of the American Agent without detailed comment.

The American Commissioner desires, however, to call attention to some misapprehensions as to his position in making the second award, which appear in the discussion of the effect of that award.

It seems to have been assumed by the German Agent that the American Commissioner agreed to that award on the theory that it was a compromise acceptable to the claimant, and, consequently, a final disposition of the claim. On the contrary, the claimant definitely stated, and the American Commissioner clearly understood, that, as she alleges in her Petition and supporting affidavit, she was dissatisfied with the amount awarded and proposed to pursue her rights, as she understood them, for further relief.

The situation will be clarified by considering the implications arising from the suggestion to the claimant of an alternative course, which was that if she preferred, the question of the amount of damages to be awarded would be referred to the Umpire for decision. The suggestion of that course necessarily implied a disagreement on that point between the two National Commissioners. Only questions on which they disagreed came within the jurisdiction of the Umpire. It is clear, therefore, that the American Commissioner thought that the award should be for a larger amount than the German Commissioner would agree to. Inasmuch, however, as the two Agents had not signed any agreed statement of facts, recommending the amount which the German Commissioner was willing to agree to, the possibility had to be considered that there might be considerable delay before the Umpire rendered his decision, and that eventually he might not make a larger award than the National Commissioners were prepared to make at once. Accordingly, it seemed to the American Commissioner that the best interests of the claimant would be safeguarded by agreeing with the German Commissioner upon the largest amount he would consent to, thus giving the claimant immediate relief and leaving her free to petition for a reconsideration of the award, if she desired, in order to secure a further award for additional damages on the merits if the Commission should be willing to reconsider the case, and this is the course which the claimant has now taken in filing the present Petition.

It is true that at the time the second award was made the Commission had not yet definitely decided that it had the right to reconsider an award once made, but the American Commissioner and the American Agent had always considered that the Commission had this right and would exercise it in its discretion, and that the Commission could not prevent a claimant from petitioning that this right be exercised.

It has now been definitely settled by the Umpire's decision of December 15, 1933, that the Commission not only has the right, but is under an obligation, on proper cause shown, to reconsider an award. In view of that decision, the only question raised in these proceedings is whether the claimant has shown cause within the limitations of that decision for a reopening and examination of the claim on its merits. That point is fully discussed in the American Agent's Brief, and need not be reexamined here.

Apart from the question of whether the claimant in this case agreed to accept the second award as final, which she denies and as to which the German Agent has not offered any evidence in refutation of that denial, this case is no different from the cases in which awards by consent were entered at the last meeting of the Commission, in which awards had previously been made by the Commission, and the consent awards were for amounts in addition to the amounts originally awarded, and all were made on petitions for rehearings.

Action similar to that taken in the cases above cited is all that the claimant is now asking, and these consent awards furnish precedents showing that the mere entry of an award, although accepted by the claimant, does not preclude the claimant from petitioning for an additional award.

The omission in this Opinion of any discussion of the negotiations between the representatives of the two Governments for a compromise settlement of

this claim by an additional award of $160,000 does not mean that the American Commissioner overlooks the importance of those negotiations as bearing upon the questions under consideration. The American Agent has fully discussed in his Reply and Brief the bearing of those negotiations upon the situation, and as the American Commissioner concurs in the views of the American Agent, it is not necessary to extend this already voluminous Opinion by reviewing them here.

In conclusion, the American Commissioner is of the opinion that the Commission should grant the claimant's Petition to the extent of reconsidering the second award, with leave to the German Agent to submit any new evidence as to the damages to be awarded, after a reexamination of the case on the merits. The time for the submission of new evidence should, however, be limited, and the American Commissioner suggests that a period of one month, after a decision granting reconsideration, be fixed for that purpose, with leave to the American Agent to apply to the Commission for an opportunity to file evidence in rebuttal within a limited period to be fixed by the Commission.

Chandler P. ANDERSON
American Commissioner

Dated March 29, 1935.

Opinion of Dr. Huecking, the German Commissioner

Although I very much should like to confine myself strictly to the two reasons which induce me to vote against the admission of this petition I am afraid such attitude might be misconstrued to mean that I accept the *status causae et controversiae* given by the American Commissioner. This I do not. I think that it contains many things that are not and leaves out some things that are essential, and that it interprets some acts of the procedure in this case differently from what I think was their real significance.

For that reason I will set out under I) the features of the case which I hold to be the essential ones; under II) some remarks about " admissions " which the American Commissioner finds in this case, whereas I do not; under III) the juridical reasons which in my opinion lead to a dismissal of this petition.

I

(1) Claimant, an American national through her second marriage, had been the owner of a landed estate in Saxony.

She lost this ownership through the fact that an attorney of hers (Rost) transferred it to one Mittag. (She says that in acting so the attorney misused his powers, a contention not upheld by the domestic courts.)

The transfer of the ownership took place on May 10, 1920, that is to say: *after the war* (armistice: November 11, 1918; coming into force of the Versailles treaty in Europe: January 10, 1920; as to America vide p. 625 [p. 1] [1] cons. Ed. of Dec. and op.).

In order to make the German government responsible for these events and to bring them under the Versailles Treaty, Claimant relies on the fact that during the war (May 10, 1918) compulsory administration of the estate had been ordered. This compulsory administration lasted until January 26th 1920, so that it was no longer in existence when the transfer of the property was carried out; but Claimant adds that her attorney had made the contract of

[1] *Note by the Secretariat*, Vol. VII, p. 21.

sale on November 21st 1919 (during the armistice) and that at the time the compulsory administrator and the Ministry had assented to this contract. Claimant thinks, they ought not to have done so, because half a year or so earlier she had informed the Ministry and the administrator that it was not her intention to sell the estate. (The exact date of this conversation is not stated by the Claimant, but it was before she gave her attorney the powers on the strength of which he made the contract.)

In the Claimant's eyes the attitude of the Ministry and the administrator, as described above, amounts to an exceptional war measure, which had the effect of removing from the proprietor the power of disposition over his property (art. 297, e Versailles Treaty) and to this attitude she traces back the loss of her property.

(2) While and after unsuccessfully suing her attorney and the purchaser before the domestic courts Claimant approached this Commission. She alleges that the price at which her attorney sold the property (570,000 Mark, equalling about $12,000 at the then prevailing rate of exchange) did not correspond to the actual value of the property. In a statement sworn to March 9, 1923 she says that her damage is $500,000 and today she declares it to be one million dollars.

She obtained two awards from this Commission and is now seeking a third.

a) First award:

In the fall of 1924 the claim had become the object of negotiations for an amicable settlement in Berlin between the counsel of the two agencies, attorney for Claimant and Claimant personally being present at some of the conferences. As a result of these negotiations an agreed statement, signed on September 4, 1924, granted a compensation of $48,000 to the Claimant.

An award for $48,000 with interest from January 5, 1920, was thereupon handed down by the Commission on January 14, 1925. On August 1, 1928, capital and interest (totalling $68,782.70) were paid in full.

b) Second award:

Four years later (March 19, 1929) a " Motion for an additional award " was filed on behalf of the Claimant.

She alleged that the award of January 14, 1925, covered only a small part of the total damages, leaving a claim for about $940,000. In support of her statement that the value of the estate was in 1920 a million dollars Claimant filed a number of exhibits (copy of which her attorney had handed to the German agent on June 1, 1927, together with a query what further evidence, if any, might be necessary).

The motion further asserted that when the settlement of September 19, 1924, was arrived at, Claimant reserved the right to take the matter up once more before the Commission in the event that her claims before the German courts should be rejected.

The German Agent answered the Motion by a short Memorandum, the wording of which shall be discussed later. Claimant and her attorney had several talks with the American Commissioner.

Thereupon, under date of April 5, 1929, the commission handed down an award in the amount of $250,000 with interest at 5% from May 10, 1918, on which Claimant received payments in accordance with the provisions of the War Claims Settlements Act 1928.

c) Three and a half years later (November 18, 1932) the present " petition for further award " was filed in which Claimant prays the Commission to increase the award to a sum corresponding " to the undisputed proof of loss"

(i. e. $1,000,000 less the two awards totalling $298,000). She alleges that the awards made were juridically wrong since the Commission had no authority to depart from the figures shown as value of her property by undisputed proof.

She further says that she did not accept the award as a full compensation, and that in the pertinent discussions she had protested accordingly and reserved the right to bring her claim once more before the Commission or some other court.

II

In every stage of this law suit (first award, second award, present proceedings) the American Commissioner finds a German " admission " where I see none. As he draws practical consequences from his view I am compelled to discuss it.

a) First award (applies to the later proceedings similarly):

The American Commissioner is under the impression that the German side in this procedure admitted and admits liability under art. 297, e Versailles Treaty. The answer would be: The fact that a compromise was made, involves by no means an admission of liability, very often it is just the uncertainty as to the principal issue which leads to a compromise. This is true quite generally; but moreover in the present case I am borne out by the Claimant herself, who states (relying on an affidavit of Mr. Otis, p. 14 printed Memorandum Brief January 6, 1933)

" At the time the agreement was made the liability of the German government had been warmly disputed by the representatives of the German Agent and while Mr. Otis regarded the liability as duly established, he was uncertain of what the result would be in a contest before the Commission in which this liability would be at issue. If there had been no question of liability and this liability were admitted by the German Agent before the question of damage was considered, Mr. Otis would have felt that the amount recommended for award in favor of Mrs. Drier was wholly insufficient * * * "

The consequence is: Even if according to the American Commissioner's view this case should be reopened and the second award should be set aside, we cannot come to his present conclusion, *viz.* to fix a time limit for the presentation of evidence regarding the value; the right conclusion only could be: to decide the law suit first " in quali ", (with respect to the principle involved).

b) Second award:

The German Agent had answered the Claimant's Motion for a second award verbally in the following form:

" I. The German Agent will not object to the admission of the Motion by the Commission.

II. It will not be disputed that Claimant in accepting the compromise, which formed the basis of the award of January 14, 1925, reserved the right to pursue her claim against Mittag and Rost and, in the event of failure to recover from them, to apply again to the Commission for an additional award.

III. The facts as set forth in the Motion will not be contested.

IV. The German Agent has no knowledge or information sufficient to form a belief as to the actual value of the estate, the equipment of the castle, etc. at the time of sale."

The question is: Does paragraph IV mean an admission?

The American Commissioner apparently holds it does. For when he states " he did not expressly admit " the idea is necessarily conveyed to the reader that the *tacitly* admitted, which idea is still reinforced when the American

Commissioner speaks of " the admissions of the German Agent as to the undisputed status of the evidence " and when he says that the American Agent " disposed " of the German Agent's point, that the evidence as to the value was not undisputed.

My interpretation is:

When the German Agent in paragraph IV expressed himself this way: " he had not sufficient information or knowledge to form a belief as to the actual value of the estate " the first thing to be borne in mind should be that it is a German lawyer who is speaking here. He is trained on the basis of the German Civil Code [Code of Civil Procedure], the article 138 of which rules that each party has to answer in detail the allegations of the other side, but which continues:

" If facts are alleged against a party which are neither own acts of that party himself nor witnessed by him personally, he is allowed to answer that he does not know them."

And such a declaration given in a case where it is admissible (as in the instant case it would be) means juridically that the allegations are *contested* (as may be gathered from *any* German lawbook, there is unanimity about that).

It stands to reason that utterances of a professional lawyer must be read and construed in the light of his training and profession.

But quite apart from this, general reasons would lead to the same result. Considering what is meant by " undisputed evidence " in the sense here relevant and why it should not be ignored by the Court, the essential element is the *tacit assent*. It is the *assent* that will not easily be disregarded by the Judge. Now, I have explained: in the instant case there is even *contradiction;* but to put it at the *highest* the German Agent's declaration amounts to no more than a statement that he refrains from forming an opinion; on no account can it be construed to mean assent. And should still some doubt persist, the last vestige of it would be removed by contrasting the above quoted paragraph IV with the preceding paragraph III of the same Memorandum. Paragraph III says:

" The facts as set forth in the Motion are *not contested.*"

and then follows immediately paragraph IV, which says that as far as the *value of the estate* etc. is concerned, the German Agent — for want of sufficient knowledge and information — *can not form a belief*. The distinction leaps to the eyes; it is clearly an intentional one and justifies the *argumentum e contrario:* just *because* the words " not contested " could and should *not* apply to the alleged value of the estate, a fresh paragraph was framed using a different term. Whatever the meaning of that term might be, *one* meaning cannot be attributed to it: the meaning " not contested " or its synonym chosen by the Claimant " not disputed ". (The same argument applies, when paragraph II and paragraph IV are contrasted: in paragraph II " not disputed " as a technical term in its technical meaning, in paragraph IV " no knowledge etc.")

The best way to define the meaning of the paragraph will probably be to put it as a question of responsibility: The Agent speaks to the Commission; and he makes it quite clear that *he* will not shoulder the responsibility for the value to be assessed, especially for the figure given by the Claimant; and (though refraining from submitting further material) he leaves that responsibility with the Commission, thus obliging them to form a judgment of their own with respect to the probative value of the evidence submitted.

c) Present proceedings:

In the present proceedings the German Agent makes it his first plea that he holds a judgment which has acquired force of *res judicata*. His point is

that such a judgment answers fully any evidence and relieves him from any necessity or even advisability to put in counter-evidence (until he should be overruled on this preliminary point).

I will not discuss here whether that attitude is well founded; but at least it is perfectly logical and logically it renders impossible any attempt to deduce from his omission any consequences unfavorable to him. But the American Commissioner draws such consequences. It is true that he does not exactly say which, but to him the omission has " an important bearing on the questions to be considered " and as he couples this point with his discussion of the " admissions " made before the second award, it seems here again he sees some sort of admission which I, according to what I have said, must deny. It is here the place to discuss the American Commissioner's request, that from the German Agent's Reply part should be stricken out. The facts as I see them are:

The German Agent evidently feared, that a certain tendency on the American side to construe anything that was said or done or not said and not done by the German Agent as an admission might lead to his attitude in the present stage of the proceedings again being misconstrued. He expected to hear (and he is borne out by the subsequent development) " you do not submit any evidence — so you admit having none ". He answered in advance:) *have evidence* but I will not submit it because I have a good preliminary plea. Needless to say that such reference to unproduced evidence (it is this that the American Commissioner protests against) is not expected by the Agent himself to have any probative value with the Commission but merely serves the absolutely legitimate purpose to protect him who prefers it against misinterpretation.

III

I now advert to the juridical principles which I suggest should govern this case.

I think that two such principles stand in the way of the Claimant's petition: The principle of *res judicata* and the principle that what is granted as a whole cannot be accepted otherwise than as a whole. I shall deal with these two points separately.

A. Claimant is fully aware of the juridical nature of the judgment rendered in April 1929. She says herself that the judgment was not a partial judgment and was meant and understood by everyone concerned to dispose definitely of the case. In other words: all are agreed that to the positive effect of the judgment (award of a certain sum) a negative effect corresponds: denial of the surplus asked for. The claim as now preferred was *dismissed* in 1929 and that dismissal has acquired force of *res judicata*.

Thus the question arises: On what grounds is a reopening asked for? If I understand the American Commissioner aright, he sees two such grounds: A manifest error, committed by the Commission and reservation to claim for more, made by the Claimant, when she obtained the second award.

a) Manifest Error:

The contention seems to be that the amount awarded was unrelated to the evidence although that evidence was undisputed.

But the estimate based on the evidence was not undisputed: and the relation between the amount awarded and the claim and the Claimant's evidence is simply established by the award itself, the award by its nature being the Commission's answer to the Claimants' demand, partly granting partly denying it. What is really meant by the argument from the American side seems to be: The Commission had no power to deviate from the Claimant's estimate taken together with the German Agent's remarks in par. IV of his memorandum.

One may rightly wonder, first, why, if such was the situation, the American Commissioner foreshadowed the possibility that the Umpire, if the case went before him, " eventually might not make a larger award than the National Commissioners were prepared to make ". (P. 18 [p. 1047, this print] [1] of the American Commissioner's opinion.)

Is not that possibility alone which the American Commissioner upholds even today the clearest denial of any " manifest error " in making the award?

As a matter of fact, there was no error at all and even less a manifest error. Was the Commission ignorant of the contents of the record? What else but the contents of the record did the Claimant's attorney in at least two conferences impress on the American Commissioner's mind and the American Commissioner in at least two conferences on the German Commissioner's mind, before the award was made? The Commission decided they had power to make an estimate of their own as to a certain value. Whether — in our opinion today — they were right or wrong in deciding so does not matter, for *they* were called upon to decide that question, not we. And when I say " it does not matter whether they were right or wrong " I hope I shall not hear " So you admit that they were wrong ". To avoid any such misunderstanding I expressly state that moreover in my view they were perfectly right. Any judge quite legitimately may deduce from any evidence submitted to him that the evidence itself conveys the idea that the estimates contained in it are exaggerated. I do not want in the least, to deal with the merits in this case; but to show that without any manifest error the Commission might very well gather an impression of exaggeration from the evidence submitted I may mention that one of the experts appearing in the evidence (1) speaks of " affection value " never accepted by this Commission as a basis of claims; another (2) reaches his final figures by stating the prices of wood for a series of years and then selecting for his subsequent multiplication not an average but the highest figure appearing in the series; a housekeeper (3) testifies to the value of paintings and expresses herself this way: " The invaluable — according to my mind — paintings that had been bought at the highest prices from noted artists "; her husband, a farmer, speaks (4) of hypothetical returns of hundred thousand yearly in this form " There were also great water supplies on the estates that might be exploited and which raised the value of the estate by hundred thousand yearly . . ." another expert (5) arrives at an estimate of a very considerable sum with respect to a long list of objects of art without any substantiation and without even stating that he ever saw the objects of which he speaks.

(1) Mr. Spaltholz, Exhibit B, 2, of the Motion for an additional award 19th March 1929 " especially an adequate relative affection value ".

(2) Mr. Heger, Exhibit E to the same Motion, " the price . . . culminates in the year 1921. Taking the prices of this year as the bases * * * ".

(3) Mrs. Langhammer, letter d. d. Biensdorf 17/12/1926 Exhibit to the same Motion.

(4) Mr. Ernst Langhammer, letter d. d. Biensdorf 17/12/1926 Exhibit to the same Motion.

(5) Mr. Leonhard Messow, Exhibit F to the same Motion.

As I said before I do not infer in any way from this that the value as estimated by the Claimant is excessive, but I do infer that it not implies any manifest error or error at all, if the Commission on the strength of this evidence arrived at a figure different from the Claimant's.

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[1] *Note by the Secretariat*, this volume, p. 135.

b) Reservation by the Claimant:

The contention seems to be that the Claimant was dissatisfied with the award, reserved her right to ask for more and that the American Commissioner clearly understood her this do to.

This in the American Commissioner's Opinion is sufficient to reopen the case now.

To appreciate what this means I suggest that for one moment this situation be looked upon from the German Commissioner's point of view:

The German Commissioner held the claim to be excessive as far as it went beyond $250,000 and voted for its dismissal. The American Commissioner agreed. The award was framed accordingly and handed down; there is *res judicata*. Now the German Commissioner learns that at the time in a talk with the party the American Commissioner clearly understood her to reserve the right to ask for more. This fact and this fact alone is said to be sufficient to set aside a judgment having acquired the force of *chose jugée*. And the German Commissioner is invited to accept this as the law of this Commission and as the natural fate of judgments to which he was a party.

The reasons for which a " reservation " as alleged by the Claimant would be wholly irrelevant seem quite obvious to me. First, as the Claimant puts if herself " this Commission is not a board of mediation " but a Tribunal. As a party you can make no pacts with it.

Second: if you could, you would have to make them with the Commission not with one member of it. The American member is not " the Commission ".

And here again I should like to add, that if I declare the " reservation " to be irrelevant, this does not mean any commitment of mine as to the facts as alleged by the Claimant.

Only subsidiarily I want to raise a second point which in my opinion stands in the way of the Claimants' petition.

From her *own* point of view she was not entitled to *accept* the award and the sums paid to her and now to sue for more without even offering to repay the amounts received if, on a reopening of the case it should be found that her claim was not worth even the $48,000 and $250,000 granted to her. She says she had (on the strength of what the American Commissioner told her) a choice between either taking her chance and going to the Umpire (which meant a certain lapse of time and uncertainty) or she might accept $250,000 and have it at once. Now if she made her choice, she would be bound by it now. How can she take the advantage and repudiate the disadvantage when it was clear and plain that she was to receive the advantage (partial grant at once), *because and if* she was ready to put up with the disadvantage (reduction of the claim)?

Nor would even in this connection her " reservation " be of any avail to her. In this connection it would be met by the German Agent's point who speaks of a *protestatio facto contraria*. When a person does certain acts that carry necessary consequences, he cannot escape liability for these consequences by mere verbal protestations that are in contradiction with the acts: When I enter a Parlor Car and ride in it from Washington to Baltimore, I have to pay the Parlor Car fee and should I put up the defence:

" Before the train started, I told the legal representative of the Company, who happened to be sitting beside me, that I declined to pay the fee and would not have any contract with them; thus there is no contract, although I admit having done the ride ",

the Judge would answer me " your acts take precedence of your words ". (The Roman version would be: " *facta loquuntur* ".)

Claimant admits having received $250,000 on the strength of a judgment which, she admits that too, was not meant to be a partial judgment. Thus she did an act, which necessarily *de lege* entailed the consequence of barring further claims and entailed these consequences equally on the strength of what she says she had been told by the American Commissioner. What use is it that she says, she protested against the consequences but accepted the money, when it was clear that anyway accepting the award was incompatible with reservations? How could she have her cake and eat it? In the record she explains her attitude by a plea of duress, saying that her acquiescence, if any, was due to destitution and starvation. As the American Commissioner does not discuss this point, I may dispense with it too.

The same consideration practically applies to a last additional point *viz.* the question whether the Claimant may rely on that in connection with the efforts to terminate this Commission's work a tentative but abortive agreement was made to settle this claim by compromise. The fact of course neither does bar the German Agent from insisting on his plea of *res judicata* nor from his plea that any additional award would be unjustifiable. The American Commissioner, who in this respect merely refers to the record, evidently himself does not think that there is a compromise in this case otherwise he would not vote in his conclusion for a time limit to take evidence but would have to vote for an award granting Claimant the amount of that compromise and *dismissing the amount exceeding that.* Here again I find traces of the error which pervades so many allegations in this matter *viz.* the belief that in a procedure you may one-sidedly profit from any happenings or situation without allowing yourself to be bound in whatsoever way to reciprocity.

Washington, D.C., May 16th, 1935.

Dr. Victor L. F. H. HUECKING
German Commissioner

Supplemental Opinion of Mr. Anderson, the American Commissioner

An examination of the Opinion of the German Commissioner in the Drier case discloses a number of points which call for critical comment.

In part I of the German Commissioner's Opinion, subdivision (1), the claimant is described as " an American national through her second marriage ". This statement does not fairly present her American nationality status. As appears from the record, she is a native born American national. She lost her American citizenship through her marriage in May, 1899, to her first husband, a German national, Baron Georg von Rosenberg. Upon his death she regained her American nationality status through her marriage to her second husband, John C. L. Drier, a native born American national and then a member of the United States Consular service stationed at Dresden, and she has since maintained that status.

In the same subdivision of the German Commissioner's Opinion he makes the point that the transfer of the ownership of the claimant's property took place on May 10, 1920, which was after the War, the importance of which in his Opinion he emphasizes by italicizing the words " after the war ". He, accordingly, contends that as the German legislation imposing compulsory administration upon the estate had been repealed on January 10, 1920, her property was not subject to it when this transfer was made.

In taking this position, the German Commissioner seems to have overlooked the fact that so far as concerns the relations between Germany and the United States a technical state of war existed until July 2, 1921, and it must be remem-

bered that the Commission has specifically held that although the effect of the ratification of the Treaty of Versailles was to repeal exceptional War legislation as of January 10, 1920, nevertheless, American claimants are entitled to recover when it can be shown that, as in this instance, exceptional War legislation was applied to American property after January 10, 1920.

Rule 13 of the Rules of the Commission adopted under the Order of May 7, 1925, relating to debts, bank deposits, bonds, etc., reads in part as follows:

" 13. Although all exceptional war measures of Germany then in force were repealed by law on January 11, 1920, a claimant nevertheless will be entitled to establish by evidence that his property, rights and interests were subject to measures in the nature of exceptional war measures in German territory, as defined in paragraph 11 hereof, * * * after January 11, 1920, and in the event that he establishes such fact Germany will be responsible for any damage that the evidence shows he sustained by the application of such measures."

The facts in the record show that shortly before the entry of the United States into the War the claimant and her husband left Germany, and that in May, 1918, her property involved in this claim was placed under compulsory sequestration pursuant to German war legislation, thus removing from claimant all control thereover.

In November, 1919, while the property was still under compulsory administration, the unauthorized contract was entered into covering its sale to one Mittag. An attempt was made on January 5, 1920, to secure the approval of the Court for this sale.

Promptly on learning of this proposed sale, claimant notified Rost, who held a power of attorney from her, of her refuasl to be a party to such a disposition and of her desire to retain title to the property for her own occupancy. She, accordingly, did all that she could to prohibit the sale.

These facts are established by the letter dated October 23, 1922, from Dr. Spiess, the compulsory administrator appointed by the German authorities, addressed to claimant. Dr. Spiess says:

" I did everything it was possible for me to do to preserve your ownership-rights in the properties. I myself had no power to prevent the sale, as, so long as compulsory administration was in force, the right of consent was vested in the Ministry of Commerce & Trade and in that office solely, moreover the transfer had only been arranged for provided compulsory administration were withdrawn." (Copy of letter filed in Docket No. 4712.)

Dr. Spiess enclosed with this letter a copy of his letter of January 10, 1920, to the Ministry of the Interior, Division of Commerce and Trade, in relation to this proposed sale, and said:

" Under these circumstances I suggest that for the time being no decision be arrived at relative to withdrawal of compulsory administration.

" I have just been informed that transfer of the property has already been arranged for on the 5th instant, assuming compulsory administration will be withdrawn and that Mrs. Drier complies with the conditions laid down by me and mentioned in my report of December 1st 1919." (Copy of letter filed on Docket No. 4712.)

Following claimant's futile efforts to prevent the sale of her property the matter was brought to the attention of the proper Saxon court, which court finally approved the sale to Mittag under the authority granted by the exceptional war legislation. This sale was not finally consummated until on or about May 10, 1920, and possession theoref turned over to Mittag.

This action of the Court, while taken subsequent to the theoretical repeal of exceptional war measures on January 10, 1920, the date of the ratification of the Treaty of Versailles by the Allied Powers, was merely consummating action

with respect to claimant's property that had been initiated under such legislation and prior to January 10, 1920. If the Court had followed the suggestion of the compulsory administrator in his letter of January 10, 1920 (see *infra*), to the Ministry of the Interior, and compulsory administration had not been withdrawn, the sale could not have been effected.

It is not entirely clear what the German Commissioner means by the statement appearing in part I, subdivision (1) of his Opinion to the effect that claimant thinks they ought not to have sold her property

" because half a year or so earlier she had informed the Ministry and the administrator that it was not her intention to sell the estate. (The exact date of this conversation is not stated by the Claimant, but it was before she gave her attorney the powers on the strength of which he made the contract.) "

The only evidence to be found in the record on this point is the following excerpt from the letter dated October 23, 1922, from Dr. Spiess to claimant, in which he says:

" To make this matter clear I now beg to inform you of the following: On January 8, 1920 I received from you from Stockholm the following telegram of January 7th:

" 'Don't give assent for sale until I arrive within a few days subject to conditions of travel. Sale of my effects at warehouse absolutely illegal, I hold you responsible for same '

" I hereby heard for the first time that you objected to the sale of the properties and the furniture, and made enquiries in regard to the matter of notary Dr. Börner.

" The latter informed me, that Captain Rost holding your General Power of Attorney had already transferred the properties to Mittag on January 5, (that is to say before you dispatched your telegram) subject to the proviso of the state compulsory administration being withdrawn forthwith, as soon as the conditions of the Ministry of Commerce & Trade had been complied with." (Copy of letter filed in Docket No. 4712.)

With this letter to claimant Dr. Spiess enclosed a copy of his letter of January 10, 1920, to the Ministry of the Interior, Division of Commerce and Trade. In this letter Dr. Spiess tells the Ministry:

" I have communicated the contents of my application of December 1st 1919 addressed to the Ministry and the contents of the Ministry's communication of December 12 1919 to Mrs. Drier's representative. In reply thereto I, on the 8th instant, received a telegram from Mrs. Drier from Stockholm, reading as follows: [then follows telegram as above quoted].

" Under these circumstances I suggest that for the time being no decision be arrived at relative to withdrawal of compulsory administration.

" I have just been informed that transfer of the property has already been arranged for on the 5th instant, assuming compulsory administration will be withdrawn and that Mrs. Drier complies with the conditions laid down by me and mentioned in my report of December 1st, 1919." (Copy filed in Docket No. 4712.)

There was also filed in Docket No. 4712 a copy of affirmation dated October 23, 1922, of Max Gottlebe, Judge of the Court of Pirna, where the property was located and presumably the Court which had jurisdiction thereover. This affirmation contains the following information with respect to the efforts made by claimant to prevent the sale of her property:

" The real estate belonging to Mrs. Drier in Bonnewitz [the property that is the subject of this claim], Eschdorf and Wünschendorf having in 1918 been placed under government compulsory administration, I accompanied Mrs. Drier to the ministry of the interior at Dresden when she went there to discuss the matter of this compulsory administration.

" In the Ministry of the Interior Mrs. Drier spoke to an official of the same, Dr. Hast. She was afraid that her above mentioned property might be sold, and told Dr. Hast, that she did not wish it to be sold, but would like to retain possession of this property.

" Thereupon Dr. Hast declared, that it was not the intention of the Ministry to sell the property."

Whether the interview referred to in this affirmation of Judge Gottlebe occurred early in 1920 on the occasion of claimant's return to Germany following the Armistice or at some earlier or later date, it is clear that it did occur sometime prior to May 10, 1920, when the sale of the property was finally consummated under the exceptional war legislation with the approval of the Saxon Court. Based on this interview claimant was certainly entitled to rely on a *statement of an official of the Ministry of the Interior that the Ministry did not intend to sell the property.* While claimant on or about January 25, 1919, gave Captain Rost a power of attorney for the purpose of looking after her business affairs in Germany she definitely forbade him in August, 1919, months before the contract of sale was negotiated, from making any sale of the estate, and clearly indicated her desire to keep the estate, where she intended to live during the winter of 1919-1920 (see page 5 of Brief filed January 9, 1933).

The sequence of events as outlined in the German Commissioner's Opinion would be more correctly stated as follows:

In March, 1922, claimant brought proceedings before the Dresden Court against Mittag, asking for a cancellation of the sale and the return of the property to her. This suit was dismissed by the Court in June, 1924, " upon the ground that Mittag had been without knowledge of Rost's lack of authority and was accordingly entitled to protection of the law as purchaser in good faith." In the meantime claimant, on November 29, 1922, executed her application for claim against the German Government to be espoused by the United States pursuant to the Treaty of Berlin. This claim was duly espoused and transmitted to the Agency for listing as a claim against Germany. Conferences with regard to the claim were then had in Germany in the summer of 1924 between the two Agencies and the representative of claimant, resulting in an Agreed Statement for an award with a reservation that claimant, if unsuccessful in the litigation in Germany seeking to recover possession of the property, was to again come before the Commission and obtain a further award. Suit was then filed by claimant in the Dresden courts against Rost in December, 1924, which suit was dismissed by the Court on May 8, 1925, " upon the ground that claimant had not been able to prove that she expressly forbade Rost " to make the sale before November 21, 1919 (page 12 of Brief filed January 9, 1933).

In part II of the German Commissioner's Opinion he states that the " American Commissioner is under the impression that the German side in this procedure admitted and admits liability under article 297 *e* " of the Treaty of Versailles. In reply to this he points out that no admission of liability can be found on the part of Germany in the entry of the first award in this case because that was a compromise mutually agreed upon. The American Commissioner is not disposed to dispute this argument as applied to the first award, but, on the other hand, it cannot be applied to the second award because that was in no way whatsoever based on a compromise agreement between the two Agents. It distinctly constituted a specific finding by the Commission that Germany was financially liable for the damages suffered under an application of Article 297 (*e*) of the Treaty. Moreover, it will be recalled that in the German Agent's Answer to the claimant's motion for the second award it was distinctly stated:

" (1) The German Agent will not object to the admission of the Motion by the Commission."

In discussing the question of admissions on the part of Germany, the German Commissioner states that " the American Commissioner finds a German ' admission ' where I see none ". In discussing this question, the German Commissioner, in part II of his opinion, quotes from Article 138 of the " German Civil Code ". This reference is unquestionably erroneous as the quotation is clearly a translation of paragraph 3 of Article 138 of the *German Code of Civil Procedure* as distinguished from the German Civil Code.

So far as at present ascertained no translation in English of the German Code of Civil Procedure has ever appeared. However, the Translating Bureau of the Department of State has made a translation of Section 138 of the Code of Civil Procedure together with the comments thereon by Adolf Baumbach, published in Berlin in 1931. The translation of the entire Article 138 reads as follows:

" Section 138. I. Each party must make a statement concerning the facts alleged by the opposing party.

" II. Facts which are not expressly disputed are to be considered as admitted, unless the intention of disputing them is evidenced from the other statements of the party.

" III. A statement without knowledge of the facts is admissible only in regard to facts that were neither the party's own acts nor the object of his or her own observation."

It will be noted that while there is no material variance between this translation of Paragraph III and the translation thereof in the Opinion of the German Commissioner, the Department's translation would seem more clearly to convey the American conception of the provisions of the paragraph.

The following commentary is made by Baumbach on the provisions of Paragraphs II and III of Article 138 as translated:

" (2) Undisputed facts II: the effect of failure to object (the affirmative acceptance of objection) takes place only when the objection is neither express nor is the result of decisive acts. Simple objection is sufficient only when more detailed statements are not to be expected from the party; the necessity of a substantiated objection, i.e. submitting a positive statement in opposition (for example also Stein J I 2 with other justification) follows regularly from the obligation to expedite (principle, *supra* 2, Sec. 128); this applies in particular to argument against ' the whole allegation ', or all items of an account RGJW 11, 184.— It does not matter whether the party states that the allegations ' cannot be disputed ', or that ' he does not wish to dispute them '; the meaning is the same in both cases in view of the carelessness of everyday speech. There is no avowal in this case (to the contrary Stein J, Sec. 288 II 2 in a highly artificial interpretation). A fictitious avowal within the meaning of Section 138 II occurs only when the exercise of the judge's duty of questioning has not led to any *debate*. In that case, however, there is an avowal within the meaning of Section 290. The conclusion of the last oral hearing is, however, authoritative for this purpose. Up to that time, therefore, debate is permissible, even in the second instance; the conclusion is reached, moreover, only after a bilateral hearing, RG JW 01, 749, and not if the official rule applies. Another question is, whether the statements of a party do not contain a real (not merely a fictitious) avowal, within the meaning of Sec. 290.

" (3) *Statement without knowledge of the facts.* III: must be distinguished from refusal to make a declaration, which is justified, where legal time limits are not observed (for example, Secs. 132, 262; debate not allowed in that case, see number 2 before Sec. 128). Permissible only where the matter does not relate to (*a*) a party's own acts, or (*b*) first-hand observations of the party or his legal representative. Effect: (*a*) where permissible: like debate, unless the whole case leads to a different conclusion; (*b*) where not permissible; a fictitious avowal, as in the case of Sec. 138 II." (German Code Civil Procedure by Adolf Baumbach, Berlin, 1931, pp. 351, 352.)

It would seem to the American Commissioner, who, however, does not claim expert knowledge of German civil procedure, that the Answer of the German Agent to the Petition for Additional Award filed in the Drier claim March 20, 1929, follows Paragraph II of Article 138 rather than Paragraph III thereof, particularly as these paragraphs are construed by the German legal authority Baumbach.

Paragraph III of Article 138 only applies, as said by Baumbach, where the subject matter thereof " does not relate to (*a*) a party's own acts, or (*b*) first-hand observations of the party or his legal representative ".

In our case the acts referred to were acts carried out pursuant to the exceptional war legislation of Germany, against which Government the claim was brought, and were accordingly defendant's own acts and were based on first-hand observations of the defendant (Germany) or its legal representatives (the court officials authorizing the acts).

Accordingly, it seems to the American Commissioner that the effect of the statements in the fourth paragraph of the German Agent's Memorandum filed March 20, 1929, that he

" has no knowledge or information sufficient to form a belief as to the actual value of the estate, the equipment of the castle etc. at the time of the sale "

is clearly to leave the claimant's evidence as to this valuation entirely undisputed, as we contend. This is particularly so in view of the fact that all of her evidence had been submitted to the German Agent over twenty months prior to the filing of his Memorandum. Such a period of time was assuredly ample for the German Agent to have satisfied himself both as to the probity and sufficiency of such evidence, particularly as all of the evidence came from parties at all times within the jurisdiction of Germany.

The German Commissioner is in error in assuming that the claimant contends that the effect of Paragraph IV of the Memorandum of the German Agent filed March 20, 1929, was to " be construed to mean assent " by him to the valuation as indicated by the evidence we filed.

Claimant's contention on this point, on the other hand, is very clearly and concisely set out in the American Commissioner's Opinion.

Here we have a very good example of the application of Paragraph II of Section 138 of the German Code of Civil Procedure as interpreted in the commentary by Baumbach, who says that under this paragraph " simple objection is sufficient only when more detailed statements are not to be expected from the party; the necessity of a substantiated objection, *i. e.* submitting a positive statement in opposition * * * follows regularly from the obligation to expedite ".

This is particularly true where the German Agent, representing his Government in a claim arising out of governmental acts, is fully advised for over twenty months as to claimant's evidence of the damages suffered as the direct result of these governmental acts and does not see fit to place any evidence whatsoever in the record in opposition to the claimant's evidence, particularly where all of the claimant's evidence comes from parties at all times under the immediate jurisdiction of his own Government.

In part III of the German Commissioner's Opinion he lists some of the evidence presented as to the contention and valuation of the claimant's property, but he omits to make any reference to the important statement bearing date December 22, 1926, of Carl Adolfo von Carlowitz, Chamberlain to the King of Saxony. This witness, who had been familiar with the property involved all of his life and has always taken a special interest therein as it originally

" belonged to one of my ancestors ", expresses the opinion, after looking through the various documents, that:

" the immovable and movable property mentioned in the beforesaid documents must have had a value of from five to six million gold marks in the year 1919." (Ex. G, filed March 19, 1929, being one of the documents turned over to the German Agent June 1, 1927.)

This Opinion, coming from a neighbor who held the rank of Chamberlain to the King of Saxony, is assuredly entitled to material weight, particularly as there has never been made any suggestion, either directly or indirectly, as to his incompetency.

In part III of the German Commissioner's Opinion, subdivision (*b*), he discusses the subject of the claimant's reservation of her right to ask for more than was granted by the second award. The position there taken by the German Commissioner seems to the American Commissioner to be fully met and disposed of by the following statement found at page 11 of the American Reply in this proceeding, filed August 15, 1934:

" As to the contention of the German Agent that an award does not require the consent of the claimant, we may fully agree, but from such a premise it surely cannot be argued that a definite assertion of the refusal of an award in full settlement (as here shown) can as a matter of law or fact be considered acquiescence. And such broader grounds defeat the contention of the German Agent that even acquiescence of a claimant, if it existed, as is not here the case, could endow the Commission with power to make awards contrary to or unsupported by any evidence or law, which is the inevitable conclusion and irrefutable fact in the instant case."

In the same subdivision of his Opinion the German Commissioner puts forward an illustration in which he assumes that the claimant's position corresponds to that of a passenger in a Pullman car, who refuses to pay for his ticket after he has made use of it. The American Commissioner does not consider that this Pullman car illustration presents a parallel case to the case under consideration. Theoretical illustrations are worthless unless the assumed facts are on all fours with the facts in the case under consideration, and even then they simply amount to a re-statement of the original problem in a form which leaves the question exactly where it was before.

In the instant claim claimant was lawfully pursuing a right given by a treaty between two sovereign governments, one of the highest rights that may be conferred on a mere individual. As the Commission said in its decision of December 15, 1933, where it was construing the remedy provided by the two Governments, where the Commission misinterprets the evidence and hands down an award not justified by the record, then it is the duty of the Commission to modify its award in accordance with the proper interpretation of the evidence. Claimant assuredly cannot be criticized for pursuing her remedy solemnly given her by the two Governments to a final conclusion. It is by no means an apt comparison to compare such a claimant following this legitimate course to a thief or a robber who by force pure and simple takes certain action to the detriment of the lawful owner of property.

In discussing the attempt to settle this claim by a compromise agreement for an additional sum of $160,000, with interest, the German Commissioner refers to this agreement as " tentative but abortive ", which he seems to think completely disposes of it. Nevertheless his discussion amounts in effect to a plea of confession and avoidance, as it would be termed in our domestic practice.

In so far as claimant was concerned, the ratification by the Foreign Office of the tentative agreement reached between the two Agents was conclusive.

The only condition attached to a final consummation of the agreement was that it was dependent on the final consummation of a number of other agreements negotiated at about the same time in order that the work of the Commission might be brought to a close.

The understanding on which these negotiations in February, 1933, were conditioned is fully set out in the American Commissioner's cable of February 23, 1933, to the German Commissioner sent following a conference with the German Agent and the Counsel for the American Agent. This cable reads:

" Your government has notified my government that it desires to dispose of all claims now pending before Commission as soon as possible Stop Accordingly the German Agent suggests to American Agent that they agree upon following arrangements for disposing of remaining claims

" He will ask his government for authority to sign agreed statements with the American Agent recommending awards in certain of the claims on understanding that American Agent will be satisfied with the decisions of Commission in remaining pending claims Stop Agreed statements to be signed in claims [then follows a list of claims, including the Drier claim]

" It is further understood that when this arrangement has been carried out the Commission will enter an order reciting that all pending claims have been thus disposed of and also authorizing the American Commissioner to enter any further orders on joint motion of both Agents and reciting further that Germany continues to pay its share of joint expense so far as necessary until June thirty in order to permit proper disposition of Commissions and Agencys files and joint property and preparation of reports by American Commissioner and Agent to their government Stop

" This proposed arrangement satisfactory to me and in furtherance of it I am prepared to accept your view that claims of [then follows a descriptive list of four claims] should be dismissed on present state of record unless American Agent submits further information before March first changing situation.

" American Agent has advised German Agent that he understands that this procedure does not affect one way or other question of filing before the final termination of Commission petitions for rehearing in claims heretofore decided if situation warrants.

" German Agent on other hand takes the position that the final disposition of all claims before Commission will preclude the filing of any further claims or petitions for rehearing without the consent of both Governments."

It will be noted that this cable was sent prior to the negotiations resulting in the tentative settlement of the Drier claim.

The fact remains that all of the agreements mentioned in the cable and negotiated at that time with the sole exception of the Drier agreement were finally consummated in accordance with the exchange of notes between the two Governments on May 7, 1934. [1] No adequate reason has ever been given, except the possibility of producing new evidence discrediting the evidence of record, as to why the Drier agreement should not have been consummated at the same time. The note of the German Ambassador of May 7, 1934, recites that his Government was not willing to consummate the Drier agreement because recent investigations tended to cast suspicion on some of claimant's evidence. This position, however, is in no sense new, as the same suggestions had been made to the Counsel for the American Agent by the German Agent at their first preliminary conference in February, 1933, some days prior to the conference that resulted in the tentative agreement approved by the Foreign Office.

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[1] For notes, see Appendix. (*Note by the Secretariat*, this volume, Appendix IV (B), p. 491.)

There would have been much more justification for the stand now taken by the German Agent with respect to the Drier claim had none of the tentative agreements of February, 1933, been finally consummated.

Washington, D.C., June 7, 1935.

Chandler P. ANDERSON
American Commissioner

Supplemental Opinion of Dr. Huecking, the German Commissioner

My main object is to prevent the discussion from slipping away from its real subject and not to allow a great mass of details to drown the only question of juridical interest, *viz*, the question: Can this case be reopened in the face of two final judgments already rendered? Thus, if on the following pages I only deal with some individual points made in the American Commissioner's Supplemental Opinion leaving others unanswered this ought not to be construed as meaning that there is an agreement as to the topics not mentioned. I found only two points of minor importance regarding which I wish to amend or clarify my Original Opinion.

First: I am quite agreeable that when the Claimant's status as a citizen is discussed, it may be particularly mentioned that she is American-born; was later a German in consequence of her first, and is now again an American in consequence of her second marriage.

Second: When I quoted in my Original Opinion Paragraph 138 of " The German Civil Code " it was indeed a slip of the pen and what was meant was: " the German Code of Civil *Procedure* ".

As to the rest, I abide by my Original Opinion confining myself to the following observations:

I

Germany's liability under art. 297, *e* of the Versailles Treaty

I carefully avoided to do what I am said to have done " to contend that as the German legislation imposing compulsory administration upon (Claimant's) estate had been repealed on January 10th, 1920 her property was not subject to it when this transfer was made ".

Because juridically we are only concerned with the question: Must the case be reopened? I have not defined my attitude regarding the question whether art. 297, *e*, Versailles Treaty would be applicable in this case.

What I did, is thoroughly different: I called attention to the fact *that this question is still open;* and I was compelled to do so because the American Commissioner in his Opinion evidently considered the question to be a settled one. Thus I stressed certain facts and dates which, in my view, had been left in the background; quite properly, if the question really had been a settled one; but wrongly, if the question was open.

When in this connection I emphasized that the transfer of Claimant's property had taken place " after the war " it was the actual warfare, the cessation of hostilities and war acts, including war legislation what was meant by me (I hoped to avoid a misunderstanding by expressly adding " in Europe, etc."). There is no contradiction, when the American Commissioner points to the fact that technically and juridically the state of war lasted much longer, a fact dealt with in Rule 13 of this Commission. I only want to *complete* this statement in the present case by mentioning that on May 10th, 1920, when Claimant lost her property which on this day was transferred by her attorney to another person, the (actual) war had ceased, war legislation had been repealed and the

compulsory administration of Claimant's estate had been removed since January 26th, 1920.

Now again I refrain from discussing the juridical consequences; the American Commissioner enters this field by stating there was merely consummating action with respect to Claimant's property that had been initiated under war legislation. I should not be supposed to agree to this, if I do not discuss it.

From what I have said it will be clear that I may leave this point without dealing with the considerable volume of details mentioned by the American Commissioner's Supplemental Opinion; only for regularity's sake I beg to point out a doubt arising as to a certain date when a letter of Dr. Spiess' is quoted on p. 3 [p. 1060, this print] [1] as bearing the (same date —") date of October 23rd, 1922; the date being according to p. 5 [p. 1062, this print] [2] the 10th of January 1920. Similarly I may mention that the date which I started from in my Original Opinion as being the date of Claimant's warning to Dr. Hast and Dr. Spiess not to sell the property, was gathered by me from the American Commissioner's Original Opinion p. 4 [p. 1039, this print] [3] (*verbis* " she returned . . . to . . . Dr. Spiess ".) Should the date be a different one, of course it may be rectified.

II

Was it *admitted* that Germany is liable under art. 297, *e*, Versailles Treaty?

In my Opinion I stated that the " German side " by which expression I meant Germany as a party to these proceedings had up to now not admitted liability.

It is no answer to this statement, when the American Commissioner replies that *this Commission* held Germany liable.

With respect to the latter point be it stated additionally:

The American Commissioner admits that the first award does not represent a finding against Germany. He thinks the second does. But it is just that second one which the Claimant tries to reverse in these proceedings. Could she really be allowed to reverse it and to rely on it at the same time?

III

Art. 138 German Code of Civil Procedure

I have never suggested that art. 138 of the German Code should or could be directly or indirectly applied to the *case*. So I need not answer any of the arguments that go in that direction.

What I have suggested is: Art. 138 should be taken in consideration when certain technical terms are used by a German Jurist; for he is trained on the basis of the German Code.

In this connection I said:

First: The words (in English) used by the German Agent in this case are the exact equivalent of the words and conceptions (in German) in paragraph 3 of art. 138. This seems to be admitted or, if it is not, I simply refer to the text.

Second: Now, when according to art. 138 a party avails himself of the permission to answer " I know not ", this means (not that he admits but on the contrary) that he *disputes* the pertinent allegation.

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[1] *Note by the Secretariat*, this volume, p. 144.
[2] *Note by the Secretariat*, this volume, p. 145.
[3] *Note by the Secretariat*, this volume, p. 129.

I said any German lawbook would show this. The American Commissioner quotes one, and indeed it bears me out. The answer is to be found in the four words p. 11 [p. 1065, this print] [1] " where permissible like debate ", the only words of relevancy in the whole quotation. Their meaning is: " if a party is permitted to say: I know not, and does so, the effect is the same as when he disputes it ". (The exceptionally poor translation uses the word " to debate " in the place of " to dispute " but when the very same German word " bestreiten " appears some lines earlier in this very same quotation the translator renders it quite correctly by " to dispute "!)

IV

Valuation by Carl von Carlowitz

It is said I omitted a valuation of Carl von Carlowitz, when I mentioned some other valuations submitted by Claimant in these proceedings. The answer is simple:

I was not and I am not concerned in this Reopening-pleadings with the probative value of any evidence. What I tried to show was:

Although there are no particularized findings of the Commission in its second award, this is no proof at all that the Commission did not form an Opinion on the evidence and further: it was quite possible that after examination the evidence was found so poor that a sensible reduction of the amount asked for was deemed indispensable.

I illustrated this by instances and thus was not bound to be exhaustive. But I am quite ready to extend the argument to the valuation Carlowitz. I do not say it is worthless; but I say it is quite imaginable that the Commission may have thought it worthless; it would be neither illogical nor arbitrary to say *for instance*, that a sweeping statement without the slightest attempt to particularize it by any palpable data, dealing in one single sentence with " five to six million gold marks " coming from a neighbour whose impartiality just for this very quality is not a matter of course, the testimony being given without any juridical guarantee (oath or the like) cannot suffice to accept the figures contained therein at their face value.

V

Abortive attempt to compromise

That I rightly style the attempt made in 1933 to settle this claim an abortive one is evidenced *(inter alia)* by the very cablegram on which the American Commissioner's Supplemental Opinion relies.

At the then time hope prevailed that it would be possible to determine this Commission's work in the first half of 1933. See the cablegram (*verbis* " it is further understood . . . to their government "). The same cablegram, last paragraph, makes it clear that the German Agent's assent (and only *his* attitude matters here, because *his* unconditional assent must be shown), was dependent on a preclusion of further petitions for rehearing, a condition which, as we all know, did not materialize. The following official utterances go the same way:

In their Memorandum of the 18th of March 1933, the United States Government confirm, speaking *inter alia* of the settlement here under discussion, that " the German Government still desire that the giving of finality to these

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[1] *Note by the Secretariat*, this volume, p. 147.

settlements *shall await* the making of a joint statement by the two Governments that the work of the Commission is thereby brought to a close; The Government of the United States regrets that the German Government has seen fit to *attach a condition* to the tentative settlements a. s. o." And even the note of May 7, 1934, quoted by the Claimant admits: " no condition was stated *except* that the work of the Commission be promptly closed ", and calls the settlement a *tentative* one;

In other words: The German Government has a financial interest to see this Commission *functa officio* and was ready to make concessions for that. From which follows that this tentative settlement, which never became final, cannot mean anything in the present law suit.

I fail to see how the fact that *other* tentative settlements were confirmed afterwards in spite of the fact that the condition on which they were based had lapsed, can confer any right on the Claimant, that the failing condition should not be pleaded against her.

Washington, D.C., June 15, 1935.

Dr. Victor L. F. H. HUECKING
German Commissioner

For the reasons stated in the foregoing Opinions, the National Commissioners have disagreed on the questions at issue, and, accordingly, certify them to the Umpire for decision.

Done at Washington, D.C., this 18 day of June, 1935.

Chandler P. ANDERSON
American Commissioner

Dr. Victor L. F. H. HUECKING
German Commissioner

Decision of the Commission

This case comes before the Umpire for decision upon a certificate of disagreement by the National Commissioners, to which they have appended their respective opinions and supplemental opinions. I attach hereto the certificate and the opinions mentioned.

The question for decision arises upon a petition for a further award by Katharine M. Drier and a reply on behalf of Germany. The petition for further award was filed November 18, 1932, and the answer July 2, 1934. Upon these pleadings issue is made as to the power of the Commission to reopen the case and rehear the merits on the amount of damages properly to be awarded to the plaintiff. For an understanding of the present status of the case it will be necessary to summarize the history of the proceeding.

The claimant is an American National who inherited through a prior marriage to a German National an estate situate near Dresden known as " Bonnewitz ". This estate consisted of a castle, its furnishings, a park, garden, farm, and certain appurtenances. The claimant and her husband left Germany shortly before the entry of the United States into the War, and her property was placed under compulsory sequestration by the German Government. In November, 1919, while the property was still under compulsory administration, an attorney in fact entered into a contract, which the plaintiff says was unauthorized, selling " Bonnewitz " to one Mittag. An attempt was made January 5, 1920, to secure the approval of the Court for this sale. Upon learning the facts the claimant protested, taking the position that she had

always forbidden her attorney to sell the property. In spite of alleged notice not to do so, the compulsory administrator gave his consent to the sale, and it was consummated, as a result of that consent, on May 10, 1920. The claim is that it was sold for a ridiculously, inadequate consideration, and that Germany is answerable for the difference between the sum so received and the fair value of the estate as of the year 1919.

As a result of negotiations had in 1924 between the claimant, her counsel, and representatives of the American and German Agents, an agreed statement was filed before the Commission, Docket Number 4712, List Number 11,290, in which the Agents stated that the amount demanded by the claimant was $500,000.00, that she had received about $12,000.00 in cash and a mortgage worth about $8,000.00 from the sale of the property, that as a result of assessments of value and evidence taken orally by representatives of the American and German Agents and the attorneys for the claimant, and by conferences between said representatives and the claimant herself, the actual damages in excess of the amount received by the claimant were ascertained to be $48,000.00. The Agents jointly recommended an award in that amount, with interest at 5% from January 5, 1920. An award was accordingly entered January 14, 1925. The amount paid August 1, 1928, including interest, was $68,782.70.

Confessedly, this award was not final. All parties to the negotiation understood and agreed that the claimant reserved the right to pursue her claim against her alleged defaulting attorney and the purchaser, and, in the event of failure to recover from them, to apply again to the Commission for an additional award. She did bring suit in Germany and was denied recovery. She thereupon, on March 19, 1929, filed a claim for an additional award in the amount of $948,600.00. In her affidavit she set forth the facts above summarized, and then detailed her alleged damage (the difference between the reasonable value of the estate at the time of sale and the sale price) referring for support to certain exhibits attached to her affidavit, setting values upon the estate without the forest and equipment, the forest separately and the equipment separately totalling approximately $1,000,000.00, from which she admitted should be deducted the amount received from the purchaser Mittag $3400.00, and the partial award above mentioned of $48,000.00. In reply to the motion for an additional award, the German Agent filed a memorandum in words following:

I

The German Agent will not object to the admission of the motion by the Commission.

II

It will not be disputed that claimant in accepting the compromise, which formed the basis of the award of January 14, 1925, reserved the right to pursue her claims against Mittag and Rost and, in the event of failure to recover from them, to apply again to the Commission for an additional award.

III

The facts as set forth in the motion will not be contested.

IV

The German Agent has no knowledge or information sufficient to form a belief as to the actual value of the estate, the equipment of the castle, *et cetera*, at the time of the sale.

Thereupon the matter came before the National Commissioners for adjudication. It would appear that the German Commissioner was of opinion that the additional award to the claimant should not exceed $200,000.00, but that the American Commissioner favored a higher award. It appears further that the American Commissioner, in conference with the claimant and her attorney, explained the difference of view of the two Commissioners and stated the amount the German Commissioner was willing to award. The claimant asserted the sum to be wholly inadequate, and, apparently as a result of her protestation, American Commissioner conferred further with his colleague. As a result he advised the claimant and her attorney, in a further interview, that the German Commissioner would be willing to sign an award of $250,000.00, with interest. The claimant, it appears, again protested that such an award would be inadequate and inquired of the American Commissioner what she could do in the premises. She was told that if the Commissioners disagreed, as would be probable, the matter would have to be referred to the Umpire, who might award more or less than $250,000.00, with interest, that the procedure might involve considerable delay. The claimant, in her present petition, hereafter to be more fully outlined, says that she stated the sum was inadequate but that on account of her destitute condition she would be compelled to accept it as a tentative award, but she reserved the right to pursue any remedy she might have before the Commission or through diplomatic channels for further compensation to reimburse her for her actual loss. In her present petition she avers, and the averment is not contradicted, that she made these statements to the American Commissioner in the presence of the German Agent. As a result of this conference the American Commissioner evidently agreed to an award of the amount in question and on April 5, 1929, the two National Commissioners signed an award for $250,000.00, with interest at 5% from May 10, 1918 to date of payment. Pursuant to that award a payment was made to the claimant in accordance with the War Claims Settlement Act of 1928.

On November 18, 1932, the claimant filed the present petition for a further award. The petition, if well founded in fact and law, seems to be timely. Adequate reasons for delay are stated, namely, the detention of the petitioner in Germany under proceedings against her there, and negotiations for a settlement of her claim for further allowance in this matter, and for her alleged illegal detention in Germany, which were pending during part of the period intervening between her second and third petitions.

In her petition the claimant recites that the first award was conditional, which is admitted. She further recites that the second award did not " purport to be, nor was it in fact in any way related to the amount of the loss proven by the evidence to have been suffered by the claimant ". The petition then recites the facts, to which reference has been above made, leading up to the execution of the award.

The grounds urged by the American Agent in support of the petition are:

1. That a grave injustice has been done and the claimant deprived of rights accorded her by the treaty of Berlin.

2. That the awards are contrary to the rulings of the Commission because they do not afford her the full measure of compensation recognized as due her.

3. That the awards are juridically wrong, because the Commission had no power to reduce them to an amount less than the sum shown by the undisputed proof to be the amount of loss suffered.

The first two reasons may be summarily dismissed. No power resides in the Commission to redress an alleged injustice inherent in its awards. There

is nothing to show that the Commission did not intend to accord the petitioner the rights guaranteed to her by the treaty of Berlin. It was under that treaty that she proceeded and on the face of things it was under the provisions of that treaty that the award was made. The only reason which may now be considered is the third, which asserts manifest juridical error in the award.

It is to be noted that the present contention has to do solely with the measure of damage. That there should be an award in some amount the National Commissioners were evidently in agreement. The position which the American Agent now takes in briefs submitted is:

(*a*) That the Commission was bound to accept the estimates of value presented by the claimant at their face value, and

(*b*) That the failure of the German Agent to present answering evidence was, in effect, an admission of the validity of that offered by her.

In addition, it is now urged that the reservation under which the claimant accepted the second award and the effort to arrive at a settlement of her claim for an additional amount, Germany once having signified its willingness to pay $160,000.00 in settlement of this and other claims based upon her alleged wrongful detention, amounts to an estoppel to contest the present petition to reopen. It is said, without denial, that from sometime in the year 1927 the German Agent was in possession of the documents, which appear as exhibits to the petition for an additional award filed March 19, 1929, that inquiry was made of him by the American Agent what, if anything, further he deemed necessary to establish the amount of the claim, and to this inquiry he never replied. Stress is also placed upon the fact that in his answer to the petition the German Agent merely stated lack of knowledge or information sufficient to form a belief as to value.

In the light of these facts it is urged the National Commissioners were bound to award the full amount shown by the so-called expert evidence as to value. The error committed by the Commissioners, if error there was, was not an error as to a matter of law but of fact. In such cases as this the damages are at large. It is the burden of the plaintiff to convince the minds of the triers of fact of the amount of damage incurred. Judgment and discretion must be exercised in appraising the quality of evidence as to damage or loss. The Commission has no function to sit as a tribunal to grant new trials for errors of fact, particularly where those errors involve opinion as to value. There is no allegation that the National Commissioners were guilty of abuse, that they refused to consider the evidence, or that they did not in fact consider it. On the contrary, it would appear that both of them considered it and reached opposing conclusions as to the amount of damage shown by it. Of this the petitioner was apparently advised, and she apparently determined to accept the largest amount upon which the Commissioners could agree. She was informed of her right to have the Umpire pass upon a dispute as to the amount of the award and she elected not to have recourse to this remedy. It is inadmissible to say that in the absence of responding evidence this or any other tribunal is bound to award the full amount stated as the opinion of witnesses of the value of property lost or damaged. The fact that the German Agent had the claimant's evidence before him and elected not to put in answering evidence is of no legal significance in connection with the question of manifest error on the part of the Commission. The opinions of the Commissioners give much attention to the form of Paragraph IV of the German Agent's answer to the second petition. It seems entirely clear that this Paragraph does not amount to an admission of the validity of the claim of damage, nor agree that the appraisals attached to the petition are to be taken at their face value.

From what has been said, it is evident that the award is regular upon its face, and that there does not appear upon the record any matter from which it can fairly be concluded that the Commissioners either abused their discretion in appraising the evidence or were guilty of manifest error in reaching the amount of their award.

It remains to deal with the claimant's reservation in accepting the award and with the effort to reach a settlement. Neither of these seems to me to be of legal significance. It must be obvious that a claimant cannot bargain with the Commission with respect to its judgment. Unless there be error in the proceedings sufficient to warrant a rehearing, a statement by a claimant that he accepts an award under protest and will apply further to the Commission is without legal force. The infirmity in the American Agent's position with respect to the purposed compromise with the claimant is that the record contains nothing with respect to it, and that, in any event, an effort to compromise with a claimant whose case is in judgment is necessarily extra judicial and cannot, in the nature of things, affect the validity of the antecedent judicial prcceeding.

For these reasons I am of opinion and decide that the proceedings may not be reopened and that the decision of the Commission as made must stand.

Done at Washington this 29th day of July, 1935.

Owen J. ROBERTS
Umpire

KATHARINE M. DRIER (UNITED STATES) *v.* GERMANY

(January 29, 1936, pp. 1082-1083; Certificate of Disagreement by the two National Commissioners, December 4, 1935, p. 1081.)

PROCEDURE; REHEARING AFTER FINAL JUDGMENT, ORAL COMPROMISE BETWEEN DIPLOMATIC REPRESENTATIVES, EQUITY. — JURISDICTION. Request for rehearing after final judgment on ground that negotiations for compromise between diplomatic representatives of two governments (see headnote preceding previous decision, p. 127 *supra*) led to oral agreement. *Held* that request should be dismissed: (1) Commission without authority to enforce agreements other than between Agents, (2) no basis in equity: claimant failed to place alleged agreement in record before German answer to original petition of November 18, 1932 (see same headnote, p. 127 *supra*).

Certificate of Disagreement by the Two National Commissioners

The American Commissioner and the German Commisioner have been unable to agree upon the action to be taken by the Commission on the petition filed by the American Agent on November 22, 1935, on behalf of the claimant, Katherine M. Drier, requesting that the decision of the Commission rendered by the Umpire on July 29, 1935, dismissing her petition for a rehearing be reopened and that the aforesaid petition for a further award be adjudicated on the grounds now urged.

The American Commissioner endorses and supports this pending petition on the grounds therein set forth, and as presented in the printed brief filed therewith by the American Agent.

The German Commissioner, on the other hand, opposes the granting of said petition on the grounds set forth in the reply thereto filed by the German Agent on December 2, 1935, wherein he requests that the petition be dismissed for the reasons therein set out.

Moreover, both Commissioners are agreed that inasmuch as this petition concerns a decision of the Umpire following the certification to him of this case for decision on an earlier petition, it seems a matter of orderly procedure that the Umpire should render the decision of the Commission on the present petition.

Accordingly, the National Commissioners hereby certify to the Umpire for decision the questions raised by the pending petition and the reply thereto in this case.

Chandler P. ANDERSON
American Commissioner

Dr. Victor L. F. H. HUECKING
German Commissioner

Washington, D.C., December 4, 1935.

Opinion of the Commission upon the Petition for Rehearing Filed by the Claimant November 22, 1935

The claimant has filed a further petition for rehearing in the above numbers. [a] The respondent has filed a reply submitting the matter to the Commission and praying that the petition be dismissed. The national commissioners have certified their disagreement to me under date of December 4, 1935. The certificate is attached hereto.

By the supplemental pleading the claimant details certain negotiations which occurred between the filing of the petition for rehearing of November 18, 1932 and the filing of Germany's answer thereto on July 2, 1934. It is made to appear that, in an effort to end the labors of the Commission in the spring of 1933 negotiations were had between the parties looking to the entry, by agreement, of orders for additional award in certain cases theretofore determined and others then pending. The showing is that the two governments, by their authorized agents, orally agreed that this claim, amongst others, should be submitted to the Commission for a further award of $160,000 but that the German Agent refrained from signing, and refused to sign, an agreed statement of facts for submission to the Commission in the premises.

The averment of the present petition is that the claimant, in consideration of the oral agreement between the governments, abandoned certain claims she was then prosecuting through diplomatic channels and changed her position for the worse. It is claimed that the agreement constituted an accord and satisfaction. In the opinion rendered upon the prior petition of November 18, 1932, reference was made to these negotiations in connection with claimant's arguments and they were referred to as abortive. It was also there stated that the record contained nothing concerning them or any agreement of compromise and that, in any event, a claim based upon an attempted compromise with the holder of a judgment was ineffectual to impeach the proceedings leading up to the judgment.

The position of the claimant in the present application is not clear. The relief asked is that the cause be reopened for a further hearing. In this respect this petition does not differ from its predecessor. If, however, the prayer

[a] *Note by the Secretariat*, Original report: Docket Nos. 4712 and 11485, List Nos. 11290 and 19733.

should be granted the function of the Commission would be to reconsider upon the original record, or upon that record as it might now be supplemented, the question of the measure of damages to which the claimant is entitled. But if there has been an accord and satisfaction, as asserted in the petition, this could not be done. Upon the theory of accord and satisfaction the petitioner would be entitled to a judgment for $160,000 but the Commission is, as I understand it, without the authority of a court to enforce agreements made between the diplomatic representatives of the two governments. Thus, if a new cause of action is asserted, based upon an agreement between the diplomatic representatives of the two governments, I think the Commission is entirely without authority to enter a decree based thereon. It can act only upon the agreements of the national agents accredited to represent the respective nations before it. On the other hand, if the matters now alleged are put forward as an additional basis in equity for the reopening of the former order of the Commission I find myself at a loss to know why, between March 1933 and July 1934 they were not placed in the record, for, during that entire period, it was open to the petitioner to supplement her pleading and to permit Germany to answer on the pleading so supplemented instead of answering only the original petition alleging other grounds for relief.

In either view, therefore, I think the Commission cannot consider the petition now under review and that it must be dismissed.

Done at Washington, D.C., January 29, 1936.

Owen J. ROBERTS
Umpire

LEHIGH VALLEY RAILROAD COMPANY, AGENCY OF CANADIAN CAR AND FOUNDRY COMPANY, LIMITED, AND VARIOUS UNDERWRITERS (UNITED STATES) *v.* GERMANY

(Sabotage Cases, December 15, 1933, pp. 1115-1128; Certificate of Disagreement, October 31, 1933, pp. 1084-1106; Additional Opinion of German Commissioner, s.d., pp. 1106-1108; Supplemental Opinion by the American Commissioner, November 27, 1933, pp. 1108-1115.)

PROCEDURE: REHEARING AFTER FINAL JUDGMENT, FRAUD, COLLUSION, SUPPRESSION OF EVIDENCE; ROLE OF UMPIRE: CERTIFICATE OF DISAGREEMENT, SIGNIFICANCE OF RULES OF PROCEDURE. Request filed May 4, 1933, for rehearing after final judgment of October 16, 1930, on the ground that Commission was misled by fraud and collusion on the part of witnesses and suppression of evidence on the part of some of them. *Held* that no certificate of disagreement required for decision by Umpire of question as to which national Commissioners disagree: Rules prescribe certificate only for Commission's convenience and for guidance of Agents, the Umpire's duty to decide arising automatically, under Agreement of August 10, 1922, upon his being apprised of disagreement (rules cannot contravene basic Agreement).

JURISDICTION: COMMISSION'S POWER TO DECIDE ON OWN —, NATURE OF ITS FUNCTION. — PROCEDURE: FINAL AND BINDING CHARACTER OF DECISIONS. *Held* that Commission has power to pass upon extent of own jurisdiction by interpretation of Agreement: Commission would otherwise be advisory

body, and its decisions not final and binding, as Agreement states they shall be.

JURISDICTION: ATTRIBUTES, FUNCTIONS OF COMMISSION, REHEARING. — INTERPRETATION OF TREATIES: TERMS, RELATED PROVISIONS, COMMISSION'S PRACTICE, MUNICIPAL LAW. — PROCEDURE: MEANING OF TERMS " DECISION " AND " FINAL "; REHEARING: CONFLICT WITH RECORD, MATERIAL ERROR OF LAW, AGREEMENT BETWEEN AGENTS, AFTER-DISCOVERED EVIDENCE, FRAUD. *Held* (1) that Commission has all attributes and functions of a continuing tribunal until close of work, and as such tries and adjudicates *large number of separate and individual cases:* word " amount " (singular) in preamble of Agreement of August 10, 1922, does not make Commission a tribunal to try *a single action divided into counts* (related provisions, Commission's practice, Settlement of War Claims Act of 1928); but that Commission is not therefore precluded from reopening case after decision: Agreement, not defining term " decision " used in art. VI (providing that decisions of Commission are final and binding), leaves it to Commission to determine when decision, whether executed or not, is " final "; and (2) that Commission (*a*) must grant request for reopening and correct decision when decision does not comport with record or involves material error of law: see Commission's practice, no need for agreement between Agents (powers otherwise absent could only be conferred upon Commission by formal agreement of two governments amending Agreement); and (*b*) may not reopen for presentation of " after-discovered " evidence: justification under municipal law (power of Court to close proofs and compel final submission of case) does not prevail before Commission (no closing without consent or over objection), while failure earlier to enact now existing legislation permitting American Government to summon witnesses etc. (Act of June 7, 1933) provides no excuse; but (*c*), still sitting as a Court, as every other tribunal has inherent power to reopen and to revise decisions induced by fraud.

Cross-reference: A.J.I.L., Vol. 34 (1940), pp. 154-164.

Bibliography: Witenberg, Vol. III, pp. 17-24; Woolsey, A.J.I.L., Vol. 33 (1939), p. 739, and Vol. 34 (1940), pp. 29-34; Annual Digest, 1935-37, pp. 480-487.

Certificate of Disagreement [1]

The American Agent, pursuant to instructions from the Government of the United States, has requested the Commission to render a decision on the question of its jurisdiction to reconsider its decisions in the so-called sabotage claims, which question the Government and the Agent of the United States consider is one to be decided by the Commission itself.

The question is raised by the pending petition presented to the Commission by the Government of the United States, through the American Agent, on May 4, 1933, on behalf of the claimants in the so-called sabotage cases, Docket Nos. 8103, 8117, *et al.*

In support of this petition the American Agent has presented, and is continuing to present, the testimony of a number of witnesses, taken under the authority of and in accordance with an Act of Congress approved June 7, 1933, and certain other evidence, and may desire to present some additional

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[1] See Appendix for Minutes of the meeting of Commission of October 31, 1933 (pp. 1597-1612), outlining the action taken with respect to the Certificate of Disagreement dated October 31, 1933, signed only by the American Commissioner. (*Note by the Secretariat*, this volume, Appendix IV (A), p. 483.)

evidence not yet available, if the Commission's right to reconsider these cases is upheld by the decision of the Umpire.

The national Commissioners are in disagreement on the questions thus raised, and have rendered their respective opinions setting forth the grounds of their disagreement.

The opinion of the American Commissioner is that, under the terms of the Agreement of August 10, 1922, between the two Governments, establishing the Commission, the Commission inherently has the juridical right to determine for itself its jurisdiction to entertain petitions for rehearing. The American Commissioner is further of the opinion that the Commission has in general the right in its discretion to reconsider a decision rendered by it, and that in the sabotage cases, inasmuch as the last decision of the Commission in those cases was made by the Umpire on a Certificate of Disagreement by the national Commissioners, the Umpire can continue to act for the Commission in dealing with this jurisdictional question as well as with all other questions arising under the pending petition in those cases.

The German Commissioner disagrees with the American Commissioner on all of the points above mentioned, and holds that the Commission has no jurisdictional right to reconsider a decision once made, unless both Governments consent.

The written opinions of the National Commissioners, which have been submitted by them to the Umpire, showing the points and grounds of disagreement between them, are as follows:

Opinion of the American Commissioner on the Question of Revision of Decisions

The Agreement of August 10, 1922, between the United States and Germany under which this Commission was established, recites in its preamble that the two Governments " being desirous of determining the amount to be paid by Germany in satisfaction of Germany's financial obligations under the Treaty concluded by the two Governments on August 25, 1921, [Treaty of Berlin] * * * have resolved to submit the questions for decision to a mixed commission ", etc. The Agreement further provides, in Article I, that the commission shall pass upon specified categories of claims. The commission is to consist, as provided in Article II, of two national commissioners, one appointed by each Government, and an umpire selected by both Governments, but eventually, by request of the German Government, appointed by the President of the United States. The umpire was authorized " to decide upon any cases concerning which the commissioners may disagree, or upon any points of difference that may arise in the course of their proceedings ".

The Agreement also provides, in Article VI, that " The commission shall receive and consider all written statements or documents which may be presented to it by or on behalf of the respective Governments ", and that " The decisions of the commission and those of the umpire (in case there may be any) shall be accepted as final and binding upon the two Governments ".

There are no other provisions in the Agreement which have any bearing on the question under consideration. No specific provision is made in the Agreement for reconsidering or correcting any decisions rendered by the Commission. Whatever authority the Commission may have to reconsider and revise its decisions must be derived from the provisions above mentioned, taken in connection with the general powers discussed herein elsewhere, which were conferred on this Commission by the Agreement.

During the course of the proceedings of the Commission many occasions have arisen for taking action on correcting awards and reconsidering decisions.

Although no specific decision in any case where the point was at issue has been made by the Commission on the question of its authority to take such action as a matter of principle, the Commission, in practice, has adopted a course of procedure which demonstrates that in its opinion it had discretionary power to reconsider and revise its decisions to fulfill the purposes for which it was organized and to serve the ends of justice. It has always assumed, and acted on that assumption, that it was fully empowered to correct any clerical or *pro forma* errors in its decisions or awards, and this has been done as a matter of routine procedure. It has also assumed, and acted on that assumption, that on any application for reopening and revising a decision on the merits the Commission should receive and consider any evidence offered in support of such application, reserving for decision, after the examination of such evidence, the question of whether or not the Commission, in its discretion, should grant the application based thereon. The procedure adopted by the Commission, in dealing with such applications, has been, to recite, in the first place, the receipt of the application and the additional evidence offered in support of it, and then to state, in substantially the following form, that —

> Although the rules of this Commission, conforming to the practice of international commissions, make no provision for a rehearing in any case in which a final decree has been made, nevertheless, the application and evidence submitted in support thereof have been carefully considered by the Commission.

It so happens that hitherto in all the cases, in which rehearing petitions have been filed, except those in which the two Agents agreed to a reopening, as hereinafter mentioned, the Commission has found that the grounds upon which they rested did not warrant reopening the case, or amending the terms of the decision, and the application in all such cases has been dismissed on that ground.

The first case in which this question was presented was decided by the Umpire on August 31, 1926. In that decision the procedure above stated was adopted, and has thereafter invariably been followed both by the Umpire and by the national Commissioners in dealing with similar cases.

It seems clear that if the Commission had been of the opinion that under no circumstances was it at liberty or empowered to reopen and reconsider a decision already made it would not have entertained, even tentatively, a petition for reconsideration, but would have dismissed it as a matter of course without examining or considering the grounds upon which it was made.

No question or objection to this mode of procedure was ever raised by either Agent until the question of reconsidering the Commission's decision in the so-called sabotage cases arose in January, 1931. The German Agent, in opposition to the American Agent's petition for a rehearing in those cases on newly-discovered evidence, objected on the jurisdictional ground that the Commission was without authority to admit the further evidence then offered, or to grant a rehearing on the basis of such evidence or any other evidence, after the claims had been dismissed by the Commission.

The German Agent based his objection primarily on the ground that under the Agreement establishing the Commission it had no inherent jurisdictional powers which would justify a revision of a decison once made, and that, apart from any question of inherent powers, the Commission's jurisdiction on this point was restricted by the above-quoted provision of Article VI that " The decisions of the commission and those of the umpire (in case there may be any) shall be accepted as final and binding upon the two Governments ". He also asserted, in support of his contention, that in all cases in which any revisions or corrections of decisions had been made this action had been taken

with the consent of both Agents, acting for their respective Governments, and, therefore, did not contravene his contention.

The American Agent, on the other hand, contended that, considering the purpose for which the Commission was established and the character of the duties imposed upon it, all authority necessary or appropriate to carry out its work must be regarded as having been conferred upon it. On this basis, he insisted that, inasmuch as the fundamental purpose of its creation was, as recited in the preamble to the Agreement, to determine " the amount to be paid by Germany in satisfaction of Germany's financial obligations " under the Treaty of Berlin, the individual and separate claims were each a part of Germany's entire financial obligation to be determined by the Commission, and until the total obligation was established no award or decision as to the component items could be regarded as final, but meanwhile was always subject to revision. [1]

The American Agent also contended that the Commission had inherent power to organize its work and procedure in any appropriate way which seemed to it advisable for the purpose of aiding in efficiently and expeditiously performing its duties, and that unless the Commission had rendered decisions as rapidly as they could agree on them it would have been utterly impossible to make any headway in dealing with the gigantic task of disposing of 20,000 claims. Nevertheless, in adopting this plan of procedure, the Commission necessarily had to hold in reserve the right to reconsider and revise any decision which, as the Commission proceeded through the mass of claims, seemed to be inconsistent with information later acquired or with more mature views later adopted in other cases. He, therefore, concluded that no decision was unalterably final until the work of the Commission was finally completed.

It so happened that before this issue arose the Commission had undertaken to lay down a series of rules for the guidance of the Agents on its attitude in regard to accepting new evidence as a basis for reconsidering decisions. These rules were set out in the Commission's decision dismissing a petition for rehearing in the case of the Philadelphia-Girard National Bank claim (Commission's Decisions, page 939). [a]

Only two of these rules have any bearing on the present question, and they were:

" Where it appears that manifestly the Commission committed an error in its findings of fact on the evidence produced by the Agents at the time the claim was submitted for decision, or in applying the principles of law and the rules of the Commission as established and applied in its previous decisions, the Commission will take under consideration the question of reopening or changing the award.

" On the other hand where a rehearing is demanded *merely* on the ground that by reason of newly submitted evidence the underlying facts were different

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[1] The decision of the Commission as announced by the Umpire with the concurrence of both national Commissioners in *The Lusitania Cases* said (printed Decisions and Opinions, page 30):

" The United States is in effect making one demand against Germany on some 12,500 counts. That demand is for compensation and reparation for certain losses sustained by the United States and its nationals. While in determining the amount which Germany is to pay each claim must be considered separately, no one of them can be disposed of as an isolated claim or suit but must be considered in relation to all others presented in this one demand. In all of the claims the parties are the same. They must all be determined and disposed of under the same Treaty and by the same tribunal. * * * "

(*Note by the Secretariat*, Vol. VII, p. 42.)

[a] *Note by the Secretariat*, this volume, p. 69.

from those appearing in the record as submitted at the time of the decision, the Commission will not grant a reopening or a reconsideration of the award."

This decision, in which these rules were announced, was dated April 21, 1930, and at that time the Commission thought it had practically finished its work, and this set of rules was intended to serve as an aid to the Agents in bringing the work of the Commission to a conclusion by discouraging petitions for rehearings, rather than as an administrative decision dealing with a jurisdictional question. This question had not, at that time, been presented and argued by the Agents, nor had the Commission had occasion to pass upon it in any submitted claim. This situation accounts for the rather incidental way in which these rules were announced. As the decision itself shows, the rules stated therein did not control or influence the conclusions reached by the Commission in dismissing the petition in that case. Accordingly, they did not have the authority of a decision by the Commission on an issue argued and submitted by the Agents, and did not establish a precedent which the Commissioners would have felt called upon to follow in latter cases if they had applied it in the decision of an earlier case.

At this point it will be convenient to examine the principle on which these rules rested and some of the implications arising from them.

Basically they assume an authority on the part of the Commission to determine, in its discretion, whether or not it will reconsider a decision, which implies jurisdictional power in the Commission to do so, if in its judgment that should be done. That consideration would seem to establish that in the opinion of the Commission, at least, it had jurisdictional power to reconsider its earlier decisions.

In further support of that view, it will be noted that the rule against reconsideration deals only with cases where the " rehearing is demanded *merely* on the ground " that the newly-submitted evidence changes the underlying facts on which the decision was made. Nothing is said by the Commission about what its attitude would be if the new evidence disclosed misrepresentation or fraud as to the facts, or the suppression of material evidence. No case presenting such considerations was under consideration by the Commission at that time, and it did not have such a situation in mind in announcing that rule, which applied more particularly to the consequences arising from delay or neglect on the part of the claimants in presenting their claim, rather than to the more serious question which would arise under the other circumstances above suggested. By announcing that rule the Commission certainly did not intend to preclude itself from taking different action if a different set of circumstances demanded different treatment in the interest of justice and equity, or if the Commission had been imposed upon.

The implication of those rules was not that the Commission was without authority to reconsider, but that there were certain circumstances in which it might exercise its authority, and other cases in which it would not be disposed to exercise that authority, which clearly indicated that, in its opinion, the exercise of that authority rested in the discretion of the Commission.

It may also be noted, in passing, that those rules did not apply to the so-called " late claims " submitted to the Commission by the Agreement of December 31, 1928, between the two Governments. This is shown by the statement introducing those rules in the decision, that they had " general application to petitions and requests for rehearings as to the *claims originally* listed ". This exclusion of " late claims " from the application of those rules calls attention to a significant difference between the jurisdiction of the Commission under the earlier Agreement and under the later Agreement.

Under the later Agreement the Governments expressly stipulated that " late claims " must be presented to the Commission " *with the supporting evidence* within six calendar months from the first day of February, 1929 ". The Commission ruled that this provision precluded it from receiving any *supporting evidence* for any purpose after the period thus fixed.

Under the earlier Agreement of August 10, 1922, which applied to the sabotage claims, no time limit was set for the presentation of evidence or the final submission of claims to the Commission for decision. It merely provided, in Article VI, that " The commission shall receive and consider all written statements or documents which may be presented ", etc. In applying this provision, the Commission ruled that it was not at liberty to fix a time limit within which a claim must be submitted, and could not refuse to receive new documents or written statements offered by either side even after a claim had been formally submitted for decision. Under the authority of this provision, such new evidence was actually received by the Commission on application by the German Agent after the first oral argument and submission of the sabotage cases at the session in Washington in April, 1929. It must be observed, however, that this ruling did not deal with the question of the introduction of new evidence after the Commission had actually rendered a decision, which question, as herein elsewhere stated, was always reserved for special consideration.

The chief significance of this difference in the two Agreements is that it shows that when the Government desired to place a limitation on the jurisdiction of the Commission they put it in the Agreement.

At the time those rules were announced there was no case pending to which they applied, and neither Agent discussed them with the Commission.

Later on, after the rehearing petitions in the sabotage cases came up in January, 1931, both Agents argued about those rules at some length, seeking to interpret them in support of their respective contentions. The Commission, desiring to determine this question on a basis of principle, rather than on an interpretation of those rules so casually announced, addressed a letter to the Agents, under date of March 30, 1931, indicating that, whatever purpose those rules were intended to serve at the time they were announced, they were " not irrevocable " and should be disregarded in discussing the question of revision then under consideration. [1] They added, " it is desirable that argument addressed to the question should be devoted not to the interpretation of that language but to the principle itself ".

Subsequently, at the session held by the Commission in Boston in July-August, 1931, to consider the reopening petition in the sabotage cases, the Commission permitted the submission, provisionally, of a quantity of new evidence, and heard extensive oral argument of both sides on the question of the merits of the claims as well as on the question of jurisdiction to reopen.

No decision on this question was announced by the Commission at that time, and since that hearing the Commission has not only received, but has expressly invited the submission of, new evidence in the sabotage claims, produced at considerable expense by both sides, and at a session in Washington in November, 1932, heard oral argument on the issues presented, involving not only the jurisdictional question of its right to reconsider the original decision but also the merits of the claims as affected by the new evidence.

[1] On this point attention is called to the fact that the Rules as originally adopted on November 15, 1922, contained at the end of Rule VIII the provision that " The decisions in writing (1) of the two Commissioners, where they are in agreement, otherwise (2) of the Umpire, shall be final ", but this Rule was revised on February 14, 1924, and this provision was stricken out.

Throughout the proceedings of the Commission, while the question of reconsidering its decision in the sabotage cases was pending, the Commission carefully refrained from any formal announcement of its opinion on the jurisdictional question. The German Agent's position was noted in the record, and the proceedings of the Commission were explicitly stated to be without prejudice on this question, which was specifically reserved for decision at the close of the proceedings.

The foregoing is a full and impartial exposition of the attitude and record of the Commission on the question of its jurisdictional power to reconsider a decision, as the record stood, down to the time of the argument and the submission of that question to the Commission at its session in Washington in November, 1932.

In the argument at that Washington session both Agents again discussed this jurisdictional question, and the Umpire, in the course of the argument (transcript, page 787 [printed, transcript, page 244]), clarified that issue in the following dialogue with the German Agent:

"THE UMPIRE. What I understood and what we all understood the German Agent to suggest was that he presents to this Commission the proposition that its construction of the *treaty* should be that it has no power now to rehear this case. I did not understand him to take the position that the Commission could not consider the question of its own jurisdiction. If he desires to clear that question, he may do so.

"THE GERMAN AGENT. The understanding of the Commission is entirely correct.

"THE UMPIRE. In other words, that is a justiciable question here.

"THE GERMAN AGENT. Yes."

The American Agent agreed with the German Agent on this point. Accordingly, the Commission had an authoritative statement from the official representatives of both Governments that the question of the power of the Commission to receive new evidence and reconsider a decision already rendered was a justiciable question, the decision of which was within the jurisdiction of the Commission.

It will be recalled that the Agreement establishing this Commission was made between the Executive branches of the two Governments, and did not have the status of a treaty. It could, therefore, be interpreted or amended by similar agreements between the Executive branch of the Governments, and it was that branch of their respective Governments for which the two Agents were the spokesmen in stating their understanding of the jurisdiction of the Commission to determine its own jurisdiction on this point.

The German Commissioner apparently disagreed with his Government on this point, as appears from his reservation of it from submission to the Umpire in the national Commissioners' certificate of disagreement. He there stated that "the German Commissioner takes the position that the question of the jurisdiction of the Commission to re-examine any case after a final decision has been rendered is not a proper question to be certified to the Umpire on disagreement of the National Commissioners and reserves that question from this certificate".

Just what the German Commissioner meant by this reservation is not clear, and is subject to explanation, but, in the opinion of the American Commissioner, neither of the national Commissioners has the authority to overrule or disregard an agreement made by the two Governments as to the jurisdiction of the Commission, and the two Governments certainly have agreed in this point, as evidenced by the above-quoted statement of the German Agent in oral argument, concurred in by the American Agent.

There is one more point to be noted in support of the position that the Commission has the right to reconsider a decision as a matter of jurisdictional authority. This point arises from the fact that there is no provision in the Agreement of August 10, 1922, which limits or prohibits that right. The Commission was established by that Agreement without limitation or condition as to its authority to carry out the duties assigned to it, except the conditions which were embodied in the provisions quoted at the outset of this discussion. In none of those provisions will be found any condition or even a suggestion that the method and procedure, or the basis of judgment, to be adopted by the Commission in performing its duties did not rest wholly in its own discretion. It is true that the German Agent contends, as above indicated, that the stipulation in the Agreement as to the finality of the Commission's decisions precludes the reconsideration by the Commission of any decision rendered by it. In the opinion of the American Commissioner this stipulation is addressed to the two Governments, rather than to the Commission, and applies only to decisions which the Commission itself, after the exercise of its judicial and discretionary powers, regards as no longer subject to revision, or by reason of its final termination is no longer in a position to deal with. [1]

On the other hand, the rules adopted by the Commission pertain to remedies, rather than rights, and were addressed by the Commission to the Agents and claimants as an expression of its attitude on matters wholly within its jurisdictional powers. [2]

As showing the wide discretionary powers conferred upon the Commission, it will be noted that the members of the Commission were not required to take an oath of office, as usually is exacted in international arbitrations, that they would render their decisions in accordance with the principles of international law, or justice, or equity. It is true that treaty interpretation, rather than international law, ruled the greater part of the decisions of the Commission on the claims submitted, but the fact remains that the Commissioners were entrusted with the interpretation of the Treaty without any limitations whatsoever, and treaty interpretation involves many important questions of international law. The two Governments recognized that the Commission must necessarily be a law unto itself in this unexplored area, and relied wholly on the sound judgment and sense of justice of the Commissioners in establishing what might be called the " law of the Commission ".

In this respect the Commission is unique among international claims commissions, and, for that reason, must be regarded as standing in a class by itself. Arguments as to its powers drawn from the proceedings of other claims commissions differently conditioned and organized are of no value here, and those advanced by the Agent of Germany based on precedents found in the procedure of other commissions, accordingly, do not require consideration.

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[1] See footnote 5.

[2] As said in Administrative Decision No. V (printed Decisions and Opinions, pages 186-187):

" * * * The American nationals who acquired *rights* under this Treaty are without a *remedy* to enforce them save through the United States. As a part of the means of supplying that remedy this Commission was by Agreement created as the forum for determining the amount of Germany's obligations under the Treaty. That Agreement neither added to nor subtracted from the rights or the obligations fixed by the Treaty but clothed this Commission with jurisdiction over all claims based on such rights and obligations. The Treaty does not attempt to deal with rules of procedure or of practice or with the forum for determining or the remedy to be pursued in enforcing the rights and obligations arising therunder. * * * " (*Note by the Secretariat*, Vol. VII, p. 149.)

The American Commissioner finds, accordingly, that the Commission has, and was intended by the two Governments to have, extraordinary and extensive powers far beyond those specifically mentioned in the Agreement establishing it. These extraordinary powers are inherent in the entity thus established, and comprise any and all authority necessary and appropriate for carrying out its duties, and the Commission may determine in its own discretion the extent of these powers and how they shall be exercised, subject always to whatever limitation or control the two Governments may impose by joint agreement between themselves.

As yet, the two Governments have not agreed to any limitation of the Commission's power to reconsider decisions, but, on the contrary, have, through their official representatives before the Commission, affirmed that this question is a "justiciable question" within the jurisdiction of the Commission to determine for itself. In other words, it rests in the discretion of the Commission to decide whether or not any decision should be reconsidered on new evidence or argument submitted on a petition for rehearing, or on its own motion if it finds that it has been imposed upon.

The American Government has already expressed its opinion on this point through Secretary of State Stimson, who stated, in a letter to the Secretary of the Treasury dated February 16, 1933, "In my opinion, it is solely within the competency of the Commission to decide as to the reopening of cases which have been heard and adjudicated by it."

In conclusion, the American Commissioner is of the opinion that the rules announced in the Philadelphia-Girard National Bank case decision do not apply to the question under consideration, and also that, as already stated by the Commission, they, like any other rules adopted by the Commission, were subject to revision and were not irrevocable. Furthermore, it should be made clear that the Commission will consider new evidence in support of a rehearing petition showing misrepresentation or fraud as to the facts or the suppression of material evidence, or that the Commission has otherwise been imposed upon, or that new evidence not previously available has been discovered which would justify a different decision.

In such cases the Commission has the power, and will exercise it in its discretion, to reconsider a previous decision. This right to reconsider should be applied only to a limited and special class of cases. It may be noted, however, that the Commission, by its previous careful and well-considered action in dealing with matters entrusted to its discretion in these proceedings, has abundantly demonstrated that it will not abuse its discretionary powers in dealing with reopening petitions. It will be recalled that it has not as yet granted any such petition. It may also be noted that the American Agent has effectively cooperated with the Commission in its efforts to complete the work of the Commission as promptly as possible, by refusing, on his own responsibility, to present several hundred applications for rehearings which he considered were not well-founded.

The Commission cannot announce in advange any general rule as to how this right will be exercised because that would depend in each case on whether or not the facts presented satisfied the Commission that in its discretion the right should be exercised.

This procedure is consistent with the course hitherto followed by the Commission in dealing with rehearing petitions. Any other course would amount to criticism and repudiation of its previous action. Unless the Commission had the right to reconsider a decision, it was absolutely without justification for hearing two extensive and very expensive re-arguments in the sabotage cases, which have prolonged the life of the Commission for upwards of two

years, at considerable expense to both Governments and, incidentally, great additional expense to the American claimants in procuring the new evidence submitted. In the opinion of the American Commissioner the Commission would not, and should not, have adopted that course unless the Commission believed it is authorized to revise its decision in these cases if the new evidence and arguments presented justified that action.

Chandler P. ANDERSON
American Commissioner

Washington, June 21, 1933.

Opinion of the German Commissioner on the Question of Reopening

The question whether this Commission has the power to reopen a case has fully and thoroughly been dealt with by the two Agents in some of their briefs in the so-called sabotage cases and in the oral argument held in Boston July 30, August 1, 1931.

After carefully having examined the arguments proffered from both sides I wish to state my opinion as follows:

In dealing with the issue now before the Commission it must be kept in mind, that this Commission is an *International* Commission, an International Court. Therefore as to its rules undoubtedly no principles specifically American apply.

Even if from reasons unknown to me every court in the United States — Federal as well as State Court — would be considered as having the " inherent power " to reopen a case, such power would have no bearing whatever on the question whether an *international* Court would have the same right. There is no doubt that in Europe at least no continental Court of the leading nations and certainly no Court in Germany has such power except when and where it is transferred to it by a special legislative act or provision. But even as to the power said to be " inherent " in the courts of the United States, the convincing force of the argument offered by the American Agent is strangely weakened by an instance so much relied upon by himself: the instance has been taken from the law of California and the Report by the Law Enforcement Commission.

The reason that in the wellknown Mooney and Billing case the Californian Court declined a petition for reopening and that said Commission took exception to this result, was not because the Commission thought the Court had violated the law by denying its right to reopen, but because it thought the legislation of the State California *should have provided* for a law transferring such power to the court.

Hardly a better illustration of the nature of the American Agent's error can be found: the right to reopen is not a power inherent in the court, but a power inherent in the sovereignty *of a State* to establish such right and to authorise a court to do so under the conditions and modalities the sovereign thinks fit.

Without such authorization no court neither in the United States nor anywhere else has a right to reopen.

And no international court can claim such right but by the authority from those powers which called it into life.

Here again the American Agent erred when from the fact that some of the Mixed Tribunals created by the Treaty of Versailles have provisions dealing with a possibility to reopen he concluded that such power must have been inherent in those courts, and he committed a further error when he reached the conclusion that *therefore* such power was also vested in this Commission.

The German Agent has already pointed out, that those tribunals had especially *transferred* to them the *power* to make their own rules by the Treaty of

Versailles and that under the authority of the power thus transferred the court by *unanimous* decision adopted such rules which thereupon *were approved* by the Powers concerned and published in the official Journals destined to promulgate the legislative acts of said Powers.

Moreover the instances as cited by the American Agent show that the courts considered it necessary to make a special provision in order to establish the right of reopening and that f.i. the Anglo-German Tribunal, making such provision in the year 1925, was far from making it retroactive, thus clearly showing that it did not consider such right to reopen as an inherent right applicable therefore to all cases brought before it, but as a right which could only be brought into effect by a specific provision (under the authority of the provisions of the Treaty of Versailles) and which therefore could be applied only to cases not yet decided by the tribunal and therefore *not* being " *res judicatae* ". Moreover a more thorough examination of the nature of the alleged " inherent power " of a court and especially of this Commission will show that the question so generally formulated and so broadly dealt with by the American Agent comprises a rather considerable number of " sub-questions " — which it will be necessary to examine separately.

1. The theory of an " inherent power " of a court to reopen a case is not borne out by the instances offered by the American Agent even as far as American domestic courts are concerned. As already pointed out, courts are *created*. Created by an act of legislation, deriving their authority from the sovereign power of a nation, represented in a written or unwritten constitution. Thus it is a *derivative* power exclusively depending on the volition and intention of its sovereign.

To show that a court has a certain power means therefore the obligation to show that such power was transferred to it (thus f.i. power and scope of its jurisdiction etc.). Such transfer could be made either by the act creating the courts, transferring thereby a specific right to a court as such or by a special act of legislation.

In either case it needs a specific provision. Therefore it would need a clear and unambiguous proof that a right, as f.i. a right to reopen, had been transferred to it. But this is exactly the opposite to what the American Agent considers to be an " inherent " power of a court.

Obviously the legislative policy as to the scope of the powers to be transferred to a court will vary in several nations and actually differ very much. No reason whatever therefore exists to conclude from the fact that one state provides by its legislation for a reopening measure, that *therefore* other nations did the same.

Moreover even if two nations should have made similar provisions in that regard for their domestic courts that would never justify the conclusion that *therefore* an international court created by those two nations must necessarily have the same power. Here again it needs a specific creative act, to wit the clear and unambiguous volition and intention of the two sovereign Powers concerned to vest in an international court created by them such power.

No argument is necessary to state that in the Agreement of August 1922 no provision exists authorising the Commission to reopen a case. Yet the Agreement of August 1922 is the only charter of this Commission as to its rights to proceed.

The right to reopen is therefore not transferred upon this Commission. (This does not mean that the Commission or the *two national* Commissioners might not *unanimously* agree to *correct* a decision, as I will discuss under No. 7.)

2. But even if the authority to reopen would have been transferred to the Commission it still would be within the volition of the Commission whether it would be willing to *use* such authority or not.

In that case the Commission had to say so, which means that it had to make the right to reopen a specific part of its rules.

But no such provision has been made.

Instead the Commission has already and unambiguously expressed its will to the contrary.

It has done so in its decision on the Petition to Reconsider an Award in the case United States of America on behalf of Philadelphia-Girard National Bank, Claimant *v.* Germany and Direktion der Diskonto-Gesellschaft, Impleaded. Docket No. 7531, List No. 2729.

The Decision reads as follows:

" In this case a final award was entered by the Commission on April 3, 1929. A Petition for the Reconsideration of this award, signed by the claimant and presented through its attorneys to the American Agent, has been submitted to the Commission together with certain additional evidence and a printed Memorandum in support thereof, dated August 7, 1929, and prepared by the private counsel for the claimant.

" Although the rules of this Commission, *conforming to the practice of international Commissions*, make no provision for a rehearing in any case in which a final decree has been made, this Petition and the supporting Memorandum and evidence have been carefully considered by the Commission.

" Before taking up the questions raised by this Petition, the Commission desires to announce certain principles having general application to petitions and requests for rehearings as to the claims originally listed, by which the Commission will be guided in dealing with this and other similar applications.

" Where it appears that manifestly the Commission committed an *error* in its findings of fact on the evidence produced by the Agents *at the time the claim was submitted for decision,* or in applying the principles of law and the rules of the Commission as established and applied in its previous decisions, the Commission will take under consideration the question of reopening or changing the award.

" On the other hand, where a rehearing is demanded merely on the ground that by reason of newly submitted evidence the underlying facts were different from those appearing in the record as submitted at the time of the decision, the Commission *will not grant a reopening or a reconsideration of the award.*

" The reconsideration of a claim after a final decision has been rendered would mean that the whole case would have to be dealt with anew. The new evidence submitted would have to be brought to the attention of the opposing party, which would have to be given a reasonable time to investigate and file additional or rebuttal evidence on its side, and also an amended answer or a reply, if that was found to be necessary, and then the whole case would have to be reexamined and decided again. All of these consequences would result from the failure or neglect of the moving party to produce the additional evidence before the claim was originally submitted for the decision of the Commission.

" Moreover, if the production of new evidence by a party would give the right to have the whole case reopened, such right would necessarily attach not only to every claimant whose claim had been submitted and decided, but also to the respondent in each case as well.

" If such a right were granted and exercised at this advanced stage of the proceedings of the Commission, it would affect awards which have already been paid, and, apart from the confusion resulting from such procedure, it would be clearly contrary to the express wording and manifest purpose of the Agreement of August 10, 1922, between the United States and Germany. According to that Agreement the decisions of the Commission are accepted *as final and binding upon both Governments*, and, inasmuch as the governments are primarily the parties in interest, the private claimant, on whose behalf the Government of the United States has finally submitted a claim for decision, cannot be given the right to alter

or nullify this situation by producing new evidence changing the status of the claim as submitted and decided.

" It is also pertinent to consider that most of the applications which have been made for rehearing have arisen in cases in which the Commission has pointed out wherein the claimant has failed to furnish evidence sufficient to establish the liability of Germany under the Treaty of Berlin, as interpreted by this Commission, and to grant a rehearing in those cases would mean a great injustice to the great majority of the claimants whose claims were dismissed by the Commission without indicating wherein the evidence submitted was insufficient, and, who, therefore, have been unable to discover new points of attack. *It may also be noted that in no case, as yet, has the Commission granted an application to reopen a claim in which a final decision has been rendered.*

" The Commission will not consider questions of law, which have been settled in its earlier decisions, as to the jurisdiction of the Commission and the liability of Germany, under the Treaty of Berlin and the Agreements of August 10, 1922, and December 31, 1928, between the United States and Germany, as interpreted by this Commission.

" The law of the Commission, as established in its earlier decisions, will control the decisions of the Commission in all later cases." (All italics mine.)

This decision plainly shows that the Commission had *never* the intention to apply a rule of reopening to its procedure.

3. Moreover it shows that the whole question of reopening is *res judicata*; it has already been passed upon by the Commission and is " final and binding ".

4. But even assuming for a moment and for argument's sake that the Commission had the power to reopen and were now willing to use it, yet it never would be authorized to make such rule *retroactive.*

If there exist principles of a legal nature common to all or the larger part of civilized nations, they are that a law or a rule must be clearly expressed to make it applicable and that no law whatsoever shall be retroactive except when especially made so by the act creating said law.

Now, here again it needs no argument, that this Commission has no power transferred upon it to make rules retroactive.

Therefore even if this Commission had the power to provide for a reopening it could not reopen a case but after having made a special rule providing for such right and moreover it could not make such rule retroactive.

5. Thus the Commission would have no power to reopen, let alone a power to retroactively provide for a reopening even if the Agreement of August 10, 1922 would be silent as to the legal effect of the Commission's decisions.

But the Agreement is far from such silence. Instead it expressly states in a formal and solemn way that " the decisions of the Commission shall be accepted as *final* and *binding* upon the two Governments " (italics mine). If language can be clear and unambiguous, this language is.

Moreover we know that from the very beginning both Governments were anxious to expedite the Commission's work as much as possible. At the same time therefore, when they made the Agreement of August 10, 1922, they further agreed to limit the time for filing claims with the Commission to a rather short period thus clearly indicating what their conception of the Commission's task was.

6. As I tried to show, under the principles controlling the procedure of this Commission even an unanimous decision be it of the two Commissioners alone or be it of the two *and* the Umpire cannot establish a right to reopen.

But assuming for argument's sake that the Commission by an unanimous vote would have the authority to provide for a rule to reopen a case, such authority would not meet the question, whether such rule could be established

by majority vote or — what comes to the same — by the Umpire alone if the two national Commissioners disagree.

Theoretically the only possibility would be that under Article II of the Agreement the Umpire were called upon to decide the issue.

But this would not only mean that the Umpire had to pass upon the principal question of the " inherent power " of the Commission as well as of its retroactive effect. Beyond that it would mean that assuming that on those two questions his findings would be in favor of the American Agent he had to pass on all cases reopened, whenever the national Commissioners disagree.

Thus by the simple means of producing " new evidence " a case already decided by the national Commissioners could be brought before the Umpire.

Now under the Agreement wherever the two national Commissioners agreed upon a decision the Umpire has no jurisdiction, and actually in innumerable and important cases the Commissioners have agreed on awards without the cooperation of the Umpire though in many cases from sound and good reasons he has been sitting with the Commissioners — if for no other reason, yet for the purpose of expediting the work and of avoiding in cases where the Commission ordered an oral argument, an unnecessary duplication of the argument should the national Commissioners disagree.

Now under the American Agent's theory the right to reopen a case — or even to reopen a decision denying a reopening — is inherent in any case and numerous are the instances where he has attempted to exert this " right ".

Consequently even in those cases in the decision of which the Umpire has not participated, the question whether a petition for reopening should be allowed would have to be decided by him wherever the two national Commissioners should disagree on that question.

That would mean that the Umpire had to examine and consider the " new evidence " adduced or the argument made in support of a petition for reopening even in such cases wholly unknown to him (and those are by far the majority) in the adjudication of which he did not participate and in which he might differ from the findings of the two national Commissioners be it with regard to the legal or to the factual basis as presented at the time of the decision though such basis is also binding upon him under the provisions of the Agreement.

From a logical point of view there is no reason why the Umpire if he has a right to consider a case on the ground of facts newly submitted should not have the same right on the ground of a legal argument newly presented.

Thus he could change the Commission's rules.

And he could even do so in cases where the Umpire acting at the time of the decision had concurred in such decision.

Since in consequence of death the Umpire has changed several times during the work of the Commission and since the present Umpire has not taken office but after almost all cases had been decided, this would mean that a new man, wholly unfamiliar with the motifs and considerations which guided the former Umpire in joining the Commission's decisions would have to answer the question whether the so asserted " new evidence " be of such kind that if produced at a time prior to the decision it would have influenced and modified it.

To point out these consequences is to prove the utter impossibility.

Moreover such procedure would mean that in cases passed upon by both Commissioners — and therefore " *final and binding* " upon the two Governments — the case could be brought anew to a trial by the simple means of a petition of reopening, if such petition could be brought to the cognizance of the Umpire in case of a disagreement of the Commissioners and if then the Umpire should allow such petition.

Thus the question of the right to reopen a case already decided by the concurrence of the two Commissioners involves also the " subquestion " whether in case of dissens of the two Commissioners on the reopening question the Umpire by *his sole authority* can have the power to pass on the merits of such case and eventually to reopen it.

That this cannot be the meaning of the Agreement seems to me undeniable.

7. It is hardly necessary to explain here that the Commission's practice to alter a decision wherever it found that an error in its findings of fact *on the evidence produced* at the *time the claim was submitted* or in applying the principles of law and the rules of the Commission had influenced the decision, has nothing whatever to do with the question of reopening on the ground of *new evidence*. In pursuance of this practice the Commissioners have acted *unanimously*. Moreover they left the *basis* of their decision to wit the facts as produced and the law and rules applicable thereto *unchanged* and merely were willing to correct their *conclusions* derived therefrom.

I more than doubt whether the Agents be it by mutual consent be it on their separate volition had ever a *right* to ask for such alteration. But certainly it was practical and sound that the *Commission* adopted this procedure. And it is significant that actually the Commission never changed a decision except with the consent not only of both Commissioners but also of both Agents.

8. This leads to the question also ignored in the argument by the American Agent whether under the assumption that the Commission as such could reopen a case because of new evidence, such power would be vested in it even if not only one of the Commissioners *but also* one of the *Agents* would oppose such measure.

That such *ex parte* measure would not only be outside of the provisions of the Agreement but also outside of any law be it national be it international, is so manifest that no further reasoning is necessary to refute it.

In my mind all these reasons stand so obviously *against* not only the right of the Commission to reopen a case but also against the right of the Umpire to reopen on his sole authority a case already decided by the two Commissioners that according to my opinion the petition of the American Agent must be denied.

Hamburg, 6 Mai, 1933. W. KIESSELBACH

The undersigned, accordingly, certifies to the Umpire of the Commission for decision the questions of difference between the national Commissioners arising out of the pending petition in the sabotage cases, and as shown by this certificate of disagreement and by the respective opinions, above set forth, with reference to that petition.

Done at Washington, October 21, 1933. Chandler P. ANDERSON
American Commissioner

Washington, D.C., November 22, 1933

The Honorable Owen J. Roberts,
Justice,
Supreme Court of the United States,
Umpire, German American Mixed Claims Commission,
Washington, D.C.

Sir:

In accordance with your statement at the close of the meeting of the Commission October 31, 1933, which was recorded in the minutes as follows:

" it is understood that it is the position of the German Agent that he is not authorized to take any part in this proceeding, and the Umpire further stated that the Umpire will be entirely willing to receive any observations or representations the German Agent may wish to make in the pending matter and he is willing to receive such as in the nature of a special appearance as not conceding anything and without prejudice to the position of the German Agent's Government before the Commission,"

I have the honor to submit to you herewith certain observations of Dr. Wilhelm Kiesselbach, the German Commissioner, which were sent me by cable through the intermediary of the German Foreign Office.

Believe me,

Yours very sincerely,

Dr. Joh. G. LOHMANN
German Agent

[Additional Opinion of German Commissioner.]

I wish to add to my opinion of May 6, 1933 the following:

From the very beginning my view has been that a distinction must be made between a court on which the power to reopen has been conferred and a court which has no such power.

In the first alternative the court would in its discretion have authority to reopen a case even if one of the parties concerned objects.

In the second alternative the court has no right whatever to reopen if one of the parties objects.

The agreement of August 10th, 1922, does not confer such authority upon the Commission. On the contrary, from the clear and unambiguous wording of Art. 6, paragraph 3 it appears that the *decisions* (not the decision) of the commission shall be final and binding upon the two Governments. If nevertheless a petition for reopening is filed the Commission is bound to pass upon it, but to deny it, if and as far as one Government opposes it.

Already in July 1928 I have stated this opinion of mine in a memorandum[a] to the other members of the Commission in connection with a petition for rehearing. So far my memorandum reads as follows:

" Under our charting an award is binding upon both Governments. Only when the Commissioners disagree the Umpire comes into action. But here both Commissioners have agreed upon the award and the Umpire, though having joined the Commissioners' decision, has not acquired jurisdiction. It is therefore to the Commissioners, and to the Commissioners only, to pass upon the motion of a second rehearing. Whether they can grant such motion by mutual consent is — under the provision of the August Agreement — a very close question. But it seems clear to me that not one of them can do so against the protest of the other. And it seems further to be clear that in case of such a dissense the lack of the right of a single Commissioner to grant a rehearing cannot be supplemented by transferring this question to the jurisdiction of the Umpire's."

I have no doubt that this is also the view of my Government as clearly stated in the letter of the Embassy of October 11th and as I know for certain, this was also in the mind of the German Agent when answering the Umpire's question in the last Washington argument. And the same view was taken by me with regard to the Umpire's decision of December 3, 1932, which did not imply a decision on the question of reopening.

From the foregoing it clearly appears that at least from my viewpoint the rules of the Commission do not imply the Commission's authority to reconsider

[a] No such memorandum in the records of Commission, see pp. 1111 *et seq.* (*Note by the Secretariat*, this volume, pp. 179 *et seq.*)

a case. On the contrary I never left any doubt that I thought a reopening impossible against an objection from one side. It was for this reason that I relied on the principal statement of the Commission's decision denying a petition for reopening as recited by the American Commissioner in his opinion Page 7 [p. 1090, this print],[a] saying that the rules of this Commission conforming to the practice of International Commissions make no provision for a rehearing. A statement which seemed to me the more clear and unambiguous as it referred to the practice of international Commissions that is to the side of the principle of the question.

If nevertheless the Commission dealt with the merits of the case that was done, as I understood it, in order to soothe the feelings of the parties concerned.

This is what I have to add to my opinion dealing with the question of the power of this Commission to reopen a case. It is unnecessary to say that my argument is still stronger if we have to deal, as is the case here, with the question of reopening a case dismissed not by one but by two decisions rendered on it.

KIESSELBACH

Supplemental Opinion by the American Commissioner

In the proceedings now pending before the Umpire on the question of the jurisdiction of the Commission to reconsider its decisions in the so-called sabotage cases, each of the national Commissioners has filed his opinion in support of their respective contentions as to the questions in disagreement, and the German Commissioner has now filed with the Umpire, on November 22, 1933, an additional opinion in reply to the original opinion filed by the American Commissioner.

In reply to this additional opinion, the present memorandum by the American Commissioner is now filed with the Umpire as a supplemental opinion.

The German Commissioner states at the outset of his additional opinion that it is an addition to his opinion of May 6, 1933, already filed with the Umpire. At the time the German Commissioner's original opinion was filed, he stated in his letter of May 5, 1933, to the American Commissioner (see minutes of meeting of October 31, 1933 [1] that he was under instructions from his Government " to bring now the question whether or not our Commission has the right to reopen, to a final decision ". He, therefore, inclosed a copy of his opinion, but reserved the right to amend and supplement it if the American Commissioner should prepare an opinion in disagreement, and he suggested, " in order to expedite the matter ", that such opinion should be sent to him by the American Commissioner with a Certificate of Disagreement, to be signed and returned by the German Commissioner together with his final opinion.

This proposed procedure has since been carried out, and now that the German Commissioner's opinion is in final form, as supplemented by the recent addition thereto, and the American Commissioner does hereby file his supplemental opinion in reply, in accordance with the reservation noted by him, the questions at issue between the two national Commissioners are now finally before the Umpire with authority to render the decision of the Commission thereon.

Inasmuch as the German Commissioner's additional opinion now under consideration is, as above noted, merely an addition to his original opinion, its purpose must be understood to be the same as that of the original opinion, which, as above stated, was to bring " to a final decision the fundamental

[a] *Note by the Secretariat*, this volume, pp. 164-165.

[1] See Appendix. (*Note by the Secretariat*, this volume, Appendix IV (A), p. 483.)

question of whether or not our Commission has the right to reopen a final decision ".

Nevertheless, some confusion results from the position now taken by the German Commissioner in his additional opinion, to the effect that the Commission has not the right either through the national Commissioners, or, in case of their disagreement, through the Umpire, to determine its own jurisdiction on the questions presented, thus, apparently, abandoning his original position. In short, he wants the judgment of the German Government substituted for the judgment of the Commission on the question of its jurisdictional authority, and on this point the two Governments are in disagreement.

The German Commissioner frankly admits, although denying any authority to reopen, that " If, nevertheless, a petition for reopening is filed, the Commission is bound to pass upon it, but to deny it, if and so far as one Government opposes it ".

The only explanation which he gives of the uniform practice of the Commission in considering the merits of a case presented on a petition to reopen is that this was done " in order to soothe the feelings of the parties concerned ".

This idea of *soothing the feelings of the parties* does not appeal to the American Commissioner as a sufficient or even admissible basis for giving serious consideration to a reopening petition if in any event the Commission was bound to reject it. It is rather grotesque to suppose that if the Commission considered from the outset that it was without jurisdiction to reopen the sabotage decision, the feelings of the claimants would be soothed by being permitted and even encouraged to spend upwards of two years and many thousands of dollars in presenting evidence and arguments in support of their petition. Furthermore, the American Commissioner considers that this suggestion is a very serious reflection on the good faith and good sense of the Commission, and he rejects it as utterly without foundation so far as he is concerned.

Whatever may be the view of the German Government on this point, the American Commissioner has no hesitation in saying that so far as his Government is concerned he is confident that an expenditure of time and money " to soothe the feelings " of the claimants by a futile gesture would be characterized as an unwarranted and inexcusable extension of the scope of its functions and duties.

At the meeting of the Commission in Washington last November this very point was raised by the American Agent in his oral argument. He then said (Printed Record, Oral Arguments, page 243):

" There is a question which arises at the very threshold of these proceedings, and that is the jurisdictional question.

" The German Agent opened his remarks by reading a statement; I am not certain whether it is intended as an argument or a protest on the part of Germany to this Commission considering the jurisdictional question. I thoroughly understand his position, that he does not want to be considered as having waived the jurisdictional question by discussing the evidence. But as I listened to the reading of that document it occurred to me that perhaps there was more than that intended by that document.

" I am not sure what the attitude of Germany may be in reference to the jurisdictional question. I am not certain whether it is the attitude of Germany that it will not submit to this Commission jurisdictional questions for its consideration and determination. If that be the attitude of Germany, I think we should know it at the very beginning. I think we should have known it a year and a half ago. If that be the attitude of Germany, then all that has occurred during the past year and a half has been useless. If Germany takes the position that this Commission has no right to consider and determine the jurisdictional question, then this whole proceeding for the past year and a half has been little less than a farce.

" If on the consideration and determination by the Commission of the evidence which has been submitted for a reconsideration of the decision of the Commission on October 16, 1930, the Commission should upon such determination decide that Germany is liable for both of these destructions, then, if Germany were to take the attitude that the decision of the Commission would not be binding on Germany, it means that Germany is simply submitting its evidence and considering these cases at the present time, but reserving to the end the position which the German Agent announced as the position of Germany, that this Commission has no jurisdiction or power to consider the question as to the right to reopen the case. I can hardly conceive that that is possible, and yet that may be what was intended by reading that protest at the very beginning of the argument."

Then follows the dialogue between the Umpire and the German Agent, quoted in the American Commissioner's original opinion, containing the explicit admission by the German Agent that the question of the Commission's jurisdiction is a justiciable question to be submitted to the Commission for decision.

The German Commissioner asserts that long before the question of reopening the sabotage decision arose he was on record as denying the authority of the Commission to reconsider a decision. The original decision in those cases was rendered in October, 1930, but he says, " Already in July, 1928, I have stated this opinion of mine in a memorandum to the other members of the Commission in connection with a petition for rehearing."

It may be noted in passing, although it is not regarded as of importance in the present discussion, that so far as the records of the American Commissioner, or of the then Umpire disclose, no copy of or reference to the memorandum mentioned can be found. The records show that the German Commissioner was in Hamburg at the date of that memorandum, so it could have been communicated to the other members of the Commission only by mail or cable, but the records of the American Commissioner show that only three letters passed between him and the German Commissioner during the Summer of 1928, and they were all of a distinctly personal nature. Moreover, it has not been possible to identify the case to which the memorandum referred. The only case which seems to resemble it is the Frank case, Docket No. 8130, in which an interlocutory award was made on March 13, 1928, and an order denying a motion to reopen was entered June 14, 1928, and a final award was entered January 31, 1929. But the Umpire did not participate in entering either the order or the award in that case, so that the question of the participation by the Umpire discussed in the 1928 Memorandum was not presented in that case. In response to a cabled inquiry, a cable has just been received from the German Commissioner, dated November 25, 1933, in which he says:

" Cannot remember name of case not does my copy show it but memorandum deals with estate case in which we had oral argument and rendered decision with reasons on question of obligation to distribute. Bonynge was very insistent therefore I thought it important and wrote memorandum for you and Parker. (Signed) Kiesselbach."

In any event, it is clear from the recorded decisions of the Commission that no decision in accordance with the views expressed by the German Commissioner in the Memorandum of July, 1928, was ever rendered by the Commission. At that time no case was pending presenting for decision the questions therein discussed. The sabotage re-argument petitions were not filed until January, 1931, and it has been stated over and over, with the concurrence of all concerned, that the Commission has never rendered a decision on the jurisdictional question mentioned, which has always been reserved for decision at the close of the reopening proceedings in the sabotage cases.

This memorandum of July, 1928, therefore, has not the importance of an expression of opinion by the Commission, although it is fully conceded to have all the importance to which an expression of opinion by the German Commissioner is entitled. That memorandum is to be considered, therefore, solely from that point of view.

As quoted in the German Commissioner's additional opinion, the memorandum under consideration reads as follows:

" Under our charting an award is binding upon both Governments. Only when the Commissioners disagree the Umpire comes into action. But here both the Commissioners have agreed upon the award, and the Umpire, though having joined the Commissioners' decision, has not acquired jurisdiction. It is therefore to the Commissioners, and to the Commissioners only, to pass upon the motion of a second rehearing. Whether they can grant such motion by mutual consent is — under the provision of the August Agreement — a very close question. But it seems clear to me that not one of them can do so against the protest of the other. And it seems further to be clear that in case of such a dissent the lack of the right of a single Commissioner to grant a rehearing cannot be supplemented by transferring this question to the jurisdiction of the Umpire."

The conclusion of the German Commissioner in this memorandum is threefold. First, he is not sure that the two national Commissioners by mutual consent can change an award. Nevertheless, the German Commissioner has joined with the American Commissioner in many cases in revising awards by mutual consent. Second, he says, " it seems clear to me that not one " of the Commissioners can grant such a motion against the protest of the other. With this conclusion the American Commissioner agrees. Finally, he says, " it seems further to be clear that in case of such a dissent the lack of the right of a single Commissioner to grant a rehearing cannot be supplemented by transferring this question to the jurisdiction of the Umpire ". With this conclusion the American Commissioner disagrees.

It seems to the American Commissioner that the German Commissioner's final conclusion destroys itself by going too far. It goes to the extent of nullifying the provision of the Agreement of August 10, 1922 (Article II), that the Umpire is authorized " to decide upon any cases concerning which the Commissioners may disagree, *or upon any points of difference that may arise in the course of their proceedings* ". The question discussed by the German Commissioner clearly involves a " point of difference " arising between the two national Commissioners in the course of their proceedings, and to deny the right of the Umpire to decide upon it is to deny a right expressly conferred upon him by the Agreement establishing the Commission.

The German Commissioner says in his additional opinion that he has no doubt that the view expressed in his above quoted memorandum of July, 1928, " is also the view of my Government as clearly stated in the letter of the Embassy of October 11, and as I know for certain, this was also in the mind of the German Agent when answering the Umpire's question in the last Washington argument ".

It must be noted that the view expressed in the 1928 memorandum dealt solely with the question of the authority of the national Commissioners to reopen by mutual consent a previous decision, or, failing that, the jurisdiction of the Umpire to act upon the questions presented by their disagreement. This was a distinctly different question from that raised by the German Embassy's letter of October 11th, which challenged the right of the Commission as a whole " to pass upon a difference of opinion which may exist between the two Governments in this connection ".

So, also, in saying that he knew for certain that the view expressed by him in his 1928 memorandum was also in the mind of the German Agent when answering the Umpire's question on the oral argument, he has not clearly distinguished in his own mind the question of the jurisdiction of the Commission on which the national Commissioners are in disagreement, and the question of disagreement between the two Governments as to the Commission's jurisdiction as a whole. The former issue was all that he was discussing in his 1928 memorandum, but the latter issue was distinctly presented in the question put to the German Agent by the Umpire on the last oral argument.

The Umpire then pointed out to the German Agent that the Commission understood that his position was that the Treaty (Agreement of August 10, 1922) should be construed as conferring no power upon the Commission to review the sabotage cases, but not that the Commission could not consider that question and determine its own jurisdiction under the Agreement. The German Agent replied that " The understanding of the Commission is entirely correct." The Umpire then added, " In other words that is a justiciable question? ", to which the German Agent answered, " Yes."

Therefore, even if the views expressed by the German Commissioner in his 1928 memorandum were in the mind of the German Agent when answering the Umpire's question, those views would not have affected his answer.

The American Commissioner also calls attention to the statement in the German Commissioner's additional opinion that " the Umpire's decision of December 3, 1932, did not imply a decision on the question of reopening ". The American Commissioner considers that the views expressed by the Umpire in that decision, as for instance, the conclusiveness of the Blue Book magazine message as decisive in favor of the claimants if authentic, distinctly imply that he was prepared to decide the petition in favor of the claimants if the facts satisfied him that he was justified in exercising a jurisdictional and discretionary authority to reopen the decision in those cases on the merits.

The other points raised by the German Commissioner's additional opinion have already been covered by the original opinion of the American Commissioner, and do not seem to call for any additional comment now.

It may be noted, however, that the German Commissioner contends that the recital by the Commission in its orders of dismissal that the rules of the Commission " conforming to the practice of international commissions make no provision for a rehearing " is an admission of lack of jurisdiction. This contention is met by the American Commissioner's statement in the original opinion that " the Commission cannot announce in advance any general rule as to how this right will be exercised because that would depend in each case on whether or not the facts presented satisfied the Commission that in its discretion the right should be exercised ".

In conclusion the American Commissioner considers that the original position taken by the German Government, through its Agent, in the oral argument, and by the German Commissioner in his letter of May 5th to the American Commissioner, that this jurisdictional question is one to be decided by the Commission, is the correct position. The new position now taken by the German Government that this jurisdictional question cannot be adjudicated by the Commission is not admissible. As stated by the American Commissioner at the last meeting of the Commission (minutes of meeting of October 31, 1933), " The American Commissioner regards this attitude of the German Government as an attempt to limit, without the consent of the Government of the United States, the jurisdiction conferred upon the Commission by the two Governments in their Agreement of August 10, 1922, in order to determine independently of the Commission, and upon political or other considerations,

questions submitted by virtue of that Agreement to the Commission for decision on purely legal grounds."

Done at Washington, this 27th day of November, 1933.

Chandler P. ANDERSON
American Commissioner

Decision of the Commission

The national Commissioners are in disagreement upon certain questions arising in these cases. These questions will best be understood by a brief statement concerning the history of the proceedings.

The memorials were filed by the American Agent in the Black Tom case on March 16, 1927, and in the Kingsland case on March 26, 1927. The answers of Germany were filed on December 14, 1927, and January 17, 1928, respectively. Both Governments assembled evidence before and after the filing of the memorials. With considerable further evidence presented after the premature argument of April 3-12, 1929, the cases of the respective Governments again appeared to be completed so that submission and oral argument could be had in April, 1930. It then developed that some evidence had recently been elicited on behalf of the United States which made it certain that both Governments would wish to file additional evidence, so the hearing was by agreement adjourned to September 18, 1930, and both Governments submitted their cases at The Hague September 18-30, 1930, on the record as then made. The Commission reached its decision dismissing both cases on October 16 and communicated it to the two Governments on November 13, 1930.

On January 12 and 22, 1931, the American Agent filed petitions for rehearing and reconsideration, which assigned as reasons for the requested action that the Commission had misapprehended the facts and committed errors of law. These petitions were considered and dismissed by the Commission in an opinion of March 30, 1931. On the same date the Commission addressed a letter to the two Agents in which it said:

" In the decision handed down today in the Sabotage Cases the Commission has decided the matter of rehearings in these cases so far as the rehearing petitions therein are based on allegations of obvious error. This decision is related to the record as it stood when the cases were decided, and the decision reserves the question of the proposed admission of new evidence, which is a separate question.

" The Commission asks me to advise you that it desires the two Agents, without waiting for the presentation of any additional new evidence, to submit briefs discussing, first, the jurisdictional considerations and legal principles which should govern the Commission's decision as to the admission of new evidence in these cases, and, second, what kind of new evidence, if any, should be admitted.

" The Commission in this connection points out that the two Agents have already presented some argument on the question of new evidence and each Agent has based his argument in part on the decision of the Commission in the Philadelphia-Girard National Bank case. To avoid further discussion as to the proper interpretation of the language used by the Commission in that case we think it best to advise you that the National Commissioners are agreed that it was the intention of the Commission in that decision to rule against the introduction of further evidence of any kind after the evidence had once been closed and a decision promulgated. This ruling is not irrevocable, but it is desirable that argument addressed to the question should be devoted not to the interpretation of that language but to the principle itself. The Commission has not seen the new evidence offered by the American Agent in the Sabotage Cases, but the descriptions of this evidence in his motions filed March 5 and 11, 1931, give the impression that the evidence offered is not new and is not of the character which courts admit after a decision is once made in cases where, after a decision, they admit any new evidence.

" The Commission accordingly requests that the Agents file their briefs on the points above mentioned within two weeks, with leave to each Agent to file a reply brief within one week after the receipt of the other Agent's brief."

Pursuant to this letter briefs on the question of the Commission's power to reopen and rehear were filed April 27, 1931. Reply briefs were not filed, for reasons not necessary to state here. On July 1, 1931, the American Agent presented a supplementary petition for rehearing covering both cases, on the ground of newly-discovered evidence, and in it set forth that he had procured much additional evidence, some of which had been filed and the balance of which was being filed with the petition. The German Agent offered no evidence (he tendered none from the time of The Hague argument until January 9, 1932). A hearing was had at Boston July 30 - August 1, 1931. The Commission did not pass upon its power to reopen and rehear the cases at that time, but reserved that question until it should have opportunity to examine the new evidence filed. The Commission then stated that perhaps it would need the assistance of an impartial expert to be retained by it to assist it in appraising certain of the documentary evidence filed by the American Agent. This matter was under advisement for some time, and on October 14, 1931, the Umpire, with the concurrence of the Commissioners, forwarded a joint letter to the two Agents stating as follows:

" It has proved impossible to carry out the American Agent's suggestion that Mr. Osborn be employed by the Commission. Mr. Osborn himself is unwilling; the American Agent now objects; the German Agent's consent is subject to restrictions, and the Commission could not accept restrictions. The Commission has now decided not to make further search for a satisfactory expert. In view of Mr. Osborn's standing in his profession, we would welcome the presentation of his testimony if the German Agent himself desires to offer it. The Commission still reserves its decision as to its right to admit new evidence in these cases."

Pursuant to this letter the German Agent on January 9, 1932, filed an affidavit by A. S. Osborn with certain annexes and over a period from January 9 to August 15-29, 1932, filed additional annexes to Osborn's affidavit.

The present Umpire was appointed to fill the vacancy, caused by Mr. Boyden's death, on March 24, 1932, and on April 8, 1932, a session of the Commission was held in order to bring the matter to a head and end the existing confusion. Pursuant to the agreement of the two national Agents an order was entered to the effect that the American Agent should conclude the filing of his evidence in support of his supplementary petition on or before June 1, 1932, and the German Agent file any evidence he cared to present in reply on or before August 15, that briefs should be exchanged and filed on or before September 15, and that the matter should be argued beginning November 1, 1932. The American Agent reserved no right to file reply evidence to that presented by the German Agent but he did assemble reply evidence, and, in order to give him additional time for its presentation, he was allowed until November 15 and the hearing was adjourned to November 21. Permission was also given to both Agents to file briefs not later than the close of the argument. It will be observed that during the entire period from March 30, 1931, to November 21, 1932, what had occurred was subject to the decision of the question of the Commission's jurisdiction to reopen the cases.

By mutual consent the hearing of November 21-25, 1932, was without prejudice to Germany's objection to the Commission's jurisdiction, all agreeing that if the new evidence filed would not change the result reached in the decision of October 16, 1930, the jurisdictional question need not be answered. The national Commissioners disagreed as to the effect of the new evidence, and the question of its effect therefore came to the Umpire for decision. He rendered

the decision of the Commission of December 3, 1932, holding the new evidence not sufficient to change the original findings and dismissing the petitions for rehearing.

The matter had gotten into such shape that the method of procedure adopted seemed the only practicable one. It was at best an unsatisfactory method, and — without meaning any criticism of anyone — I am convinced, as the matter is now viewed in retrospect, it would have been fairer to both the parties definitely to pass in the first instance upon the question of the Commission's power to entertain the supplementary petition for rehearing, as requested on May 27, 1931, by the American Agent. The reception or rejection of the new evidence would have been a consequence of the decision of that question. As will be seen from the decision of December 3, 1932, Germany insisted upon its objection to the jurisdiction of the Commission to rehear, and the United States asserted that the Commission had such jurisdiction. The German Commissioner reserved the question in the certificate of disagreement upon which the Umpire's functioning was grounded.

On May 4, 1933, a single petition was filed by the American Agent (signed by four firms of private counsel for claimants and countersigned by the American Agent) for a rehearing of both cases, which averred (1) "That certain important witnesses for Germany, in affidavits filed in evidence by Germany, furnished fraudulent, incomplete, collusive and false evidence which misled the Commission and unfairly prejudiced the cases of the claimants", (2) "That there are certain witnesses within the territorial jurisdiction of the United States", some of whom are specifically named in the petition, "who have knowledge of facts and can give evidence adequate to convince the Commission of the liability of Germany for the destruction of the Black Tom Terminal and the Kingsland plant, but whose testimony cannot be obtained without authority to issue subpoenas and to subject such witnesses to penalties for failure to testify fully and truthfully", (3) that evidence can be produced "to show that the Commission has been misled by the German evidence", (4) "That there has also come to light evidence of collusion between certain German and American witnesses of a most serious nature to defeat these claims."

This petition was filed with the proper officers of the Commission, but no action has been taken upon it.

In May, 1933, the Umpire was apprised of the disagreement of the American and German Commissioners with respect to the power of the Commission to entertain the application. The German Commissioner by letter of May 5, 1933, addressed to the Umpire, enclosing a copy of his letter to the American Commissioner of even date and a copy of his opinion on the question of reopening, brought the situation to the attention of the Umpire. The German Commissioner's letter is as follows:

"Hamburg, May 5th, 1933

"My dear Mr. Justice,

"I beg to hand you herewith a copy of a letter I wrote to Mr. Anderson and also a copy of an opinion I wrote on the question whether or not our Commission has the right to reopen a case.

"Though from a strictly formal point of view you, as our Umpire, are not interested in the question but after it has been certified to you by the two National Commissioners, I feel it is my duty to keep you informed on what is going on, since I am afraid that Mr. Anderson and I might not agree on the issue.

"I remain, my dear Mr. Justice,

very sincerely yours,
(*Signed*) W. KIESSELBACH

"Mr. Justice Owen J. Roberts,
United States Supreme Court,
Washington D. C."

His letter to the American Commissioner appears in the minutes of the Commission's meeting of October 31, 1933,[1] and his opinion enclosed therewith and the American Commissioner's opinion are embodied in the American Commissioner's certificate of disagreement handed to the Umpire at that meeting. An additional opinion of the German Commissioner was filed on November 22 and a supplemental opinion of the American Commissioner on November 27.

The foregoing statement will serve to disclose the nature of the points upon which the Commissioners are in disagreement. A preliminary question of procedure arises which must also be decided. It may be stated as follows: May the Umpire, in the absence of a joint certificate submitting that question to the Umpire, decide a question as to which the two national Commissioners are in disagreement? If this preliminary question be answered in the affirmative, then two others of substance remain for decision, as follows:

Has the Commission the power to pass upon the extent of its own jurisdiction?

If it has, then does this jurisdiction extend to the reopening of a case, once decided, by reason of after-discovered evidence, or disclosure that testimony offered was fraudulent, or a showing of collusion between witnesses for the two Governments, and that, in consequence, the Commission was misled by the record as made at the time of its decision?

Orderly procedure would have required that these issues be decided by the Umpire before the filing of the tendered evidence, since the right to tender such evidence is involved in the decision. The American Agent has, as I am advised, filed a very large quantity of evidence, which, in view of the questions of power now mooted, I have thought it improper to examine or to treat as forming part of the record in the cases.

Addressing myself to the preliminary question of procedure, I conclude that the disagreement of the national Commissioners is before me in such manner as to make it my duty, under the Agreement of August 10, 1922, between the two Governments, to take cognizance of the disagreement and decide the questions involved. The Agreement provides, in Article II, " The two Governments shall by agreement select an umpire to decide upon any cases concerning which the commissioners may disagree, or upon any points of difference that may arise in the course of their proceedings." The duty of the Umpire under the plain terms of the document arises automatically upon a disagreement between the Commissioners and his being apprised thereof. Under the Agreement no formal act is required to bring into operation the authority thus vested in the Umpire. Rule VIII (*a*), entered February 14, 1924 (amending that rule as originally enacted on November 15, 1922), reads: " The two National Commissioners will certify in writing to the Umpire for decision (1) any case or cases concerning which the Commissioners may disagree, or (2) any point or points of difference that may arise in the course of their proceedings, accompanied or supplemented by any statement in writing which either of them may desire to make of his opinion with respect to the decision of the case or cases or point or points of difference certified." But rules adopted by the Commission as a matter of its own convenience and for the guidance of the national Agents can not contravene the explicit terms of the instrument which created the Commission. This brings me to the questions of substance.

May the Commission pass upon its own jurisdiction?

The Agreement of the two Governments created the Commission to deal with three classes of claims specified in Article I arising by reason of obligations undertaken by Germany under the Treaty of Berlin of August 25, 1921.

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[1] See Appendix. (*Note by the Secretariat*, this volume, Appendix IV (A), p. 483.)

While at the date of the execution of the Agreement, August 10, 1922, it was known that such claims would be numerous and amount in the total to a huge sum, the nature and the validity of the separate claims which might be submitted were unknown. It was for the purpose of passing upon these claims, both as to validity and amount, that the Commission was created. At the very threshold the tribunal might encounter in each case the question whether the claim presented fell within the categories of those to be adjudicated or was outside the scope of the Treaty and the Agreement. In this aspect the Commission was bound to determine its own jurisdiction, and for that purpose to interpret and apply the terms of the Agreement which created it.

A decision that it had jurisdiction of a claim was by the very terms of the Agreement to be accepted by both Governments as final and binding upon them (Article VI). The Agreement submits the questions for decision as between the two Governments to the Commission. What those questions are must be determined within the four corners of the instrument. It is not within the competency of either Government to retract the authority which it conferred upon the Commission. If that body may not from the terms of the Agreement ascertain what power was conferred, it would be wholly incompetent to act except in an advisory capacity, and none of its decisions could in the nature of the case be accepted as final and binding by the Governments, as the Agreement states they shall be. How the Commission shall proceed with its task, the form of pleading to be adopted, the manner of hearing (subject to what is hereafter stated in respect of Article VI), the form and entry of its decisions, its control over a case after a decision is rendered, are all left to its determination and regulation.

The Agreement is to be read in the light of its language and its purpose; and where it is silent, the powers and duties of the Commission are to be determined according to the nature of the function entrusted to it. I have no doubt that the Commission is competent to determine its own jurisdiction by the interpretation of the Agreement creating it. Any other view would lead to the most absurd results — results which obviously the two Governments did not intend.

This brings me to the second question of substance.

Has the Commission the power to reopen a case upon the showing made by the pending petition?

The answer to this question must also be found in the terms of the Agreement creating the Commission. On the one hand it is pointed out that the preamble refers to the desire of the parties that the " amount to be paid by Germany in satisfaction of Germany's financial obligations * * *" be determined. The fact that " amount " is singular rather than plural and while various claims of American citizens and the Government are involved, in the ultimate Germany is to pay a total ascertained by the addition of all the claims allowed, is said to make the Commission the arbiter of a single suit or action consisting of thousands of counts, each count representing the claim of an American national or of the Government of the United States. It is insisted that the Commission is limited by a few covenants, rules, or directions to be found in the Agreement, that it may proceed practically as it sees fit to accomplish the task committed to it, that its only concern is justice and equity as between the Nations signatory to the Agreement, and that if in justice and equity it should rehear a case nothing in the Agreement or in the constitution of the Commission stands in the way. The argument is that in effect the tribunal sits without terms or sessions as a continuing tribunal, trying a single case, and its doors are never closed to the litigants before it until it shall have completed this task and formally disbanded.

On the other hand it is contended that each of the claims presented constitutes a case within the meaning of the Agreement; that each is initiated by a petition or memorial to which an answer is filed, thus making up an issue for trial; that it was intended, when the Commission reached a decision in any such case, the decision should be final and binding upon the parties; that the Commission is without power, once it has rendered its decision in a case, to reopen or rehear it for any reason.

I think these positions are both extreme and that neither represents the true construction of the Agreement or an accurate definition of the Commission's powers.

I am not persuaded that the use of the word " amount " in the preamble makes the Commission a tribunal to try a single action divided into counts. There is much to indicate that, while the total of the awards is to be taken to make up the amount due by Germany, the claims presented are to be treated as individual cases. Thus in Article II, where reference is made to the selection of the Umpire, his function is amongst other things specified as " to decide upon *any cases* concerning which the commissioners may disagree, * * * ". And cases are in this sentence distinguished from questions. Article IV provides that " The commissioners shall keep an accurate record of the questions *and cases* submitted * * * ". The uniform practice of the Commission indicates this understanding of its function, for each claim has been treated as initiating a separate case and has eventuated in a separate decision (a decision of it as a separate case: even though as a convenience the Commission in one document frequently dismissed a number of claims and less frequently rendered awards in a number of cases, each received the same treatment as if the decision thereof had been expressed in a record devoted to it alone). On the part of the United States this method of dealing with the claims has been recognized in the Settlement of War Claims Act of 1928 where provision is made for the certification to the Treasury of the awards of the Commission as they are made upon individual claims.

My view is that the Commission is a tribunal sitting continuously with all the attributes and functions of a continuing tribunal until its work shall have been closed; and that as such tribunal it is engaged in the trial and adjudication of a large number of separate and individual cases.

The German Government would have me draw from these premises the ultimate conclusion that the Commission is without power to reopen any case in which it has made a decision, and in support of this view refers to the last paragraph of Article VI, which provides " The decisions of the commission and those of the umpire (in case there may be any) *shall be accepted* as final and binding upon the two Governments." This paragraph, in my judgment, furnishes no aid to the German argument. It is a covenant as between the two Nations binding each of them with respect to any decisions which may be made. But it is to be observed that neither this paragraph nor any other provision of the Agreement purports to define what is or what shall be considered a " decision of the commission ". It is left to the Commission to determine when its decision upon any claim is final. It has no concern with the action taken in consequence of its awards. It is a matter for the two sovereigns to carry out their agreement that they shall accept the decisions as final and binding. If a decision should be revised by the Commission as a result of a rehearing and a new decision reached in a particular case, the Commission would have no concern with the adjustment of the settlement consequent upon its action. A court may often render a judgment which, by reason of what has occured, it is not possible to execute in accordance with its terms, but the mere fact that the judgment may be incapable of execution

in part or in whole in no way alters the jurisdiction of the tribunal or indeed its duty to render such judgment as to justice and right may appertain.

With this preliminary general statement as to the jurisdiction of the Commission, I address myself to a determination of its power to reopen a case in which it has rendered a decision.

1. I think it clear that where the Commission has misinterpreted the evidence, or made a mistake in calculation, or where its decision does not follow its fact findings, or where in any other respect the decision does not comport with the record as made, or where the decision involves a material error of law, the Commission not only has power, but is under the duty, upon a proper showing, to reopen and correct a decision to accord with the facts and the applicable legal rules. My understanding is that the Commission has repeatedly done so where there was palpable error in its decisions. It is said on behalf of Germany that this has never been done except where the two Agents agreed that such course under the circumstances was proper. And the argument is drawn from this fact that the Commission is without power to take such action of its own motion or in the face of opposition by either Agent. I can not follow this argument.

If the Commission's decisions once made are final and the body wholly without power to reopen them, then a case once decided can only be reopened by a formal agreement of the two Governments amending the Agreement under which the Commission sits, for no additional power can be conferred upon the tribunal except by the parties who called it into being and gave whatever jurisdiction it originally possessed. If, therefore, a case may be reopened by consent, the same action may be taken without consent. The first petition for reopening and rehearing filed in these cases by the American Agent was based in grounds such as are above described. I have no doubt that the Commission had power to consider that petition and to deal with the case in the light of the matters it brought forward.

2. I come now to the question of jurisdiction to reopen for the presentation of what is usually known in judicial procedure as after-discovered evidence. I am of opinion that the Commission has no such power.

In cases where a retrial is granted or a reopening and rehearing indulged for the submission of so-called after-discovered evidence, this is usually by a court. It is to the interest of the public that litigation be terminated, and municipal tribunals have the power to set a case for trial and to compel the parties to proceed. While they will not compel a litigant to proceed without hearing his reasons for delay, neither party has a right to hold the case open until he feels that he has exhausted all possible means of obtaining evidence. If such right existed, courts would be unable to function. By analogy, if this Commission had the power to make an order to close the proofs in any case and compel the parties to proceed, either party who was not then ready, because it had not exhausted its sources of information and evidence, might well have an equity to ask a reopening that it might be permitted to offer evidence theretofore unavailable.

But the situation here is quite otherwise. Article VI, second paragraph, provides " The commission shall receive and consider all written statements or documents which may be presented to it by or on behalf of the respective Governments in support of or in answer to any claim." All must admit the parties intended the Commission should not sit indefinitely but should expeditiously complete its work. The Agreement provides that all claims to be considered must be brought to the Commission's attention within six months of its first session. But, on the other hand, no time limit whatever was set in

the original Agreement for the closing of proofs. In contradistinction, such a mandatory provision for closing proofs was embodied in the supplementary Agreement of December 31, 1928, as to claims embraced within the scope of that instrument.

The Commission has from its inception been sensible of its lack of power to compel the closing of the record and the final submission of any case. While it has urged the Agents to complete their records and to submit and argue their cases upon such completion and has sought the cooperation of the Agents to bring the cases to final submission, it has never, as I am advised, entered an order for the final closing of the record in any case without consent or over objection. I do not think it has power so do to. The clause quoted from Article VI compels the reception of any written statement or document presented by either party. As I read this provision, so long as either party is of opinion that written statements or documents are or may be available in support of its contention it may of right demand that the Commission await the filing thereof before final submission of the cause. The American Agent was under no obligation to close his record and submit his case at The Hague if he knew, or had reason to expect, that further evidence was obtainable.

It is suggested in the petition for reopening that the United States was unable to obtain the evidence from certain witnesses without the power to compel their testimony. This fact was as obvious in the autumn of 1930 as it is today. The German Government availed itself of its ordinance of June 28, 1923, which permitted the summoning of witnesses, placing them under oath, examining them before a court, and rendering them liable to penalty for false-swearing. No reason is apparent why a similar statute could not at any time have been adopted in the United States. The best evidence that it could is that when the American Agent and the Department of State requested the passage of such a law it was promptly enacted and has been availed of in obtaining evidence now proffered (Act of June 7, 1933). The lack of an instrument which would have been ready to hand if requested can not excuse the failure to obtain the testimony thereby obtainable.

The Agreement does not contemplate that when the two Agents signify their readiness to submit a case and do submit it upon the record as then made to their satisfaction, obtain a hearing and decision thereon, the Commission shall have power to permit either Agent to add evidence to the record and to reconsider the case upon a new record thus made.

3. The petition now under consideration presents, in the main, a situation different from either of those above discussed. Its allegations are that certain witnesses proffered by Germany furnished the Commission fraudulent, incomplete, collusive, and false evidence which misled the Commission and unfairly prejudiced the claimants' cases; that certain witnesses, including some who previously testified, who are now within the United States, have knowledge and can give evidence which will convince the Commission that its decision was erroneous; that evidence has come to light showing collusion between certain German and American witnesses to defeat the claims. These are serious allegations, and I express no opinion of the adequacy of the evidence tendered by the American Agent to sustain them. I have refrained from examining the evidence because I thought it the proper course at this stage to decide the question of power on the assumption that the allegations of the petition may be supported by proof, postponing for the consideration of the Commission the probative value of the evidence tendered.

The petition, in short, avers the Commission has been misled by fraud and collusion on the part of witnesses and suppression of evidence on the part of some of them. The Commission is not *functus officio*. It still sits as a court.

To it in that capacity are brought charges that it has been defrauded and misled by perjury, collusion, and suppression. No tribunal worthy its name or of any respect may allow its decision to stand if such allegations are well-founded. Every tribunal has inherent power to reopen and to revise a decision induced by fraud. If it may correct its own errors and mistakes, *a fortiori* it may, while it still has jurisdiction of a cause, correct errors into which it has been led by fraud and collusion.

I am of opinion, therefore, that the Commission has power to reopen these cases, and should do so, in order that it may consider the further evidence tendered by the American Agent and, dependent upon its findings from that evidence and any that may be offered in reply on behalf of Germany, either confirm the decisions heretofore made or alter them as justice and right may demand.

Done at Washington December 15, 1933.

Owen J. ROBERTS
Umpire

LEHIGH VALLEY RAILROAD COMPANY, AGENCY OF CANADIAN CAR AND FOUNDRY COMPANY, LIMITED, AND VARIOUS UNDERWRITERS (UNITED STATES) *v.* GERMANY

(Sabotage Cases, November 9, 1934, pp. 1155-1158; Certificate of Disagreement, September 29, 1934, pp. 1128-1155.)

PROCEDURE: MOTION TO ORDER BILL OF PARTICULARS CONCERNING FILED EVIDENCE. — EVIDENCE: FILING, RELEVANCY, MOMENT FOR DISCUSSION. Motion of German Agent filed June 13, 1934, for ruling that American Agent, who filed evidence in support of request for rehearing (see headnote preceding previous decision, p. 160 *supra*), by brief, bill of particulars, or otherwise substantiate charges of a general nature contained in request. Motion overruled: (1) filed evidence in itself defines and limits allegations, (2) inappriopriate, not helpful, and unfair to demand discussion of evidence by American Agent prior to German Agent's filing of evidence, (3) under Agreement of August 10, 1922, Commission must receive any writing either sovereign party may tender and may not, as court in civil law procedure, rule out evidence for irrelevancy, (4) decision of December 15, 1933 (see p. 160 *supra*), defining character of evidence which Commission will receive, enables German Agent to determine whether or not to offer evidence in rebuttal.

Cross-reference: Witenberg, Vol. III, pp. 25-27 (French text).
Bibliography: Witenberg, Vol. III, pp. 25-27.

Certificate of Disagreement

A Motion by the German Agent filed June 13, 1934, has now been submitted to the Commission asking for an order that the American Agent file a brief, a bill of particulars, or some other written statement substantiating the contentions advanced in his petition for a rehearing, wherein specific allegations be listed and specific evidence filed by him in support of his petition for reopening the Sabotage Cases be cited.

The Motion under consideration relates to the charges made by the American Agent in his petition for a rehearing in the Sabotage cases filed by him on May, 4, 1933. This petition averred (i) "That certain important witnesses for Germany, in affidavits filed in evidence by Germany, furnished fraudulent, incomplete, collusive and false evidence which misled the Commission and unfairly prejudiced the cases of the claimants", (2) "That there are certain witnesses within the territorial jurisdiction of the United States", some of whom are specifically named in the petition, "who have knowledge of facts and can give evidence adequate to convince the Commission of the liability of Germany for the destruction of the Black Tom Terminal and the Kingsland plant, but whose testimony cannot be obtained without authority to issue subpoenas and to subject such witnesses to penalties for failure to testify fully and truthfully", (3) That evidence can be produced "to show that the Commission has been misled by the German evidence", (4) "That there has also come to light evidence of collusion between certain German and American witnesses of a most serious nature to defeat these claims."

On June 13, 1934, the German Agent filed an Answer to the American Agent's petition of May 4, 1933. This Answer denied "that witnesses for Germany in affidavits filed by Germany furnished fraudulent, incomplete, collusive and false evidence which misled the Commission and unfairly prejudiced the cases of the claimants".

This Answer also alleged that "the German Agent is at a loss to make a more detailed rebuttal since the allegations of the petition as quoted above are vague and general, and do not cite which specific witnesses are to be charged with fraud, collusion, etc., and which parts of their testimony are false and mislead the Commission. For the same reasons the German Agent is not in a position to determine at this time whether or not he will file evidence in rebuttal of the testimony, reports and other material presented by the American Agent in support of the petition." This Answer further indicates that the reason for filing the motion for a bill of particulars is to set out more fully these criticisms of the petition.

Evidence in support of the American Agent's petition was filed during the period September 15, 1933, to February 15, 1934, on which last mentioned date the American Agent gave notice that he had filed all the supporting evidence that he desired to present in that proceeding, pending the filing by the German Agent of rebuttal evidence, if any.

This petition presented a jurisdictional question as to the right of the Commission to reconsider its original decision dismissing these cases, which the two Governments desired to have decided before examining the evidence offered either with respect to its admissibility or its bearing on the merits of the claims.

The National Commissioners disagreed on this jurisdictional question and the decision was, accordingly, rendered by the Umpire.

The Umpire held in his decision, rendered on December 15, 1933:

"1. I think it clear that where the Commission has misinterpreted the evidence, or made a mistake in calculation, or where its decision does not follow its fact findings, or where in any other respect the decision does not comport with the record as made, or where the decision involves a material error of law, the Commission not only has power, but is under the duty, upon a proper showing, to reopen and correct a decision to accord with the facts and the applicable legal rules. My understanding is that the Commission has repeatedly done so where there was palpable error in its decisions. It is said on behalf of Germany that this has never been done except where the two Agents agreed that such course under the circumstances was proper. And the argument is drawn from this fact that the

Commission is without power to take such action of its own motion or in the face of opposition by either Agent. I cannot follow this argument.

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"* * * The first petition for reopening and rehearing filed in these cases by the American Agent was based on grounds such as are above described. I have no doubt that the Commission had power to consider that petition and to deal with the case in the light of the matters it brought forward."

The decision then continues:

"2. I come now to the question of jurisdiction to reopen for the presentation of what is usually known in judicial procedure as after-discovered evidence. I am of opinion that the Commission has no such power.

* * * * * * *

"It is suggested in the petition for reopening that the United States was unable to obtain the evidence from certain witnesses without the power to compel their testimony. This fact was as obvious in the autumn of 1930 as it is today. The German Government availed itself of its ordinance of June 28, 1923, which permitted the summoning of witnesses, placing them under oath, examining them before a court, and rendering them liable to penalty for falseswearing. No reason is apparent why a similar statute could not at any time have been adopted in the United States. The best evidence that it could is that when the American Agent and the Department of State requested the passage of such a law it was promptly enacted and has been availed of in obtaining evidence now proffered (Act of June 7, 1933). The lack of an instrument which would have been ready to hand if requested can not excuse the failure to obtain the testimony thereby obtainable.

"The Agreement does not contemplate that when the two Agents signify their readiness to submit a case and do submit it upon the record as then made to their satisfaction, obtain a hearing and decision thereon, the Commission shall have power to permit either Agent to add evidence to the record and to reconsider the case upon a new record thus made."

In conclusion the decision holds:

"3. The petition now under consideration presents, in the main, a situation different from either of those above discussed. Its allegations are that certain witnesses proffered by Germany furnished the Commission fraudulent, incomplete, collusive, and false evidence which misled the Commission and unfairly prejudiced the claimants' cases; that certain witnesses, including some who previously testified, who are now within the United States, have knowledge and can give evidence which will convince the Commission that its decision was erroneous; that evidence has come to light showing collusion between certain German and American witnesses to defeat the claims. These are serious allegations, and I express no opinion of the adequacy of the evidence tendered by the American Agent to sustain them. I have refrained from examining the evidence because I thought it the proper course at this stage to decide the question of power on the assumption that the allegations of the petition may be supported by proof, postponing for the consideration of the Commission the probative value of the evidence tendered.

"The petition, in short, avers the Commission has been misled by fraud and collusion on the part of witnesses and suppression of evidence on the part of some of them. The Commission is not *functus officio*. It still sits as a court. To it in that capacity are brought charges that it has been defrauded and misled by perjury, collusion, and suppression. No tribunal worthy its name or of any respect may allow its decision to stand if such allegations are well-founded. Every tribunal has inherent power to reopen and to revise a decision induced by fraud. If it may correct its own errors and mistakes, *a fortiori* it may, while it still has jurisdiction of a cause, correct errors into which it has been led by fraud and collusion.

"I am of opinion, therefore, that the Commission has power to reopen these cases, and should do so, in order that it may consider the further evidence tendered by

the American Agent and, dependent upon its findings from that evidence and any that may be offered in reply on behalf of Germany, either confirm the decisions heretofore made or alter them as justice and right may demand."

Turning back now to the question presented by the German Agent's Motion, hereinabove mentioned, filed June 13th, for " a bill of particulars ", etc., this motion has now been submitted for the decision of the Commission, accompanied by a " Reply of the American Agent ", etc., filed June 23, 1934, and also by a " Memorandum filed by the German Agent on July 26, 1934, relative to the Reply of the American Agent ", and a " Reply to the German Agent's Memorandum " filed by the American Agent on August 6, 1934. The national Commissioners are in disagreement as to the action to be taken by the Commission on this Motion, their respective opinions being as follows:

Opinion of the American Commissioner

It appears from the foregoing statement of the present status of the pending proceedings that the only question now presented for decision by the Commission is the action to be taken on the German Agents' Motion for a bill of particulars, and that the Commission is not called upon to take any action on the pending petition for rehearing, which has not yet been submitted for its decision. Neither is the Commission called upon at this time to determine what evidence submitted by the American Agent is to be considered. The American Agent has not been heard upon that question. It is not presented at this time. It can only be presented and considered when the petition and supporting evidence is submitted to the Commission for action.

In discussing the issues presented by this Motion, the German Agent relies on the Umpire's decision of December 15, 1933, as having the effect of eliminating from consideration all evidence offered by the American Agent which comes within the application of two of the three classes of evidence dealt with by the Umpire. He couples his Motion with his Answer to the petition, and in the Answer he takes the position that " under the decision of the Umpire of December 15, 1933, which rules that no after-discovered evidence and consequently no allegations based on such evidence can be the basis for a re-hearing ", he will refrain from a discussion of allegations based on such evidence because it has become immaterial.

In taking this position as to the effect of the Umpire's decision the German Agent is entirely within his rights but in the opinion of the American Commissioner he has completely misinterpreted the meaning of the Umpire's decision. The Umpire has held that newly discovered evidence is not admissable merely for the purpose of changing the record on which the original decision was made. But in the same decision the Umpire has also held that new evidence challenging the truth and good faith of evidence upon which the Commission relied in making its original decision was not only admissible but must be considered on a petition for a rehearing. The Umpire made his position on that point clear when he said in his decision of December 3, 1932, with reference to the Blue Book Magazine message:

" If the so-called Herrmann message is authentic, that document alone would compel a contrary finding to that I have just stated so far as concerns Wozniak's being a German agent." (Decs. and Ops. of Com., p. 1013.) [a]

[a] *Note by the Secretariat*, this volume, p. 113.

Again, the Umpire said in that decision, with reference to the Herrmann message, that:

"As the American Agent has well said, I may utterly disregard all the new evidence produced and still, if I deem this [Herrmann] message genuine hold Germany responsible in both of these cases." (Id., p. 1016.) [b]

Reading the Umpire's decision of December 15, 1933, in the light of these statements in his decision of December 3, 1932, it is evident that he regarded as admissible any new evidence which proved fraud, perjury, collusion, or suppression of facts in the original record.

While the Commission by the Umpire in its decision of December 15, 1933, held that this Commission did not have the power to reopen a decision merely on after-discovered evidence, this does not mean that the Commission cannot and will not receive and consider after-discovered evidence for the purpose of determining whether any evidence upon which the Commission relied in its decision of October 16, 1930, was of a false and perjurous character, or whether any such evidence established the fact that the Commission in the decision of October 16, 1930, was in fact misled to the detriment of claimants on whose behalf the United States is presenting these claims by the character of the evidence filed at that time by the German Agent. This is particularly true where the so-called after-discovered evidence conclusively shows the falsity and misrepresentation inherent in certain of the essential defense evidence filed prior to The Hague decision.

The German Agent also takes the position in his Answer that " that part of the petition which deals with the American Agent's endeavors to compel testimony under oath has become immaterial since the Act of June 7, 1933, was passed and the German Agent, therefore, refrains from commenting thereon ".

The only comment on this point that the American Commissioner feels called upon to make at this time is to point out that during all the period under consideration there was a law of the Congress of the United States (Act of July 3, 1930, 46 Stat. 1005) in force which authorized the compulsory examination of witnesses in the United States by this Commission, and notwithstanding repeated requests by the American Agent to have the Commission take action under this law such action by the Commission was prevented by the obstructive attitude of the German Government. As was pointed out in the Certificate of Disagreement of the two National Commissioners of November 28, 1932 (Decs. and Ops. of Com., p. 1000), [c] these requests of the American Agent were supplemented by the suggestion of the Commission itself to the two Governments that they confer the requisite authority on the Commission to take advantage of the right granted by the Act of July 3, 1930.

The German Agent concludes, therefore, that in view of the limitations imposed by the Umpire's decision upon the evidence to be considered, the contention to be dealt with concerns only " that part of the petition of May 4, 1933, in which the American Agent alleges that 'witnesses for Germany, in affidavits filed by Germany, furnished fraudulent, incomplete, collusive and false evidence which misled the Commission and unfairly prejudiced the cases of the claimants ' ".

It is the evidence filed in support of this allegation to which the German Agent addresses this Motion for a bill of particulars.

He says: " This allegation is very vague and unsubstantial, no specific statement or part of a statement being identified that, in the opinion of the

[b] *Note by the Secretariat*, this volume, p. 115.
[c] *Note by the Secretariat*, this volume, p. 105.

American Agent, is to be held untrue and misled the Commission; nor is there any indication as to which German witnesses are to be charged with fraud, perjury, collusion, etc."

It will be noted that under the German Agent's interpretation of the effect of the Umpire's decision, the scope of the discussion is reduced to a consideration of the new evidence bearing upon the question of whether any evidence on which the Commission relied in rendering its original decision was false, fraudulent, incomplete or collusive, thereby misleading the Commission and unfairly prejudicing the cases of the claimants.

The German Agent asserts in his Motion that " This material contains a tremendous number of assertions, many of them being in conflict with each other, or with statements made in testimony previously submitted by the American Agent. For this reason and inasmuch as it is anything but self-explanatory, it leads to unclear, inconsistent, or contradictory conclusions; in some instances it is not possible at all for the German Agent to arrive with certainty at a conclusion which might be drawn from particular pieces of material."

The American Agent in reply points out that issues to be considered are issues of fact and have already been sharply defined.

He says further: " Both sides know what they are and the task of the German Agent, in so far as the new evidence is concerned, is merely to examine it, determine in what respect, taken in connection with prior evidence in the case, it discredits positions taken and proof offered by the defence at The Hague submission. This is ordinarily a task which counsel in any litigation are expected to perform for themselves."

The American Agent adds: " The real question is whether they [the defense] should be supplied by the American Agent with a brief analysing the significance of the new evidence in advance of introducing their own rebuttal evidence."

The German Agent says at page 4 of his Motion: " Sometimes the result of the examination by the German Agent [of the evidence supporting the petition for rehearing] would show that an affidavit of a German witness is in accordance with one part of the new evidence, whereas it is contradicted by another part of it. In such case he would have to consider steps on his part with regard to both alternatives to the question of counter-evidence."

The American Agent's comment on this statement is that " This dilemma, the answer to which the German Agent says involves a tremendous undertaking on his part, is brought about by the prior positions taken by his witnesses. This is a situation for which the American Agent is in no sense responsible, and which offers no basis for the relief asked for by the German Agent." He says further that he does not feel called upon to explain or elect what part of the testimony of the German witnesses he intends to rely on. On the contrary he says, " The American Agent intends to rely upon the entire body of evidence submitted in support of the petition for a rehearing."

In view of the foregoing considerations, and taking into consideration also the very specific information which the American Agent has set out in his petition giving the names of four witnesses whose evidence is challenged and six listed categories of alleged facts, the truth of which he seeks to establish by the new evidence, the American Commissioner is of the opinion that the task of the German Agent is much less difficult and complex than he represents it to be.

Furthermore, the German Agent has already had several months since the new evidence was filed in which to study all of it, and twice as much time to study the greater part of it, and was personally present at the examination of

one of the most important witnesses. He evidently has already given it a very careful examination, as appears from some of the allegations in his Motion papers.

However, even accepting the German Agent's own estimation of his difficulties, it does not appear to the American Commissioner that he is entitled to call upon the American Agent to assist him in formulating his defence. Such procedure would be most unfair to the American Agent, and, in the opinion of the American Commissioner, would result in protracting rather than expediting the progress of this litigation. The method of procedure sought by the German Agent would require the American Agent to submit a brief on an incomplete record, leaving the German Agent free to file rebuttal evidence later which would not merely call for a new brief by the American Agent, but at the same time would protract and delay the decision of these cases.

The objections to the proposed plan demonstrate why it has never been adopted as a recognized rule of procedure.

These points have been fully argued by the American Agent in his reply and Memorandum in opposition to the Motion, and the American Commissioner fully concurs in the views therein set forth.

Furthermore, the only question which the German Agent is called upon to decide now is whether or not he desires to submit any evidence in rebuttal and that is a question which he must decide for himself without calling upon either the American Agent or the Commission to help him in making his decision. As already pointed out, the petition itself is not yet before the Commission for action.

For these reasons, as well as for the additional reasons advanced by the American Agent in opposition to this Motion, the American Commissioner concurs in the conclusions set forth in the American Agent's Reply, which are briefly: (1) the demand for a bill of particulars is inappropriate in the present situation; (2) the rules of the Commission do not require the American Agent to file a brief on the new evidence before the record is complete; (3) to require the American Agent to file a brief dealing with an incomplete record would delay rather than expedite the orderly progress of this case, and the briefs of both Agents should be filed simultaneously before the petition itself is submitted for decision and should deal both with the admissibility of the new evidence and its value on the merits of the issues involved. The American Commissioner, accordingly, holds that the Motion should be denied.

Chandler P. ANDERSON
American Commissioner

August 23, 1934.

Opinion of the German Commissioner

I. The Umpire's Decision of December 15th, 1934 [1933], has defined the thema probandum of the discussion.

The thema probandum at present is not the old one discussed at the Hague and Washington on September 18th, 1930 and November 21, 1932: " Did German Agents cause the destruction of Black Tom and Kingsland? " but the thema probandum is now: " Did witnesses as defined by the December Decision commit fraud etc., as defined by the Decision and was the Commission misled by such fraud? "

A new thema probandum means a fresh case. (When I say " a fresh case ", it is not meant to exclude the possibility of framing the fresh case partly by

reference to certain pieces of the old file; how far such procedure may be permissible shall be dealt with later.)

II. The Umpire's Decision contains a twofold ruling which governs the fresh case: a positive and negative one. The Decision rules positively what allegations the fresh case must contain and negatively what allegations it is not allowed to contain.

The American Commissioner has ventilated both sides and he has begun with the negative one. I shall do the same. He has handled the subject in an abstract way: he does not dwell on any specific evidence, asking whether it is admissible or not, but he explains generally what consequences ought to be drawn from the Umpire's ruling and what its right interpretation is. Only in one place the American Commissioner mentions a particular piece of evidence (the Herrmann message). Again I shall follow his example, speaking generally about the same things and mentioning regarding the different pieces of evidence only the Herrmann message, in order to answer what has been said about it.

III. The Umpire's ruling sets up three categories: palpable error, new evidence, fraud. The first category is no longer of interest here. The second category is barred to the Claimants: it is not permissible for them to introduce allegations which would fall under this category. They are restricted to the third category; they are allowed to rely on fraud, suppression, collusion.

To avoid any misunderstanding in this connection, one point should be stressed at the very outset: When the Umpire speaks of fraud, suppression, collusion, he does not mean anything which was already at the Hague or at Washington brought before the Commission and fully and fairly argued before it. Fraud, *already discussed*, does not open the door to a reconsideration of any case. No party may claim more than a fair and exhaustive hearing; this granted it does not matter whether the subject-matter thus exhaustively and fairly dealt with, was an allegation of fraud or any other allegation. *All* reasons possibly adduced to justify a reconsideration on account of fraud (including the reasoning in the Umpire's Decision) does not apply to and does not cover the case of an allegation of fraud, previously made and previously dealt with under all the guarantees of the Law. (Of course, if a *further* fraud is alleged, *different* from the one already discussed, but preventing the trial of the old fraud-allegation from being a full and fair one, this new allegation, not yet discussed, may, if the other conditions are there, possibly lead to a reopening.)

I think, I could express the view expounded here in terms of Anglo-Saxon Jurisprudence and support it from it. But purposively I have chosen general terms.

IV. If fraud still undiscussed is alleged, the next restriction flows from the Umpire's Decision when he states, he admits such fraud, *as misled the Commission*. Thus the Umpire asks for causality between fraud and decision. (I think it is merely a slip of the pen, when the American Commissioner on p. 9 [p. 1133, this print][d] says " or whether ", where the appropriate words would be " supposing that ".) This means: The claimants may rely only on fraud, which led to statements, that are *necessary elements of the Decision*. If this question is to be answered in the negative, then the allegation of fraud is inadmissible. Particular attention must be paid to cases in which statements are supported *not only* by evidence allegedly tainted with fraud, but by *other* evidence too; in such cases an examination becomes necessary whether the evidence not tainted with fraud would be sufficient by itself to support the

[d] *Note by the Secretariat*, this volume, p. 194.

corresponding statement. If yes, again the allegation of fraud would be of no avail.

V. Hitherto undiscussed fraud, leading to statements which are necessary elements of the Decision and are not supported by sufficient other evidence may be alleged under the Umpire's ruling. The question arises: which *evidence* is admissible to prove it? The American Commissioner discusses whether *new* evidence may be adduced in this connection. He says that while it is true that the Umpire bars new evidence (second category), this principle would not apply, if the new evidence is bearing on fraud (third category). The American Commissioner disapproves of the German Agent's view to the contrary, as he states it. I agree with the American Commissioner. From a formal standpoint one may say that such evidence comes within the second category as well as within the third. But I have no doubt that a sound interpretation of the Umpire's ruling must place it in the third category. If the German Agent holds a different view, then I disagree with him.

VI. Whereas consequently no further doubts may prevail about the admissibility of *new* evidence, I want to emphasize that I entirely disagree with the American Agent about the extent of admissibility of the *previous* evidence. If I understand his Briefs aright, he has decided not to sift in any way the old evidence notwithstanding the restricted thema probandum. In spite of the fact that the Umpire has rejected a whole category of allegations and has limited the American case to a much narrower thema probandum, the American Agent has not eliminated one shred of his evidence, although mostly collected *before* the Umpire's ruling. And evidently he does not want to do so at any time in the future.

Indicative of the American Agent's view-point is perhaps his Brief, dated August 4th, 1934, where in a sweeping way he says (here and in other places) " we have to determine *from a review of the whole record*, whether, * * * the award requires a reversal "; (italics mine).

His argument simply and sweepingly seems to be that he may use *any* previous evidence to corroborate the new one, without taking the trouble of any discrimination.

That is just the thing which is barred by the Umpire's ruling. We have *not* to go on inflating the record indefinitely, but we have to confine ourselves to the *fresh case*, as I expressed it in the beginning of this Opinion. And evidence to be tendered has to relate to the fresh case and not to the old one.

I do not deny on principle that within certain limits previous evidence may be combined with admissible new evidence to corroborate it; but I deny absolutely that this means an authorization for the American Agent to go on with his case just as he did before the oral argument, just as if there were no judgments with force of res judicata and no December Decision of the Umpire in existence.

The practical conclusion to which I come is: Old evidence to be relied upon by the American Agent (and with new evidence, of course, it is the same), is only admissible in so far as it has a real bearing on the present thema probandum. And the American Agent must show that it has. And the only way to show this is to sift it and to indicate what evidence belongs to the individual allegations that constitute the fresh case. These individual allegations are dealt with in the second part of my Opinion. There I shall refer back to the present argument in so far as *evidence* is concerned.

VII. Having said all I want to say about the negative bearing of the Umpire's ruling, I could stop here, but for the fact that the American Commissioner mentions the " Herrmann message " and infers from the Umpire's pertinent

remarks in the Washington-Decision that the Umpire shares his opinion as to a certain interpretation of the Umpire's (later) December-Decision.

I have to reply:

In the Washington-Decision the Umpire states that the Herrmann message, if genuine, would prove both the Black Tom and the Kingsland case. He states this and nothing more. He makes no statement, neither directly nor by inference — about the admissibility of the Herrmann message, be it on account of fraud or on any other account. And logically he *could* not make any statement about the admissibility; for perusal of the records shows that throughout the Washington Debates by general agreement the question of the *admissibility* of the fresh American allegations was held in abeyance and was only assumed *for arguments' sake.* This alone would dispose of any conclusions based on the Herrmann message. But aside from this the argument drawn from the message is not sound for a second reason. In the Washington Debates the Herrmann message was not considered in the light of its proving any fraud of German witnesses, but simply in the light of its proving the American case. Strongest doubts must prevail whether it then was not simply after-discussed evidence brought against the Hague-Decision and should have been rejected on that ground. But a decision of that point may be dispensed with. For instead of being rejected, it was fully and fairly discussed, which furnishes an independent reason, to consider it as being no longer of importance.

VIII. I now advert to the second part of this Opinion. Having examined negatively, what the fresh case, called for by the Umpire's ruling, must not contain, it now becomes necessary to state positively, what it must contain. I think it must specify three things:

" *A.* Which are the Witnesses whose testimony is assailed as coming within the scope of the Umpire's ruling of December 15, 1933?

" *B.* Which are the assertions or actions of the Witnesses mentioned under *A*, that are assailed as being fraudulent, suppressive, collusive in the sense of the Umpire's said ruling?

" *C.* How is it shown that the Commission was misled by the allegations mentioned sub *B*, viz. that the Hague and the Washington Judgments *rest* on these allegations, those latter having been accepted and believed by the Commission? "

I think, this is a true paraphrase of the contents of the Umpire's ruling and it is quite clear that the claimants having obtained a ruling, which in a *general* and *abstract* form admits part of their case, are now under a duty to submit the individual and concrete allegations such as constitute a juridical case correctly framed. And before such a juridical case correctly framed, at this new stage of the procedure is laid before him, the German Agent is neither obligated nor even able to answer fully and exhaustively, in particular to define his attitude as to rebuttal evidence.

IX. The Claimants have not *expressly* and *explicitly* answered the questions as outlined above. They *refer* the German Agent (and the Commission) to their " petition for rehearing " (anterior in date to the Umpire's ruling) and to the evidence itself they have filed (mostly likewise anterior in date to the Umpire's ruling).

Their allegation is that in the case as it was fought before the Umpire's December Decision all issues were so sharply defined and the matter so thoroughly discussed that now the German Agent (and the Commission) cannot be in doubt which parts of the record and of the evidence are still upheld by the Claimants and considered as relevant by them, in particular if coupled with the contents of their " petition for rehearing ".

I do not deny that, generally speaking, in many instances a fresh case in the sense in which I use this term throughout this Opinion, may be framed by reference. But I hold that in any case two conditions must be strictly complied with:

(*a*) The allegations and evidence referred to must be easily discernible from the rest;

(*b*) They must be clear and unambiguous in themselves.

The Question arises: Have these conditions been met in the present circumstances? I think, the answer must be: No.

(*a*) From the very outset it would be surprising if the allegations and evidence pertinent to the fresh case, as outlined in the Umpire's December Decision, were clearly discernible from the rest in the present situation. We are faced with a law suit of quite unusual dimensions; an enormous record was collected, lengthy hearings were held; two judgments were rendered; the Umpire's December Decision placed the whole matter on a different ground, ruling out anything which did not come within the scope of a new framed and clear-cut theme. But, as I already pointed out in a different connection, the American Agent has been going on with the case exactly as he did before; the Umpire has eliminated in his Decision a well-defined part of the case, the American Agent has eliminated nothing of his evidence, just as if the Umpire's ruling as to the elimination were meaningless and negligible. What he refers to, is a petition which wholly, and evidence which mostly, are previous to the Umpire's ruling and which, of course, made not and could not make the discrimination which the Umpire stated to be vital. How could it be expected that such discrimination could be made *subsequently* with any degree of certainty by the German Agent and by the Commission the American Agent remaining inactive?

I think, some instances may illustrate, whether it is possible or not to state whether evidence submitted by the American Agent really comes within the scope of the Umpire's Decision.

(1) The American Agent has filed as Exhibit 977 Annex R. an affidavit of Mr. Arnold setting forth that the check for $2,500.00 handed over to Baran for the Wozniak letters was collected on June 27, 1931. No German witness or expert has, so far as I can see, ever questioned this payment or made a statement on this point. Where is the connection with the case as it stands today?

(2) In Exhibit 977 Annex L, one James W. Kusiw testified that in June 1931 Baran requested him to examine a piece of paper cut from one of the Wozniak letters in order to ascertain its age. The result was that from the nature of the paper no inferences could be drawn.

Kusiw confirms allegations which the American Agent had advanced in Washington (Page 254, Printed Oral Argument) which had never been questioned by the German Agent and which were accepted as common ground in the Umpire's Decision (Page 1010). [c]

(3) Mr. Paul Koenig has given a statement of several hundred pages (Exhibit 985). The main aim of his examination evidently had been to establish his connection with Burns and Scott, two watchmen employed on the Black Tom Terminal in 1916. No statement of German witnesses concerning this point has ever been before the Commission so that it cannot be seen what meaning shall be attributed to it in a proceeding restricted to the issue of fraud, collusion, etc., of German witnesses. And further: Koenig emphatically *denies* having ever known the two watchman and sets forth that persons with

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[c] *Note by the Secretariat*, this volume, p. 111.

similar names appearing on his lists were not identical with them. Does the American Agent *rely on* that? (He states he relies on the " whole record ".) Does he agree with it? If yes, why does he bring evidence on things that are common ground? If no, why does he submit evidence by which he refutes himself?

(4) The Koenig statement and in a similar way the Kristoff reports filed by the American Agent as Exhibit 983 Annex A, (binder containing detective reports covering shadowing of Kristoff and his acquaintances in 1917 and later years), give raise to an additional remark: Both of them are of considerable length embracing together about 1000 pages. It is natural that statements which might be construed to have a bearing on the issue of fraud, etc. (if any) would only appear in comparatively small parts of this evidence and be scattered all over it. It is natural that the Commission, to which it was presented, must be put into a position to deal with it. I, therefore, think that the Commission has a right to be provided with an explanation of the meaning of such evidence so as to know under what aspect it has to be read. Such comment has to be given as soon as the evidence is filed and certainly cannot be made dependent upon a preceding action on the part of the German Agent.

(5) American Exhibit 988, Annexes C, D, and E, contains an affidavit made by one Thomas Tholsfsen stating the following facts:

In the night of the Black Tom disaster he received a telephone call by one Hans Johannsen, master of the barge " Johnson 17 " urging him to send a tug in order to remove the said barge out of the danger-zone. As further annexes the American Agent submits a death-certificate concerning Johannsen and a document telling us where he is buried.

What German witnesses did say anything relied on at the Hague or at Washington, which had the slightest connection with that telephone call or with Johannsen's burial ground? In what respect did German witnesses commit fraud, collusion, suppression, as far as these points are concerned?

(*b*) As a further condition to be complied with before a party may be allowed to state its case by mere reference to certain allegations and evidence I mentioned above that the allegations and evidence referred to must be clear and unambiguous and not contradictory in themselves. The first practical consequence seems to be that the Claimants must state their own version of their case. I notice that the claimants and the American Commissioner *admit* that witnesses which the Claimants wish to bring within the scope of the Umpire's Decision (whether rightly or wrongly, I do not want to examine now) made different statements with respect to the same events, statements that undoubtedly are wholly incompatible with each other. Partly such inconsistent statements are made by the same person, contradicting himself flatly; partly they are made by several persons without there being any indication from the Claimants which is the witness they believe in this situation.

Again I quote some instances as an illustration.

1) Relations between Wozniak and Herrmann

In his subpoena examination, 1933, Wozniak stated that he did not remember having seen Herrmann in 1916 or 1917, thus adhering practically to his previous testimony that he did not know Herrmann. In the affidavit executed before the Department of Justice on January 12, 1934, he modified this statement in so far as he admits the possibility that a boy whom he met with Captain Hinsch several times in 1916 may have been identical with Herrmann.

None of these statements is compatible with the basic allegations advanced by the American Agent in the previous stage of the proceedings that Wozniak

was introduced to Herrmann by Captain Hinsch in New York, that thereupon Herrmann met Wozniak several times in New York and provided him with incendiary pencils with instructions for their use as well as with money, a theory prominently based on Herrmann's sworn statement given in 1930.

What is the American theory at present?

2) Wozniak in Mexico

The American Agent's fundamental theory that Wozniak had been employed as a German Agent had been prominently based on the assertion that he had stayed in Mexico in the summer of 1917, consorting there with admitted German agents.

In his subpoena examination Wozniak has first refused to answer the question as to his whereabouts during that period, pleading that he might make himself liable to penalty for perjury by reason of his previous testimony for Germany. When the examination went on he gave up this attitude, alleging that he did not remember whether he had been in Mexico and that his failure to make a positive statement on this point had nothing to do with the question whether he might become subject to criminal prosecution. In his affidavit executed on January 12, 1934, he again changed his attitude and stated clearly and unambiguously that he never was in Mexico, but had been working at Tupper Lake during the respective period.

Has his testimony been submitted to show that he lies or that he tells the truth? And if he lies *or* if he tells the truth, *when* did he do it, considering the variety of his statements?

3) Origin of the Kingsland Fire

In the subpoena examination Wozniak testified that the fire was of incendiary origin and had been brought about by the ignition of a phosphorous rag handed over to him by a German agent (" Mike ") and which he had used unconsciously and unaware of what was going on. This story is in absolute conflict with the fundamental theory pleaded by claimants hitherto that Wozniak started the fire, acting deliberately and consciously as a German Agent under instructions from Captain Hinsch and Herrmann by using an incendiary pencil; and it is a further conflict that two witnesses whose testimony is contained in the new evidence (Thorne and Baran) still make statements in support of the theory that Wozniak started the fire by an incendiary pencil.

Same questions as to (*b*):

4) Wozniak-letters

Considerable part of the new evidence consists of testimony given by Wozniak and Baran, both confirming the genuineness of these documents.

Again, my question: will the American Agent, by producing this testimony prove that it is true or that it is false? Or, if his only end is to elucidate things in a general way and for general reasons, must not he tell us so? For if he relies constantly " on the whole record " up to now he tells us exactly the contrary. And more particularly in such a case: must not he tell *at once* the German Agent, because the German Agent's decisions as to rebuttal evidence are thoroughly different in the one case and in the other?

I summarize:

Does it mean " assisting the German Agent in his defense " when in cases like the quoted ones the American Agent is invited to be unambiguous? Is he entitled (as the American Commissioner thinks he is) to blame the *witnesses*

in question for the contradiction and its consequences and to plead that the German Agent must face the necessity to evidence at the same time two things that exclude each other or else make up his mind, which of the statements he wants to assail and which not? I cannot share this view. Must not *any* Claimant state his case first and give a full and clear version of the facts on which he relies, tendering evidence subsequently and only when he is contradicted? If that evidence is self-contradictory is not he obligated to *choose* which version he will adopt, risking otherwise to be looked upon as having made no statement at all? And I think the same holds good, if his task has become the showing up of hostile witnesses as fraudulent. No claimant can cope with that task without defining his attitude regarding the truth of their statements which implies in the case of contradictory statements and self-contracting [sic] witnesses a clear indication of his own stand.

X. The result to which I come is this :

The fresh case which is necessitated by the Umpire's new thema probandum cannot be established by mere reference to a previous petition and to evidence, as the American Agent tries to do.

Directions should be issued to the American Agent inviting him to file a Brief dealing with the three vital questions, outlined above, which for convenience's sake, I repeat:

" *A.* Which are the Witnesses whose testimony is assailed as coming within the scope of the Umpire's ruling of December 15, 1933?

" *B.* Which are the assertions or actions of the Witnesses mentioned under *A*, that are assailed as being fraudulent, suppressive, collusive in the sense of the Umpire's said ruling?

" *C.* How is it shown that the Commission was misled by the allegations mentioned sub *B*, viz. that the Hague and the Washington Judgments *rest* on these allegations, those latter having been accepted and believed by the Commission? "

And from the statements in the first part of my Opinion, appearing under *VI*, it follows that I suggest a *further* ruling:

" *D.* What is the individual and specific evidence, new or old, adduced to support the individual and specific allegations submitted according to *A* and *B*? "

XI. Practically this suggestion of mine means that I grant the German Agent's Motion in a special form. The three vital questions set up by me verbally in his writs and the " bill of particulars " for which he asks, in its essence is not much different from the " fresh case ", as I use the term throughout this Opinion.

At the same time my suggestion means that I deny the American Agent's plea that the German Agent should be directed to define his attitude as to future rebuttal evidence *first:* the gist of my Opinion is that the German Agent is *unable* to answer the case now brought against him, before the case is really and not only in words restricted to the new thema probandum, before the individual and particularized allegations that support this case are set out clearly and before these allegations are free from self-contradiction and ambiguity, and before the pertinent evidence is singled out.

XII. From my last statement it will be gathered that and why I disagree with the individual grounds relied on by the American Commissioner in his support of the American Agent's plea: he says the Rules of the Commission do not oblige the American Agent to file a Brief now, I think the Umpire's December Decision does; he says the German Agent had ample time to define his attitude; I think, he was unable to do it, a reason against which mere time is of no avail, and the argument may be that the *American* Agent had ample time

to frame *his* case correctly. The American Commissioner fears that the case may be protracted by granting the German Agent's Motion, I see the only means to speed it up in forcing the discussion back to the real thema probandum and in cutting out and eliminating what is not strictly pertinent to that theme.

The American Commissioner would not like the Claimants to file a Brief on an incompleted record; to my mind it is not a matter of incompleted record, but of an overcompleted record and an insufficiently stated case.

XIII. The American Commissioner concludes his Opinion with several suggestions which reach beyond a mere decision on the German Agent's Motion. I have no objection to this in so far as procedure is concerned; my idea is that in any case of a deadlock between the Agents this Commission should deal autonomously and exhaustively with the case and take all steps which in the Commission's opinion are appropriate. But on the merits of the said suggestions, I differ from the American Commissioner. Whether, for instance, the two Agents should be directed, to file a future Brief *simultaneously* should not be decided now, but only after the next American Brief, which forms the subject-matter of this Opinion, is known.

This may be of minor importance; but of great importance is a further suggestion which I find expressly stated in the American Agent's Brief of August 4th, 1934, *but* which evidently is approved of and endorsed by the American Commissioner. He proposes that when the Commission comes to discuss the petition for rehearing itself, the admissibility of the new evidence and the merits of the issues involved should be dealt with simultaneously.

I have no doubt that the admissibility should be discussed first and separately.

This is not the first time that the Commission is faced with that question. When the American side would not acquiesce in the Hague Judgment and sought for a reopening, the German side opposed this in the first line on a plea of inadmissibility. The substantiation then was different from now and is superseded now by the Umpire's December Decision. But the juridical point is exactly the same there and here. The Commission then did what is suggested now by the American Agent: Admissibility and merits were treated simultaneously at the same hearing. And as a result I find in the Umpire's December Decision the remark: " It would have been fairer to both the parties definitely to pass in the first instance upon the question of the Commission's power to entertain the supplementary petition for rehearing. "

And I think the strongest reasons militate for that conclusion.

In the Umpire's December Decision I find on p. 68 (Report of American Commissioner, December 30, 1933; U. S. Government Printing Office, 1934) [p. 1120, this print] [f] a statement which reads:

" Orderly procedure would have required that these issues (fraud, collusion, suppression) be decided by the Umpire *before* the filing of the tendered evidence *since the right to tender such evidence is involved in this Decision.*"

Thus the Umpire says: His ruling determines the *right to tender evidence* and he draws the inference that in " orderly procedure " first and above all the Claimants have to show their *right* to tender evidence and the scope of that right. (By the way I notice that this disposes of the American Commissioner's point that it would not be fair to grant the German Agent an opportunity to make up his mind as to rebuttal evidence in a later stage of the proceedings. The American Agent has first to show that he is entitled to bring evidence and to what extent. This distinguishes him from the German Agent who holds two judgments with force of *res judicata* and quite naturally is not on

[f] *Note by the Secretariat*, this volume, p. 185.

the same level as his adversary.) But the main point is that to the Umpire's mind, in a Reopening case the discussion of the right to tender evidence and the filing of the evidence itself mean different stages of the procedure and that the first stage has to be considered first.

Only subsidiarily I should like to add: Practical reasons would lead to the same result. To plead a case of such volume as the instant one on its *merits* means an enormous burden; of course, it must be borne if that is indispensable. But it is not indispensable as long as a limitation of the pleadings to the much less entangled question of admissibility offers a chance to do without it.

Dr. Victor L. F. H. HUECKING
German Commissioner

September 13, 1934.

Supplemental Memorandum by the American Commissioner

To facilitate the discussion and permit a full presentation of the points of difference between the two national Commissioners, they have exchanged copies of their respective Opinions before presenting their Certificate of Disagreement to the Umpire.

The American Commissioner finds on reading the German Commissioner's opinion that he and the German Commissioner have dealt with the German Agent's Motion on a fundamentally different basis. The American Commissioner has limited his discussion to the single question raised by the German Agent's Motion, namely, whether or not the American Agent should be required at this stage of the proceedings to file " a brief, bill of particulars or some other written statement substantiating the contentions advanced in his [the American Agent's] petition for a rehearing." This is the only question presented by the pending Motion of the German Agent.

The German Commissioner, on the other hand, has assumed that the pending Motion involves the question of the admissibility of the new evidence offered, and, accordingly, has undertaken to examine in considerable detail the character of the new evidence with reference to its admissibility under the Umpire's decision of December 15, 1933.

It seems to the American Commissioner that the question of the admissibility of the new evidence is quite outside of the scope of the present proceeding. That question is one which must be dealt with by the Commission when the record is complete and the cases are finally submitted.

The German Commissioner does not refer to the request of the German Agent for a bill of particulars but is of the opinion that the American Agent should be invited to file a brief dealing with certain questions which he states and which he deems vital.

The Umpire in his opinion of December, 1933, stated, after calling attention to the difference between the procedure before this Commission and the proceedings before a Court, as follows:

"Article VI, second paragraph (referring to the agreement between the two governments) provides:

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

" The Commission has, from its inception, been sensible of its lack of power to compel the closing of the record and the final submission of any case. * * * The clause quoted from Article VI compels the reception of any written statement or document presented by either party."

Thus under the agreement between the two Governments, the Commission is obligated, as the Umpire has held, at the proper time (that is, in this case when the petition for rehearing and all evidence offered by the respective governments has been filed) to pass upon the admissibility and weight to be given to all the evidence offered by either government but it cannot do so until the claim, or in this instance, the petition of the American Agent, and the answer of the German Agent, together with the supporting evidence offered by the respective governments, has been filed. It is powerless, as the Umpire has held, to compel the closing of the case and must wait to consider and pass upon the evidence until the case is finally presented to the Commission.

The decision of the Umpire of December 15, 1933, was rendered upon a certificate of disagreement between the National Commissioners regarding the power of the Commission to reopen these cases upon the pending petition. Prior to that decision, as stated by the German Commissioner, a large part of the evidence had been tendered by the United States to sustain the allegations of the petition. The Umpire refrained from examining the evidence at that time and from expressing any opinion on its adequacy, " postponing ", as stated by the Umpire, " for the consideration of the Commission the probative value of the evidence tendered ".

The Commission has not at this time considered or passed upon the probative value of the evidence tendered and consequently there has been no opportunity for the National Commissioners to agree or disagree thereon, and no disagreement thereon has been certified to the Umpire.

In accordance with the concluding statement of the Umpire in his opinion the Commission should reopen these cases and " consider the evidence tendered by the American Agent and, dependent upon its finding from that evidence and any *that may be offered in reply on behalf of Germany*, either confirm the decisions heretofore made or alter them as justice and right may demand " (italics mine).

When that has been done if there should be a disagreement between the National Commissioners upon the probative value or the adequacy of the evidence tendered, such disagreement would then be certified to the Umpire.

It may be noted in this connection that the procedure before the Commission differs from court proceedings in that the only opportunity afforded, under the agreement, to either government to object to the admissibility of evidence is when the case is finally submitted to the Commission.

Also the American Agent must be given a hearing on that question before decision. The record at the present time is admittedly incomplete, pending the submission of rebuttal evidence, if any, by the German Agent, as noted in the opinion of the Umpire of December 15, 1933, and any further evidence in reply called for by the rebuttal evidence.

Moreover, the Commission has not yet been called upon to examine the new evidence already submitted. The pending Motion of the German Agent does not involve an examination of this evidence by the Commission and this Motion can and should be decided without an examination of the admissibility or probative value of evidence which is incomplete and not a final record of the claimant's case.

The American Commissioner, accordingly, refrains from discussing now the questions raised by the German Commissioner as to the admissibility of any of the new evidence which he considers is entirely outside of the issues raised in the present proceedings. He regards the discussion of that question as premature and inadmissible at this time, although one to be dealt with by the Commission at a later stage of the proceedings.

Furthermore, the American Commissioner sees in the German Commissioner's opinion convincing evidence that if the German Agent adopts the views

expressed in the German Commissioner's Opinion he will have little difficulty in deciding now whether or not he wishes to offer any evidence in rebuttal, and, if so, on what points.

The situation, as I see it, briefly stated, is:

(*a*) If the German Agent is of the opinion that no admissible evidence has been offered on behalf of the United States to sustain the charges of fraud, collusion, perjury or suppression of evidence, then he is at liberty to rest his case. The Commission will then fix, by rule, the time and order in which briefs may be filed.

(*b*) If, on the other hand, the German Agent is of the opinion that there is evidence supporting the charges, or some of them, he is at liberty to file such evidence as he deems proper and should do so, as noted by the Umpire in the concluding paragraph of his opinion of December 15, 1933, in order that this proceeding may be progressed to a final determination.

The American Commissioner, accordingly, has nothing further to add to his original opinion.

Chandler P. ANDERSON
American Commissioner

September 25, 1934.

Supplemental Memorandum by the German Commissioner

I. When I assume — as I do indeed — that the pending Motion involves the question of admissibility, I think, I am borne out by the American Commissioner himself, whose Opinion, first part, is devoted to that question, and very properly, too. The pending Motion asks for a bill of particulars. I grant it (see XI, p. 27 [p. 1147, this print] [g] of my Opinion, which is perhaps not fully appreciated by the American Commissioner when he says, I do not refer to the request of the German Agent for a bill of particulars). And in granting it, I have, of course, to define *what* particulars that bill ought to contain. I define this by formulating (in consonance with the German Agent's Motion) four questions, which this bill should answer. I think it is a misunderstanding, when the American Commissioner says, that I suggest the American Agent should file "*a*" brief "dealing with certain questions". I suggest that he should file *the* bill of particulars asked for; and I suggest that it should deal with *the* questions as put by the German Agent.

But the framing of these questions *means an implicit decision on the admissibility.* In my opinion, nothing is pertinent to the present case but these questions and no evidence is admissible but which lies within their scope. This I have tried to show in my Opinion. I do not think it indispensable that the Umpire should give a ruling on admissibility beyond the implicit ruling, which I would find in an order acceding to my suggestion that the bill of particulars should be framed in the way indicated by the proposed questions.

II. I could stop here, but for some views I find expressed in the American Commissioner's Supplemental Memorandum. The American Commissioner holds that this Commission would be *forbidden* to make a decision on admissibility now.

(*a*) The first ground alleged for this seems to be, "we are only concerned with the German Agent's Motion". I have already said that in my opinion this Motion *involves* the issue of admissibility. But I feel obliged to contradict the argument on principle, too. If there is a deadlock — as in the instant

[g] *Note by the Secretariat,* this volume, p. 203.

case — the Commission's task is to overcome it by *appropriate directions*, but they are not bound to remain within the scope of an individual brief or motion.

(*b*) Nor is the question of admissibility in any way privileged, so that it by necessity could be treated only in a final hearing.

First of all: When the question of admissibility appears as a preliminary or previous question to any direction to be given or any individual point to be decided, it goes without saying that this Commission will pass upon it. That applies to the present situation.

But even if that question is to be decided as such, I cannot concur with the American Commissioner's statement that it must be reserved to the final hearing. He thinks he may infer this from the fact that this Commission is bound to accept any evidence and cannot compel the close of the procedure. The conclusion is erroneous. This rule does in no way prevent that in one case you have separate stages; it then applies to both stages *separately* the second stage becoming superfluous if its application in the first stage and the decision in the first stage leads to a final solution. The instant reopening case is just a case in point.

And there is a second argument: We have a *special ruling* in this case in the form of the December Decision. Supposing the American Agent had a right to file *any* evidence, he had it up to The Hague and perhaps to the Washington-Decision. Since then, we have the December-Decision, just dealing with this question and *limiting* his right. He has lost his former right as far as it extended to evidence which the Umpire has expressly declared to be inadmissible. I again refer to the Umpire's words (p. 68) [p. 1120, this print],[h] " *the right to tender evidence* is *involved* " in his decision and for this reason orderly procedure would even have required that such decision should be rendered " *before* the filing of the tendered evidence " (italics mine).

III. The American Commissioner protests that no examination should take place *now* of the *probative* value of the evidence submitted. I agree with him and throughout my Opinion have strictly adhered to that principle. I only want to stress the point that an examination of the question: " does that evidence without a bill of particulars enable the opposing party to see what allegations it is meant to support or is it self-contradictory without such bill and is the thema probandum ambiguous without such bill? " is a different thing. And this examination cannot be dispensed with, for the decision on the German Agent's Motion hinges on these very points.

Dr. Victor L. F. H. HUECKING
German Commissioner

September 29, 1934.

The National Commissioners, having disagreed as aforesaid, hereby certify to the Umpire for decision the questions raised by the pending Motion of the German Agent.

Done at Washington September 29, 1934.

Chandler P. ANDERSON
American Commissioner

Dr. Victor L. F. H. HUECKING
German Commissioner

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[h] *Note by the Secretariat*, this volume, p. 185.

Opinion of the Umpire upon Certificate of Disagreement by the National Commissioners

Under date October 4, 1934, the National Commissioners transmitted to me as Umpire a certificate of disagreement respecting the action to be taken by the Commission on the motion of the German Agent now pending in the above cases and requested that I render a decision thereon.

I file herewith the certificate of disagreement and the separate opinions and supplemental opinions of the Commissioners, which have been prepared with the greatest care and have aided me in reaching my conclusion.

The status is as follows: May 4, 1933, the American Agent filed a petition for rehearing. He began, September 15, 1933, to file evidence in support of it. A jurisdictional question having arisen on which the National Commissioners were in disagreement, the Umpire rendered the decision of the Commission December 15, 1933, to the effect that the allegations of fraud and collusion contained in the petition, if supported by satisfactory proof, would be sufficient to warrant a rehearing of the cases. February 15, 1934, the American Agent completed the filing of evidence deemed by him to substantiate the charges made in the petition. June 13,, 1934, the German Agent filed an answer denying the allegations of the petition, and the same day presented a motion for a ruling that the American Agent " should file a brief, bill of particulars or some other written statement substantiating the contentions advanced in his petition for a rehearing ". The National Commissioners disagree as to the action proper to be taken on this motion. The German Commissioner would grant it; the American Commissioner would deny it.

1. The issue which will come before the Commission is made up by the allegations of the petition and the categorical denials of the answer. It is true that charges contained in the petition are general in their nature. If the German Agent had desired that before the American Agent began to file his proofs in support of these allegations they should be elaborated and made more specific, he might then have filed a motion to that effect and might well have contended that, in order to draft his answer to the charges, he needed additional information. In view of the trial practice of the Commission, I am not clear what action would have been taken upon such a motion. My understanding is that strictness of pleading has not been required in the cases presented to the Commission, but be that as it may, no motion for a bill of particulars or for an elaboration of the charges contained in the petition was made. Meantime, the American Agent filed evidence which he deemed tended to support the charges. The filing of all of the evidence which the American Agent desired to file was, as above stated, completed February 15, 1934. This was prior to the filing of the answer of the German Agent. That evidence, in and of itself, must necessarily define and limit the allegations of fraud and collusion embodied in the American Agent's petition.

The proper office of a bill of particulars is to enable a respondent to ascertain exactly what it is he is required to meet by his evidence. What has been done in the present case, namely, the submission by the moving party of all the proofs in support of his petition before the responding party is required to offer any proof, certainly renders unnecessary any particularization in the matter of formulation of the charges on which the petitioner relies.

2. If the German Agent's motion be considered a demand that the American Agent file a brief analyzing and discussing the evidence on which he relies prior to the German Agent's filing any evidence he may desire to offer, it seems obvious that the request ought not be granted. The office of briefs in matters coming before the Commission has always been, and necessarily must be, to aid the Commission in reaching a proper conclusion upon the whole body of the

proof offered by both sides. It would not only be inappropriate but probably not be helpful to demand that one side file a brief discussing the evidence before it is known what the evidence of the other side may be. Moreover, it would be, it seems to me, unfair to require the American Agent to make his argument in advance of presentation of proofs in opposition.

3. In support of his motion, the German Agent asserts that the evidence offered by the American Agent is of large volume; that it deals to a great extent with matters which the German Agent thinks have been rendered irrelevant by the Commission's decision of December 15, 1933; that the German Agent is unnecessarily handicapped and confused by the admixture of that which may be relevant and that which may not; and that therefore the American Agent ought to be required now to specify on which of the evidence heretofore filed he intends to rely. No doubt such a specification on the part of the American Agent would not only be helpful to his adversary but in the end would be an aid to the Commission in deciding upon the motion. The question is, however, whether the Commission can or ought to impose such a requirement upon the moving party. The agreement under which the Commission is organized is silent as to the method of procedure which should be followed in a matter of this sort. The parties to the controversy are sovereigns. The agreement requires the Commission to receive any writing either party may tender. The practice of the Commission has not been in accordance with civil law procedure in ordinary municipal tribunals. If it had been, the issues would have been nicely defined in formal pleadings, and the evidence as offered would have been tested as to its relevancy by the issues made up on the pleadings. Evidence as tendered would then have been admitted or ruled out of the cause, and when the time arrived for decision the Commission would have had before it only that body of evidence which had been formally admitted and would of course ignore that which had been by its rulings excluded from the record. The Commission has always been of the view that the terms of the agreement under which it sat prevented preliminary rulings upon the relevancy of evidence. The result has been that whatever was offered on behalf of either sovereign was accepted and filed, and when the time arrived for a decision the relevancy of each item of evidence had to be determined as part of the process of arriving at a conclusion. This method of procedure necessarily puts a somewhat heavier burden upon the Agents and upon the members of the Commission than if a strict method of pleading and ruling upon evidence under the pleadings had been adopted. I do not think that the Commission either can or ought now to alter the method which has been pursued throughout its work from the beginning.

4. The German Agent urges, and the German Commissioner holds, that the present proceeding differs so far in its character from the ordinary trial of a claim presented for compensation under the terms of the international agreement that a different rule should here apply. The suggestion is that, in view of the Commission's decision of December 15, 1933, the Commission shall, by some sort of order, define the character of evidence which it will receive and consider in support of the motion. It seems to me that the decision of December 15, 1933, has already done this insofar as it is necessary so to do. If items of evidence presented by the American Agent are irrelevant to the issue upon which the granting of a rehearing depends, as outlined in the Commission's decision of December 15, 1933, then obviously such evidence requires no rebuttal on the part of Germany. If evidence presented by the American Agent clearly falls within the category outlined in the Commission's decision, the German Agent is free to meet it by counter proof. If an item of

evidence be of doubtful relevancy, the German Agent will have to determine whether as a matter of policy he will rebut it or take his chance that it will be ruled irrelevant by the Commission when it comes to formulate its final conclusion upon the motion. In these respects the German Agent stands in no different position from that which he has occupied with respect to proofs offered in support of sundry claims for reparation. The practice has been, as I understand it, for the American Agent to file a claim petition and, in support of that petition, to tender such evidence as he thought relevant, and for the German Agent, in response, to tender such evidence as he thought important, disregarding evidence offered by the American Agent which he thought of no probative value in the premises. That, it seems to me, is quite analogous to the present situation.

CONCLUSION

From what has been above said, I conclude and decide that the motion of the German Agent should be overruled.

Owen J. ROBERTS
Umpire

[Handed down, November 9, 1934.]

LEHIGH VALLEY RAILROAD COMPANY, AGENCY OF CANADIAN CAR AND FOUNDRY COMPANY, LIMITED, AND VARIOUS UNDERWRITERS (UNITED STATES) *v.* GERMANY

(Sabotage Cases, July 29, 1935, pp. 1173-1175; Certificate of Disagreement by the National Commissioners, pp. 1159-1173.)

PROCEDURE: MOTION TO JOIN PRELIMINARY QUESTION (REOPENING) TO MERITS; REHEARING: OLD AND NEW EVIDENCE. Motion of American Agent filed May 2, 1935, for order that Commission does not desire submission of claims until able to decide both on rehearing and merits. Motion overruled: in the absence of agreement to that effect between parties, preliminary question (whether Commission was misled by fraud and case should be reopened) will be determined separately; if determined in favour of claimants, conclusions reached in Commission's decision of October 16, 1930 (see p. 84 *supra*), will be re-examined in light of old and new evidence.

Cross-reference: Witenberg, Vol. III, pp. 28-30 (French text).
Bibliography: Witenberg, Vol. III, pp. 28-30; Woolsey, A.J.I.L., Vol. 35 (1941), pp. 282-283.

Certificate of Disagreement by the National Commissioners

The American Commissioner and the German Commissioner have been unable to agree as to the action to be taken on the questions presented by the Motion filed by the American Agent on May 2, 1935, with reference to the procedure to be followed by the Commission at its next hearing on the sabotage cases:

Opinion of Mr. Anderson, the American Commissioner

This Motion calls upon the Commission to determine whether the next hearing shall be merely of a preliminary nature for the consideration of the

admissibility of the new evidence offered by the American Agent and its sufficiency to justify a reopening of the case, or, on the other hand, whether the Commission should at the same hearing consider the claims on the merits to determine whether the new evidence as admitted, taken together with the other evidence in the record, furnishes justification on grounds of justice and equity for the Commission to alter or confirm its previous decisions.

In the opinion of the American Commissioner the questions presented by this Motion simply require the interpretation and enforcement of the Commission's last decisions as rendered by the Umpire on December 15, 1933, and November 9, 1934.

In this Motion the American Agent calls attention to a letter addressed by the German Agent under date of April 16, 1935, to the Commission, in which he states that he has reserved " the right to submit additional evidence " if the Commission should decide to reopen these cases. It is this reservation which the American Agent desires to have specifically dealt with by the Commission in deciding the present Motion, because the American Agent contends that the effect of this reservation, if allowed, would be " to accomplish by indirection what the German Agent endeavored to accomplish directly by his Motion of June 13, 1934, which was denied by the Commission in the Opinion of the Umpire on November 9, 1934; namely, to further postpone the final action by the Commission in these cases by requiring the American Agent to argue the claims on an incomplete record in order that the German Agent may have the advantage of having the American Agent point out the particular evidence that it is necessary to meet."

It will be recalled that in the German Agent's Motion, which was overruled by the Umpire's decision of November 9th, he requested the Commission " to require the American Agent to either file a brief, a bill of particulars, or some other written statement, before the German Agent would be required to file any evidence in opposition to the pending petition for rehearing ".

In denying that Motion the Umpire held that it would be " unfair to require the American Agent to make his argument in advance of presentation of proofs in opposition ".

Exactly the same situation is again presented by the German Agent's present reservation of the right to submit additional evidence if the Commission should decide to reopen these cases.

It appears to the American Commissioner, from an examination of the previous proceedings and rulings of the Commission, that it has already definitely decided that at its next hearing it will expect these cases to be submitted for final decision, and in order to finally dispose of them the Commission must have before it all the evidence that either Government may desire to file, so that the Commission may pass not merely upon the preliminary question of the admissibility of such evidence, but also upon its probative value as to the merits of the claims. As the American Agent says, in the statement in support of his Motion, " It is obvious that consideration of the additional evidence submitted in support of the charges (of fraud, etc.) in the pending Motion for rehearing will require a review of the whole case. The new evidence can only be weighed and its effect gauged in connection with what has gone before." That being true, and the American Commissioner agrees with the views of the American Agent on this point, it would be a waste of time and a duplication and a delay of the work of the Commission to go over the same ground twice.

In brief, the position of the American Agent is that in accordance with the decisions of the Umpire of December 15, 1933, and November 9, 1934, the sabotage cases ought to be submitted to the Commission for final decision at one hearing. The Commission should then decide, first, whether the evidence

submitted by the United States sustains the allegations of the Petition, and, second, at the same hearing determine, from such evidence and any that Germany may offer, whether justice and right demand a confirmation or alteration of its previous decisions in these claims. This procedure would greatly expedite the final disposition of this litigation.

The question of the jurisdictional right to re-open the cases has already been passed upon affirmatively by the Umpire in his previous decisions, and, in order to have the two remaining questions, namely, fraud and revision, promptly disposed of by the Commission, all of the evidence on each side which either Government wishes to submit must be available to the Commission at its next hearing.

It is understood that the German Commissioner disagrees with the American Commissioner on the procedure above proposed. He apparently is of the opinion that there should be two hearings, (1) to pass upon the sufficiency of the evidence to sustain the allegations, and (2) if sustained, a further hearing to determine the character of the order to be entered upon the Petition, and that before the second hearing is held the German Agent should be permitted to file additional evidence. If this course were followed, the American Agent would also have the right to file further evidence, new briefs would be necessary, and the litigation conceivably would be prolonged for a considerable period.

The American Commissioner does not think that the German Commissioner's proposal conforms to the meaning of the decision of December 15, 1933, or that it is in accord with the expressed wish of both Governments to bring this litigation to as early a conclusion as is consistent with its proper determination.

There is one point which the two National Commissioners agree upon, and that is that when the German Agent has filed his evidence in opposition to the new evidence filed by the American Agent, the latter shall have an opportunity to file rebuttal evidence, and the German Agent shall then be at liberty within a reasonable time to file any evidence which he desires to present in opposition to the American Agent's rebuttal evidence, but that when in the course of the procedure to be adopted by the Commission as a consequence of this Motion, these proceedings are brought to the point of a final submission to the Commission for disposition on the merits, the German Agent will not then be at liberty to reserve the right to submit any additional evidence, but must then decide for himself what, if any, additional evidence he desires to submit on the question of the merits, and either submit it to the Commission or notify the Commission that no further evidence will be submitted.

The German Agent, in opposing this Motion, calls attention to a letter written by the American Agent on February 15, 1934, notifying the Commission that in filing his new evidence he " reserves the right to file further and additional evidence " in these cases upon their reopening under the decision of the Umpire of December 15, 1933.

The German Agent contends, therefore, that inasmuch as the reservation in his letter of April 8, 1935, is merely a duplication of the American Agent's letter of February 15, 1934, he is justified in making his reservation.

On this point it is to be noted that the American Agent's reservation was made before the Commission made its decision of November 9, 1934, which the American Agent considers was in effect a denial of the right of either Agent to make such a reservation, and, accordingly, the American Agent has abandoned his reservation and contends that the German Agent cannot maintain his reservation which was made after that decision was rendered.

In conclusion, if the American Agent has not correctly interpreted the decisions of the Umpire, the Commission nevertheless should at this time advise the Agents that it does not desire to take submission of the pending

Petiton until both Governments have filed all the evidence they desire to have considered, and it is desirable that the Agents should now be advised that there is to be one hearing, at which all questions involved in the Petition are to be considered and determined in order that the Commission may enter a final order either confirming or modifying its previous decisions, thus finally disposing of the pending Petition. The American Commissioner considers further that the Commission should request the two Agents to agree on definite time limits within which the filing of their evidence and briefs must be completed and the cases finally submitted.

It is, of course, understood that the decision on the pending petition can only determine finally the question of Germany's liability in these claims, as the determination of the amount of damages, if any, has by agreement of all parties been postponed until the question of liability has been finally decided.

Washington, D.C., May 31, 1935.

Chandler P. ANDERSON
American Commissioner

Opinion of Dr. Huecking, the German Commissioner

I note from the American Commissioner's Opinion:

He does not uphold the American Agent's view, that the Sabotage Cases have already been reopened. He is aware of the fact that two different stages are before us and that this Commission is called upon to decide *first:* " Was the judgment in these cases obtained by fraud? ", *second:* " Ought the judgment to be altered on its merits? ". What he suggests is, that these two questions should not be pleaded separately, but at the same time; that the German Agent should be compelled to plead the merits, *before* there is any decision against him affirming fraud and reopening the cases.

The issue involves two practical consequences:

(*a*) It determines the subject matter of the Commission's next hearing

(*b*) At this time the American Agent wants the German Agent to define his attitude with regard to future evidence regarding the *merits:*

The fact that it is no longer contended that the case has already been reopened immediately carries with it the consequence that the whole question appears in an entirely different light. As long as it was said that the case was already reopened doubts could exist in which stage of the proceeding we actually were. A possibility existed to speak of the merits and to submit Motions dealing with the evidence regarding merits and similar points.

The very moment it is clearly seen and recognized on both sides that there are two separate stages in this cause (the preliminary stage of fraud and — perhaps — an ulterior stage dealing with the merits) the first impression must be that the American conclusions as now preferred are most unusual ones. I doubt that it will be possible to show among the thousands of cases dealing with reopening and retrial that are reported in the Law books or Commentaries one single instance in which such an extraordinary way of dealing with a case was adopted. To mix up two stages in the same proceeding although they have (as I will show later) a completely different subject matter, a different legal view from which they ought to be looked at and a different evidence, would mean so uncommon a practice, I may even say so unheard of a practice in international matters, that only the strongest reasons and the most exceptional considerations would justify it. That *logically* the preliminary procedure must come first and the main procedure must come afterwards — if at all — seems to be admitted; why should that logical and natural sequence be disregarded? The question imposes itself: Is this case really different from any other case?

Are the arguments adduced of such particular weight as to justify a conclusion that the German side should be compelled to acquiesce in a way of handling the matter never adopted before and going against the natural and logical sequence of things as well as against any precedent?

I utterly fail to see anything that distinguishes this case from any other case and that may justify such unwarranted request and I may now say at once that I vote for the adoption of the ordinary course followed by courts in cases of this kind.

This said, I will discuss the points which have been made in detail.

To support his views, the American Commissioner relies — without separating them on principle — on juridical reasons and on reasons of expediency. I will deal with both, but I want to make it quite clear from the outset, that they do not stand on the same footing. If a party pleads res judicata — and that is what the German Agent does — he cannot be overruled on reasons of expediency. The latter have no weight at all as long as the juridical plea has not been refuted by juridical reasons. Sub " I ", I propose to deal with the juridical aspect of the matter, sub " II " with the expediency.

I

Juridical aspect

(A) Although the American Commissioner cites with apparent approval the position of the American Agent that the question of reopening must come first and the examination of the merits second, he rejects the application of this principle to the pleadings. When he suggests *one* hearing he does not define it as one hearing having two consecutive parts, one part restricted to the subject matter of fraud, ensuing deliberation of the Court, then (if that deliberation has a result favorable to the Claimant) pleadings dealing with the merits. Under the circumstances " one hearing " would mean a hearing on the merits similar to that held before the judgment was rendered only extended by one point, the point of fraud which only for the Court would be a preliminary point in their deliberations.

Thus what is envisaged by the American Commissioner is a full retrial on the merits to be ordered *now*. And further it is suggested that this retrial should be ordered now without any examination of the evidence, allegedly supporting fraud.

The question, then, boils down to this: Is any Court entitled to order a retrial on the merits, without having examined evidence? and this admittedly with the consequence that (again without such examination) by now such ruling affects the rights of the party holding final judgment with respect to future evidence in a retrial on the merits?

As I said before: It would be impossible to show among the thousands of retrial cases which are reported one Court which upholds such a view; one writer who defends it.

But the necessary data in this respect are readily available. I intentionally refrain from quoting American cases or American writers. In order to illustrate the general point we are dealing with by a judgment of general significance I draw attention to the decision of the House of Lords Jonesko *versus* Beard (Law Reports, Appeal Cases, 1933, p. 300). The Court (The Lord Chancellor, Lord Buckmaster, Viscount Dunedin, Lord Warrington of Clyffe, Lord Blanesburgh, Lord Tomlin) quotes with assent Lord Justice James who had stated in Flower *versus* Lloyd:

> You cannot go to your adversary and say " You obtained the judgment by fraud and I will have a rehearing of the whole case ", until that fraud is established.

Thus the House of Lords holds that you have no right to have fraud and merits established *at the same time* but that you myst establish fraud *before*, and before you have a rehearing.

Should a unanimous decision of the House of Lords be deemed insufficient I may refer to the jurists:

In Danniels' Chancery Practice (8th Edition, Volume 2, Year 1914, Page 1333) we read

" the fraud used in obtaining the judgment is the principal point in issue and necessary to be established by proof before the propriety of the judgment can be investigated."

Again the " before " which like the " until " in the quotation from the House of Lords, though it be one word only, is a full answer to the Opinion of the American Commissioner.

And if further support of the juridical views quoted be desired, be it mentioned that in annotation (o) *loco citato* Danniels refers to ten cases pro with no case contra.

I may be permitted an additional remark.

In all juridical systems that know an order for retrial and at the same time allow appeals, an order of this kind may be separately appealed from (see for instance the three successive appeals from such order in Brown *versus* Dean, Law Reports, Appeal Cases, 1910, p. 373-376, brought before the Divisional Court, then before the Court of Appeals and finally before the House of Lords). The general principle underlying this practice is exactly the idea that no one holding a final judgment may be compelled to answer on the merits before the order for the retrial itself is final; (still less before it is even in existence!) the essence of the final judgment being, as it has been expressed " to close the mouth on the one side and the ear on the other ".

(B) The American Commissioner tries to base his Opinion juridically on the decisions given by the present Umpire of this Commission under date of December 15, 1933, and November 9, 1934.

They do not serve him as a precedent in which may be found general principles of law which may be relied upon but he goes farther. He thinks that these two decisions directly and immediately contain the determination of the present issue so that they are in the present case the only source of law and in the American Commissioner's mind the whole question now to be discussed is merely a question of the interpretation of those two earlier decisions of the Umpire.

To deal with the latter point first: It stands to reason that the question now in issue (viz.: Shall the retrial on the merits take place simultaneously with the discussion of fraud) was not decided by the December and November decisions of the Umpire because when these decisions were rendered no disagreement of both Commissioners as to such simultaneousness had been certified to the Umpire (By the way: The American Commissioner fails to explain why if the issue was decided by the Umpire it was decided *twice* in two different decisions.). But I am quite agreeable that the two decisons of the Umpire be utilized as a guide to general principles applicable in this case. If I do so I fail to find in either decision anything that may support the American Commissioner's view but I find general principles which bear out my own standpoint.

In his Decision dated December 15, 1933 (the same decision in which the Umpire stresses that a decision in a reopening " involves the right to tender evidence ") he says *expressis verbis:* " it would have been fairer to both the parties definitely to pass in the first instance upon the question of the Commission's power to entertain the supplementary petition for rehearing ". What

else does this mean than the very matter now at issue, viz. that the preliminary question should not be tried *at the same time* as the main question but it should be dealt with (just as its name implies) preliminarily to that question?

Adverting to the decision dated November 9, 1934, I cannot find *one* syllable in it which deals with the merits. It deals with a Motion submitted by the German Agent and this Motion was (quite in conformity with the German Agent's general viewpoint) confined to fraud. It asked for a bill of particulars as to fraud and spoke of the evidence to be submitted on both sides as to fraud.

And fully in harmony with these facts the Umpire mentions " that the issue which will come before the Commission is made up by the allegations of the Petition and the categorical denials of the answer ". Here we find it clearly delineated what the theme of the next hearing ought to be; and by inference we may state that it will *not* be the *merits* of the case. The same idea appears in the next part of the November decision: The German Agent is informed that he must examine the relevancy of the American evidence as to *fraud* (cf. the words: " the issue upon which the granting of a rehearing depends "). What about the merits then? Will it be seriously contended that the decision contains a similar direction as to German evidence regarding the merits? The answer, of course, must be No. But then this answer " No " disposes of the American Commissioner's contention, for if the decision — as he says — really orders that the hearing on fraud and the retrial on the merits should be held simultaneously then necessarily the decision of the Umpire would have given such directions.

(C) The American Agent admits that he held the same Opinion as I hold now and pleaded accordingly, when the Sabotage Cases were argued at Boston. No sufficient explanation is given why he changed his mind, for the present explanation " that he was overruled at Boston " is factually wrong. He could not have been overruled for the simple reason that the German Agent was not contradicting him at the time (Page 42, two first paragraphs). Further the printed record shows (Page 41, and cf. the remarks p. 132 beginning with " One thing ") that the Commission through its Umpire made no ruling at all but merely expressed hopes and made courteous suggestions. Last but not least even if Boston had overruled the American Agent, Boston itself would not have been overruled by the present Umpire. I have already quoted from his December decision the passage in which he says " it would have been fairer to both the parties definitely to pass at the first instance upon the question of the Commission's power to entertain the supplementary petition for rehearing ". (And be it noted additionally that some lines earlier he states that the Boston arrangement was an arrangement made " by mutual consent ".)

Furthermore, I think the German Agent is entitled, as he does, strongly to emphasize the fact that even in the present proceedings the American Agent has made a reservation as to future evidence which is thoroughly incompatible with the simultaneous hearing on both fraud and merits. The facts cannot be denied that the American Agent made the very same reservation to which he objects when it was repeated by the German Agent. The American Commissioner says that the American Agent abandoned that reservation as superseded by the *November 1934* decision. Apart from the fact that the American Commissioner here admits (what he denies elsewhere) that the reservation would *not* be superseded by the *December 1933* decision (for the reservation is posterior to the December 1933 decision) the American Commissioner is mistaken about the facts: The last utterance of the American Agent which I have before me is his statement of May 20, 1935. Here he clearly persists in his reservation justifying if by reasons (which do not explain at all its incompatibility with the simultaneous hearing but) which show conclusively that he does

not abandon it. It goes without saying that it is a strong argument in favor of the German Agent's view when his adversary makes and upholds a reservation which is justifiable only when the German Agent's view is adopted, quite apart from the unusual fact that the American Agent opposes a reservation made by himself in his own favor when the identical reservation is made by the German Agent.

(D) I should not want to leave this point of the juridical aspect without stressing its particular importance with respect to the hearing which is before us. I feel it is my duty to insist on this because I find in the American Commissioner's Opinion certain considerations which I cannot leave uncontradicted. The American Commissioner says that it is obvious to him that the question of fraud requires a review of the whole case and that if the question of fraud should be separated from the merits it would be a waste of time and a duplication and it would mean going over the same ground twice.

There can be no question of going over the same ground.

First, the subject matter is totally different. The question " Was there fraud prevailing at the previous hearing? " is entirely different from the question: " How did the fire in Kingsland or Black Tom originate? "

Second, the Judge's general starting point is a fundamentally different one in both cases.

If the question of reopening has to be passed upon, the judge has to take his stand in the shoes of the former judge, who gave the final decision; his mind has to go back to the situation prevailing at the time the decision was rendered; his basis are the views held by the former judge and the former judge's appreciation of the evidence. The question put to the judge now sitting is: " Would the evidence as to fraud have influenced his predecessor? "

If the question of the merits has to be passed upon the views of the previous judge and the situation as it was at the time the judgment was rendered, are irrelevant. To the judge now sitting the *present* time and the present time only offers the basis, from which to answer the query: " What are *your* findings from the evidence now before *you ?* "

Third, the evidence would be totally different.

If the decision of the Umpire of December 15, 1933 is loyally adhered to only a limited volume of evidence has to be considered as far as the question of fraud is concerned. I cannot admit for a moment that in order to discuss the subject matter of fraud it is necessary to plead the whole record.

II

Expediency

(A) Because I deny the American Agent's Motion on juridical grounds it is only for completeness' sake if I add some remarks about expediency (see above).

(B) When the American Commissioner contends that in order to avoid delay and other practical disadvantages expediency would recommend that the hearing as to fraud and the hearing as to merits should be held simultaneously I think he is misled by the fact that of two alternatives he sees and appreciates only one. He argues throughout as if it were a matter of course that the Commission will grant a rehearing on the merits. That is by no means a matter of course. It is quite possible that the Commission's decision goes the other way. In this case any hearing on the merits is *superfluous*.

The question, then, is:

What might we possibly win with respect to time and to effort of all concerned by adopting the American Commissioner's suggestion; and what might we possibly lose?

(1) We might possibly win the time that would lie between the hearing on fraud and the hearing on the merits. That we might spare a whole hearing, must be taken *cum grano salis*: It gives fallacious impression, if continually the words " one hearing " are stressed. Even if the American Commissioner's view were adopted there will be *two* hearings. Should the next hearing extend simultaneously to fraud and revision and should the Claimants obtain a reopening, still the amount of damages would be open.

(2) On the other hand, the list of what we might lose, is by far longer:

(*a*) We risk, what we otherwise would save, the time needed to collect evidence on the merits, the time needed to bring rebuttal evidence, the time needed to bring surrebuttal evidence.

(*b*) We risk, what we otherwise would save, the time to prepare briefs on such evidence; and the time to answer them and the time to answer such answer.

(*c*) We risk, what we otherwise would save, extension of the briefs (and the respective reply-briefs) concerning *fraud* to perhaps very voluminous briefs concerning *merits* covering the bulk of an enormous record instead of a reasonable part of it;

(*d*) We risk, what we otherwise would save, a very considerable extension of the preparation of both Judges and Agents, such preparation no longer being limited to a relatively restricted subject-matter but forcibly covering an extremely vast area.

(*e*) We risk, what we otherwise would save, days of discussion, afterwards turning out to be futile.

It is clear from all this, that what may be possibly gained is out of all proportion with what would be wasted in the way of time and exertions and it may be said, that granting the American Agent's Motion would much more probably mean delay, and very considerable delay, than denying it.

The American Commissioner concludes his argument by pointing to the general understanding, that the question of damages should not be pleaded at the hearing, only liability. Does not that understanding rest on the same ground as the one on which I place myself, and does it not testify as to the very practice of the Commission in these cases? Was not that understanding arrived at because everybody felt, that as long as there is a fair chance of a very extensive discussion and preparation becoming superfluous in consequence of a decision regarding a preliminary point, that preliminary point should not be treated together with the point dependent on it but previously and separately?

Conclusion

Rejecting the American Agent's Motion I suggest a ruling of this Commission:

That the next hearing of the Commission and its preparation should be limited to the question of fraud.

Additional remark

In the American Commissioner's Opinion I find certain observations regarding points about which he states we agree and about time limits to be agreed upon between the Agents. I do not think that it is necessary to embody these questions in the present Opinion and I shall define my attitude as to these

points not here but in a separate letter [1] which it is my intention to address to the American Commissioner.

Washington, D.C., June 7th, 1935.

Dr. Victor L. F. H. HUECKING
German Commissioner

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[1] Letter referred to, dated June 8, 1935, reads:

" My dear Mr. Anderson:

" In your Opinion dated May 31st, 1935 you state on page 5, 6 [p. 1161, this print] (*Note by the Secretariat* — this volume, p. 213):

" 'There is one point which the two National Commissioners agree upon, and that is that when the German Agent has filed his evidence in opposition to the new evidence filed by the American Agent, the latter shall have an opportunity to file rebuttal evidence, and the German Agent shall then be at liberty within a reasonable time to file any evidence which he desires to present in opposition to the American Agent's rebuttal evidence, but that when in the course of the procedure to be adopted by the Commission as a consequence of this Motion, these proceedings are brought to the point of a final submission to the Commission for disposition on the merits, the German Agent will not then be at liberty to reserve the right to submit any additional evidence, but must then decide for himself what, if any, additional evidence he desires to submit on the question of the merits, and either submit it to the Commission or notify the Commission that no further evidence will be submitted '.

" I think that indeed our views coincide regarding this matter, but as I am not absolutely certain whether I understand the passage aright, I state the point in my own terms:

" (1) The American Agent is at liberty, to file rebuttal evidence, meeting the evidence which the German Agent has submitted on the 28th of February 1935 and on the 16th of April 1935.

" (2) The German Agent is then at liberty to file surrebuttal evidence, meeting such rebuttal evidence as mentioned sub (1).

" (3) Both Agents should try to agree on definite time limits within which to file the evidence mentioned sub (1) and (2). Same suggestion regarding briefs.

" (4) Should the Umpire rule, that at the next hearing the question of fraud and the question of the merits should be dealt with simultaneously, the German Agent would be obliged to define after that decision his attitude as to further evidence regarding the merits.

" (5) It seems that there is no unanimity about the question, regarding whether and to what extent further evidence on the merits may be submitted. Should no agreement be reached on such a question it must be decided; and it may be necessary to decide it before (5) is complied with.

" (6) With the proviso mentioned sub (5) the German Agent in the contingency mentioned sub (4) cannot maintain his present reservations to evidence on the merits. Nor could he make such a reservation at the hearing on the merits itself.

" It may be advisable to call this letter of mine not yet a confirmation of your views but merely a suggestion of mine; thus perhaps you will be good enough to consider its contents in this light and if you think you may fall in with it to send me a letter of confirmation.

" Sincerely yours,

" Dr. Victor L. F. H. HUECKING.

" The American Commissioner concurs with the German Commissioner in the foregoing statement as to points of agreement between them.

" Chandler P. ANDERSON
" *American Commissioner* "

For the reasons stated in the foregoing Opinions, the National Commissioners have disagreed on the questions at issue, and, accordingly, certify them to the Umpire for decision.

Done at Washington, D.C., this 7th day of June, 1935.

Chandler P. ANDERSON
American Commissioner

Dr. Victor L. F. H. HUECKING
German Commissioner

Decision of the Commission

The American Agent has filed a motion that an order be entered " to the effect that the Commission does not desire to take submission of these claims, until all evidence that either Government desires to have considered *in support of or in opposition to the pending petition for rehearing has been filed* in order that the Commission may, when it takes submission, enter an order finally disposing of these claims on their merits, and that the order further advise the Agents of the two Governments accordingly ".

The German Agent opposes the making of such an order. The Commissioners have certified their disagreement as to the section to be taken.

The proceedings leading up to the filing on May 4, 1933, of a petition by the American Agent for a rehearing of these cases are sufficiently outlined in the decision of December 15, 1933. The present motion has to do solely with the procedure appropriate under that petition for rehearing. After the American Agent had petitioned for a rehearing, the German Agent challenged the power of the Commission to act upon it. This question of power had been raised in earlier stages of the case, but as shown by the decision of December 15, 1933, had been reserved. The contention of the German Agent required the Commission squarely to meet that question. This it did in its decision of December 15, 1933. The conclusion was that no power was vested in the Commission to reopen a case merely for after discovered evidence; but that, where, as in the present instance, the assertion is made that fraud has been perpetrated upon the Commission, power exists to examine the facts and to act in accordance with the findings consequent upon such examination. Nothing more was decided on December 15, 1933. At the time of that decision the German Agent had not answered the petition nor offered evidence. The American Agent had offered evidence intended to support the allegations of the petition. What was said at the close of the opinion was based upon the assumption that the claimants could effectively support the allegations of their petition. Thereafter the German Agent filed an answer denying those allegations.

By the petition and answer an issue was framed. The issue may be stated thus: " Was the Commission misled by fraud practiced upon it? " If that issue be decided in favor of the claimants, the Commission should reopen the case upon the merits and reexamine the conclusions reached in the light of the whole record, including the proofs offered to impeach evidence forming part of the record when its decision on the merits was rendered. Obviously the case is not reopened by the presentation of a petition praying for such action. Especially is this true where the allegations of the petition are categorically denied. This the American Agent concedes. The decision of November 4, 1934 [announced November 9, 1934], so recognizes. It is there said: " The issue which will come before the Commission is made up by the allegations of the petition and the categorial denials of the answer."

The first step is the determination whether the claimant's assertions as to fraud, *et cetera*, are made out. To ascertain this the evidence in support of those assertions must be examined. Necessarily, such examination will include a reference to evidence in the record prior to the Commission's decision on the merits. Such reference will be necessary for comparison between the old evidence and the new, and to show the bearing and meaning of the proofs tendered upon the issue of fraud and collusion. On this preliminary matter, namely, whether the case shall be opened and a rehearing had upon the merits, it will not be necessary to argue the cases on the merits. If the claimants prevail upon that preliminary question, the former decisions will be laid aside and the merits reexamined in the light of all the evidence, including that tendered on the issue of fraud and collusion. If they fail, reconsideration of the Commission's decisions on the merits of the claims will be unnecessary and indeed improper. The relevancy and weight of evidence upon the comparatively narrow issue made by the petition and answer will be one thing; the relevancy and weight of evidence upon the merits, if a rehearing be granted, will be quite a different thing.

It is, of course, conceivable that the Commission should hear argument on both the propriety of reopening the case and the merits at one and the same time. Much may be said pro and con such a procedure. Nevertheless, I suppose that if the parties were in agreement that this course should be followed, the Commission would acquiesce. There is no such agreement. Germany insists that the preliminary question be determined separately. I am of opinion this is her right. She now has a judgment. Before that judgment may be set aside and a new hearing held upon the merits, it is incumbent upon the claimants to sustain the affirmative of the issues made by their petition. The next hearing, therefore, will be upon the question of reopening *vel non*, and not upon the merits.

It is earnestly urged that the Agents agree at once to limit the time for rebuttal by the United States of the proofs offered by Germany in opposition to the petition for rehearing, and confer with the Commission as to the fixing of a time for argument and for the filing of briefs on that issue.

I attach hereto the certificate of disagreement by the National Commissioners, together with their separate opinions and supplemental opinions attached thereto.

Done at Washington July 29th, 1935.

Owen J. ROBERTS
Umpire

LEHIGH VALLEY RAILROAD COMPANY, AGENCY OF CANADIAN CAR AND FOUNDRY COMPANY, LIMITED, AND VARIOUS UNDERWRITERS (UNITED STATES) *v.* GERMANY

(Sabotage Cases, June 3, 1936, pp. 1175-1177.)

PROCEDURE: REHEARING, SETTING ASIDE OF PREVIOUS DECISION, UNFOUNDED SUSPICION, REINSTATEMENT OF CASE INTO PREVIOUS POSITION, REOPENING. Setting aside of Commission's decision of December 3, 1932 (see p. 104 *supra*), according to which new evidence so far submitted by claimants could not lead to reversal or material modification of decision of October 16, 1930 (see p. 84 *supra*): no sufficient ground for suspicion expressed by the then German Commissioner before case was argued that claimants withheld

from Commission unfavourable expert report. Cases reinstated into position before 1932 decision, but not reopened as far as 1930 decision is concerned.

Bibliography: Witenberg, Vol. III, pp. 31-32; Woolsey, A.J.I.L., Vol. 33 (1939), p. 739, Vol. 34 (1940), p. 34, and Vol. 35 (1941), pp. 283-284.

Decision of the Commission

Reference is made to the decision of this Commission dated December 3d, 1932, in which the Umpire held that

" if the new evidence " (submitted to him at the time in order to impugn the decision of this Commission rendered at the Hague under the date of October 16th 1930) " were formally placed on file and considered in connection with the whole body of evidence submitted prior to the Commission's Opinion of October 16th 1930, the findings then made and the conclusions then reached would not be reversed or materially modified ".

Against this Decision and the Decision rendered at the Hague October 16, 1930, the petition for a rehearing now under consideration is directed. Its allegations are, *inter alia*, that before the case was pleaded at Washington the then German Commissioner brought it to the knowledge of the Commission that according to information received by him Claimants had obtained a report from one of their experts the contents of which were adverse to the genuineness of the main documents on which they relied but were withholding such report from the Commission. As to the actual happenings the Umpire has stated during the argument of these cases:

" I have known Mr. Albert S. Osborn for many years. When I was in practice I retained him in connection with several problems arising with respect to documents whose authenticity was contested. At some time he referred me to Mr. Elbridge W. Stein as a competent expert in similar matters. Mr. Stein, at that time, had an office in the Bulletin Building, Philadelphia. On one or more occasions I consulted him.

" Just before the date set for hearing in the sabotage cases (probably some time in November 1932), Mr. Stein attempted to get into communication with me by telephone. He wished an interview with me concerning the sabotage cases in which I knew he was a witness for the claimants. I refused to allow him to communicate with me.

" During the meetings of the Commission preliminary to the hearing, Dr. Kiesselbach advised Mr. Anderson and me that the claimants had suppressed an expert report adverse to the authenticity of the Wozniak letters and the Herrmann message. I cannot say that Dr. Kiesselbach specifically stated the source of his information.

" The communication naturally disturbed me but I knew of no action that the Commission or I, as Umpire, could take in the premises and so stated.

" My impression that there had been some such suppression was strengthened by Mr. Osborn's statement, in one of his affidavits, that it was remarkable that no opinion by Mr. Stein, a competent expert in such matters, had been submitted as to the age of the documents but only an opinion as to handwriting, a matter that was uncontested.

" In the oral argument the German Agent made no reference to this matter and as the American Agent did not refer to it the impression remained that there had been a withholding of a report which might have shed light on the question argued before the Commission."

In addition this Commission states through its Members present at the time that there can be no doubt as to the entire good faith of the then German Commissioner when he made this communication. The Umpire and the American Commissioner hold, that Claimants have shown, that there was no suf-

ficient ground for suspicion, and that for this reason Claimants are entitled to a reconsideration. The German Commissioner, whilst doubting that Claimants were actually wronged (especially as in his view mere suspicions never can be a basic element of juridical findings) takes the stand, that in international arbitration it is of equal importance that justice *be done* and that *appearances show clearly* to everybody's conviction that justice *was done*. He does not think that the second requirement was satisfactorily complied with in the present case, and for this reason, he accedes to the conclusion of the other members of this Commission. It is therefore decided, that the Decision of this Commission rendered at Washington on the third of December 1932 be set aside. This decision reinstates the cases into the position they were before the Washington Decision was given. It has no bearing on the Decision rendered at the Hague and does not reopen the cases as far as that decision is concerned. Before the Hague Decision may be set aside the Commission must act upon the claimant's petition for rehearing. Whether upon the showing made, the Commission should grant a rehearing, unless Germany shall agree to a different course, must, under the Commission's Decision of July 29, 1935, be determined by a hearing separate from and distinct from any argument on the merits. Both parties are entitled to file evidence (and to exchange briefs) as well in the proceedings in which a ruling for a reopening is sought as in the subsequent proceedings dealing with the merits, should such a ruling be granted. Evidence filed and briefs submitted in the proceedings, in which a reopening is sought, must remain within the limitations set by the Commission's Decision dated December 15, 1933.

Done at Washington, June 3, 1936.

Owen J. ROBERTS
Umpire

Chandler P. ANDERSON
American Commissioner

Dr. Victor L. F. H. HUECKING
German Commissioner

NOTE

[At an informal meeting of the Commission held June 17, 1936, the Commission granted Motion of the German Agent dated June 16, 1936, asking for a postponement of further proceedings for the reason that invitation had been received by the Department of State, Washington, D.C., from the German Government suggesting that representatives of the United States meet with representatives of Germany with a view to negotiating a compromise settlement of the sabotage claims.

In accordance with this invitation, negotiations were had in July, 1936, in Munich, Germany, between the duly authorized representatives of the two Governments. As the result of these negotiations, a compromise settlement of the sabotage claims and the Drier claim, being all claims then pending before the Commission, was reached. The formal papers usual for carrying out settlements of this character were, however, not signed by the German Agent. Protests against carrying out the settlement were likewise filed with the Department of State on behalf of certain American nationals holding awards of the Commission and on behalf of certain German nationals holding awards of the War Claims Arbiter.

In view of the fact that the German Agent did not sign the usual formal papers, Motions were filed with the Commission by the American Agent for

awards in accordance with the Agreement reached at Munich in July, 1936. The American Agent likewise filed with the Commission the several protests received on behalf of American nationals and on behalf of German nationals.

The questions involved in these Motions and protests were discussed in briefs filed with the Commission, and were the subject of oral arguments before the Commission at the meeting held July, 7 1937, at which meeting the following rulings thereon by the Commission were announced by the Umpire:]

" The Commission has considered the motion with care and has also considered all of the points made in the briefs and oral argument. Without reiterating its reasons, it is of the opinion that the motion must be dismissed, unanimously of that opinion.

" With regard to the protests by certain German nationals, those protests the Commission feels, in large part, fall as a result of its decision. The same thing is true of the protests by certain awardholders.

" With regard to the applications filed by certain claimants, either German nationals or holders of claims under certain arbitral awards, and with regard to the applications of certain American awardholders to permit them to intervene in the proceedings, the Commission unanimously denies those applications." (Minutes of meeting, July 7, 1937, p. 1658.)

LEHIGH VALLEY RAILROAD COMPANY, AGENCY OF CANADIAN CAR AND FOUNDRY COMPANY, LIMITED, AND VARIOUS UNDERWRITERS (UNITED STATES) *v.* GERMANY

(Sabotage Cases, June 15, 1939, pp. 310-312; [a] *Certificate of Disagreement and Opinion of the American Commissioner, June 15, 1939, pp. 1-310.)*

JURISDICTION: EFFECT ON — OF WITHDRAWAL OF MEMBER FROM COMMISSION AND FAILURE TO FILL VACANCY. — PROCEDURE: UNANIMITY, DELIBERATIONS, ROLE OF UMPIRE. — INTERPRETATION OF TREATIES: PRACTICE, PURPOSE, BENEFITS RECEIVED, MUNICIPAL DECISIONS, TEXT WRITERS. Withdrawal of German Commissioner from Commission on March 1, 1939, after submission of cases to Commission on January 27, 1939, followed by conferences of Umpire and Commissioners with a view to the decision of the issues presented until February 28, 1939. Failure of German Government to fill vacancy (see Agreement of August 10, 1922, art. II). *Held* that Commission not *functus officio* and, acting through Umpire and American Commissioner, has power to proceed with cases and decide whether fraud proved sufficient to set aside decision of October 16, 1930 (see p. 84 *supra*), and whether claimants proved their cases: (1) under Agreement *supra*, art. II and VI, and its Rules of Procedure, unanimity not required, and concurrence of only two members necessary for decision (practice ever since Commission's creation), (2) both before and after special rules of procedure for sabotage cases were adopted, Umpire participated in deliberations and opinions of Commission (reference made to decision of March 30, 1931, p. 101 *supra*), (3) after submission of case to Commission, retirement of one National Commissioner cannot prevent decision by remaining members of

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[a] Henceforth, references to page numbers are to *Opinions and Decisions on the Sabotage Claims Handed Down June 15, 1939, and October 30, 1939, and Appendix.* (Washington, Government Printing Office, *s.d.*). Comp. Vol. VII, p. 3.

Commission: (*a*) this would defeat purpose of Governments in establishing Commission, (*b*) Germany received benefits after Commission's creation, i.e., under Settlement of War Claims Act of 1928, 80 per cent of German property returned to former owners, (*c*) reference made to municipal decisions, *inter alia*, *Republic of Colombia* v. *Cauca* (1903), 190 U.S. 524, and to text writers on international law.

SABOTAGE DURING PERIOD OF AMERICAN NEUTRALITY. — PROCEDURE: SETTING ASIDE OF PREVIOUS DECISION; REINSTATEMENT OF CASE INTO PREVIOUS POSITION, REOPENING; REHEARING: OLD AND NEW EVIDENCE, FRAUD, EXAMINATION OF MERITS. — EVIDENCE: FRAUD IN — ; WITNESSES, AFFIDAVITS, DOCUMENTS, AUTHENTICITY OF DOCUMENT. Setting aside of Commission's decision of October 16, 1930, on merits (see p. 84 *supra*), reinstatement of case into position before 1930 decision, reopening, rehearing granted on the whole record: *held* that material fraud in evidence presented by Germany seriously misled Commission and affected its decision in favour of Germany. Though unnecessary in circumstances, Commission also examined proofs tendered by United States to determine whether claims had been made good: German Commissioner insisted, that misleading of Commission immaterial if United States failed to sustain burden of proof incumbent upon it; *held* that, on the record as it now stands, claimants' cases are made out. Analysis of new evidence: see *supra* and Analytical Table *infra*.

Cross-reference: A.J.I.L., Vol. 33 (1939), pp. 770-772; Witenberg, Vol. III, pp. 70-721 (French text).

Bibliography: Witenberg, Vol. III, pp. 33-72; Woolsey, A.J.I.L., Vol. 33 (1939), pp. 737-740, and Vol. 35 (1941), pp. 289-298.

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Certificate of Disagreement and Opinion of the American Commissioner

These cases originated out of two disasters, — the first, the destruction at Black Tom, N. J., on July 29-30, 1916; the second, the fire at Kingsland, N. J., on January 11, 1917.

In these disasters millions of dollars worth of property was destroyed, and in the case of Black Tom, at least two lives were lost.

The Memorials of the United States were filed in March, 1927, and therefore the cases have been pending before the Commission more than twelve years.

The present status of these claims is as follows: The American Agent on the 4th day of May, 1933, filed a petition for rehearing and reconsideration of the decision at Hamburg, dated the 16th day of October, 1930, on the ground that it was induced by fraud and collusion on the part of witnesses and suppression of evidence on the part of some of them. The purpose of the petition is fully set out in the following language in the decision of the Umpire at Washington, December 15, 1933 (Report of American Commissioner dated December 30, 1933, pp. 75, 76):

" Its allegations are that certain witnesses proffered by Germany furnished the Commission fraudulent, incomplete, collusive, and false evidence which misled the Commission and unfairly prejudiced the claimant's cases; that certain witnesses,

including some who previously testified, who are now within the United States, have knowledge and can give evidence which will convince the Commission that its decision was erroneous; that evidence has come to light showing collusion between certain German and American witnesses to defeat the claims. These are serious allegations, and I express no opinion of the adequacy of the evidence tendered by the American Agent to sustain them. I have refrained from examining the evidence because I thought it the proper course at this stage to decide the question of power on the assumption that the allegations of the petition may be supported by proof, postponing for the consideration of the Commission the probative value of the evidence tendered.

"The petition, in short, avers the Commission has been misled by fraud and collusion on the part of witnesses and suppression of evidence on the part of some of them. The Commission is not *functus officio*. It still sits as a court. To it in that capacity are brought charges that it has been defrauded and misled by perjury, collusion, and suppression. No tribunal worthy its name or of any respect may allow its decision to stand if such allegations are wellfounded. Every tribunal has inherent power to reopen and to revise a decision induced by fraud. If it may correct its own errors and mistakes, *a fortiori* it may, while it still has jurisdiction of a cause, correct errors into which it has been led by fraud and collusion.

"I am of opinion, therefore, that the Commission has power to reopen these cases, and should do so, in order that it may consider the further evidence tendered by the American Agent and, dependent upon its findings from that evidence and any that may be offered in reply on behalf of Germany, either confirm the decisions heretofore made or alter them as justice and right may demand."

On the 2nd day of May, 1935, the American Agent filed a Motion, asking that an Order be entered

"to the effect that the Commission does not desire to take submission of these claims until all evidence that either Government desires to have considered in support of or in opposition to the pending petition for rehearing has been filed in order that the Commission may, when it takes submission, enter an Order finally disposing of these claims on their merits and that the Order further advise the Agents of the two Governments accordingly."

The German Agent opposed the making of such an Order, and, in the decision of July 29, 1935, denying the Motion, the Commission, by the Umpire, said (p. 2):

"By the petition and answer an issue was framed. This issue may be stated thus: 'Was the Commission misled by fraud practiced upon it?' If that issue be decided in favor of the claimants, the Commission should reopen the case upon the merits and reexamine the conclusions reached in the light of the whole record, including the proofs offered to impeach evidence forming part of the record when its decision on the merits was rendered. Obviously the case is not reopened by the presentation of a petition praying for such action. Especially is this true where the allegations of the petition are categorically denied. This the American Agent concedes. The decision of November 4, 1934 [1], so recognizes. It is there said: 'The issue which will come before the Commission is made up by the allegations of the petition and the categorical denials of the answer.'"

In the course of his opinion the Umpire also said (p. 3):

"* * * If the claimants prevail upon that preliminary question [the right to reopen], the former decisions will be laid aside and the merits reexamined in the light of all the evidence, including that tendered on the issue of fraud and collusion. * * *

"It is, of course, conceivable that the Commission should hear argument on both the propriety of reopening the case and the merits at one and the same time. Much may be said pro and con such a procedure. Nevertheless, I suppose that if the

[1] Announced November 9, 1934.

parties were in agreement that this course should be followed, the Commission would acquiesce. There is no such agreement. Germany insists that the preliminary question be determined separately. I am of opinion this is her right. She now has a judgment. Before that judgment may be set aside and a new hearing held upon the merits, it is incumbent upon the claimants to sustain the affirmative of the issues made by their petition. The next hearing, therefore, will be upon the question of reopening vel non, and not upon the merits."

Following this decision, additional evidence and exhaustive briefs were filed on behalf of each Government. Oral arguments were then had on May 12 to 29, 1936. The Commission on June 3, 1936, handed down a unanimous decision, setting aside the decision of December 3, 1932, and restoring the claims to the position they were in before that decision was rendered. In the course of its decision the Commission said:

" Before the Hague Decision may be set aside the Commission must act upon the claimant's petition for rehearing. Whether upon the showing made, the Commission should grant a rehearing, *unless Germany shall agree to a different course*, must, under the Commission's decision of July 29, 1935, be determined by a hearing separate from and distinct from any argument on the merits." (Emphasis supplied.)

That Germany, following the decision of June 3, 1936, did elect to follow " a different course ", is evidenced by the fact that the German Agent exercised the right given him in the Order of the Commission of December 1, 1937, reading as follows:

" that the German Agent may not only file the documents called for under Rule 4 [of the Special Rules, under Order of March 20, 1929], [b] but may submit, if he desires, further evidence."

The same Order provided that:

" The German Agent shall file with the Commission any other evidence [in addition to that called for under Rule 4] he desires to file on or before March 1, 1938, and not thereafter."

Pursuant to this Order, the German Agent did file a considerable amount of evidence other than that called for under Rule 4 of the Special Rules, his last evidence being filed on January 14, 1939.

During the past twelve years, thousands of pages of evidence, consisting of official documents from the files of various Government Departments, affidavits, examinations of witnesses under the Act of July 3, 1930 (46 Stat. 1005), and under the act of June 7, 1933 (48 Stat. 117), and other instruments have been filed and during that period, voluminous briefs were filed by each side and lengthy oral arguments heard, covering the various features of the cases.

The cases were closed on January 14, 1939, and each Agent has filed exhaustive briefs covering a full discussion, not only of the questions raised by the petition of May 4, 1933, but likewise arguing the cases on the merits. The American Agent filed his briefs on September 13, and December 5, 1938. The German Agent filed his briefs on November 16, 1938, and January 12, and 14, 1939. After exhaustive oral arguments by distinguished counsel extending through twelve days, the cases were finally submitted to the Commission on the 27th day of January, 1939.

After about two weeks had elapsed, the Umpire and the Commissioners began their conferences. These conferences continued, but not on consecutive days, until Tuesday, February 28, 1939, when the last conference was held.

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[b] *Note by the Secretariat*, this volume, p. 244 *infra*.

Another conference was scheduled to be held on Thursday, March 2, 1939, at the office of the Umpire. Shortly before the time for the conference, a letter from the German Commissioner, announcing his retirement, was delivered to the Umpire and a similar letter was delivered to the American Commissioner. These letters and the replies thereto have been made matters of record. [1]

The subject of these conferences, in their early stages, was whether the evidence which had been adduced had proven fraud sufficient in character to set aside the decision at Hamburg.

In the course of these conferences, the American Commissioner expressed to the Umpire and to the German Commissioner his opinion that the decision at Hamburg had been reached on false and fraudulent evidence and that the proof of fraud was sufficient to set aside the Hamburg decision and reopen the cases.

After the conferences had continued for a considerable time, the Umpire expressed himself in entire agreement with the American Commissioner on the question of fraud. Thereupon the German Commissioner argued that, if, upon an examination of the whole record, both before and subsequent to the Hamburg decision, the Commission were to come to the conclusion that the United States had not proven its case, even though there had been fraud in the evidence before The Hague argument, it would be necessary to dismiss the petition, and he urged upon the Umpire and the American Commissioner the necessity of considering the whole evidence for that purpose.

It was thereupon agreed that the whole record should be examined to determine whether the American case had been proven or not, and it was while the Commission was engaged in examining this question that the letters aforesaid of the German Commissioner were received.

As was indicated clearly in the Umpire's reply, the letter to the Umpire presented a wholly false picture of the deliberations of the Commission. The effort of the German Commissioner to justify his retirement, by attributing bias to the Umpire, will receive, as it deserves, the disapprobation of every right-thinking person.

CERTIFICATE OF DISAGREEMENT

Under these circumstances, I deem it my duty as American Commissioner to certify, and I do hereby certify, to the Umpire that, in both of the cases now under consideration by the Commission, there was a disagreement between the American Commissioner and the German Commissioner on all material points before the Commission, and particularly on the point as to whether the evidence which has been adduced had established fraud sufficient in character to justify the Commission in setting aside the decision at Hamburg.

I further certify that at the time when the German Commissioner retired, the Commission was, at his instance, considering the question whether the American Agent had proven his case, and, more particularly, whether the Herrmann message was an authentic instrument; and with this, my certificate, I am submitting my opinion with respect to said cases and the points of difference certified, and I respectfully ask that this opinion be filed as a part of the record in this case.

I. JURISDICTION

There have been spread upon the minutes of the Commission the letter of the German Commissioner, addressed to the Umpire, announcing his retirement

[1] For letters, see appendix. (*Note by the Secretariat*, this volume, Appendix V, p. 493.)

from the post of German Member of the Mixed Claims Commission; the Umpire's reply thereto; the letter of the German Commissioner to the American Commissioner apprizing him of his retirement; the American Commissioner's reply thereto, and the letter of the American Commissioner to the Secretary of State, notifying the Secretary of State of the German Commissioner's retirement and the status of this case at the time of the retirement of the German Commissioner.

Although the German Commissioner announced his retirement on March 1, 1939, and more than three months has expired, the German Government has failed to follow the procedure prescribed by the Agreement of August 10, 1922, for filling the vacancy.

Under the circumstances set out above and in the letters spread upon the minutes, the question which is now before the Commission for its decision is, whether the Commission, acting through the Umpire and the American Commissioner, has the power to proceed with the cases and to decide whether the evidence which has been adduced has proven fraud sufficient in character to set aside the decision at Hamburg; and, second, whether upon an examination of the whole record, the American Agent has failed to prove his case.

Or, to put the question in a different form, did the retirement of the German Commissioner on March, 1 1939, render the Commission *functus officio* and deprive the Commission of the power to decide the questions at issue?

In order to examine and decide this question, it is necessary to refer to the pertinent provisions of the Treaty of Berlin; the Agreement of August 10, 1922, between the two Governments, under which this Commission was organized, and the Rules of Procedure adopted by the Commission.

Under the Treaty of Berlin it was provided, in section 5, of the Joint Resolution of Congress, approved by the President July 2, 1921, [1] and incorporated in said Treaty, as follows:

" All property of the Imperial German Government, or its successor or successors, and of all German nationals, which was, on April 6, 1917, in or has since that date come into the possession or under control of, or has been the subject of a demand by the United States of America or of any of its officers, agents, or employees, from any source or by any agency whatsoever, * * * shall be retained by the United States of America and no disposition thereof made, except as shall have been heretofore or specifically hereafter shall be provided by law until such time as the Imperial German Government * * * shall have * * * made suitable provision for the satisfaction of all claims against said Governments respectively, of all persons, wheresoever domiciled, who owe permanent allegiance to the United States of America and who have suffered, through the acts of the Imperial German Government, or its agents, * * * since July 31, 1914, loss, damage, or injury to their persons or property, directly or indirectly, * * * or in consequence of hostilities or of any operations of war, or otherwise."

Under the Agreement of August 10, 1922, between the United States and Germany, the preamble states that the two Governments,

" being desirous of determining the amount to be paid by Germany in satisfaction of Germany's financial obligations under the Treaty concluded by the two Governments on August 25, 1921, * * * have resolved to submit the questions for decision to a mixed commission."

Article II of said Agreement reads as follows:

" The Government of the United States and the Government of Germany shall each appoint one commissioner. The two Governments shall by agreement select

[1] 42 Stat. 105.

an umpire to decide upon any cases concerning which the commissioners may disagree, or upon any points of difference that may arise in the course of their proceedings. Should the umpire or any of the commissioners die or retire, or be unable for any reason to discharge his functions, the same procedure shall be followed for filling the vacancy as was followed in appointing him."

Under this Agreement, the Mixed Claims Commission, United States and Germany, was constituted and was authorized to pass upon three categories of claims set out in said Agreement, and has decided many cases involving millions of dollars.

The purpose for which the Commission was created is to determine the amount to be paid by Germany in satisfaction of Germany's obligations under the Treaty of Berlin to satisfy all claims against Germany of all persons who owe permanent allegiance to the United States and who have suffered through the acts of the Imperial German Government, or its agents, loss, damage, or injury to their persons or property, directly or indirectly.

As indicated above, the German Commissioner retired on March 1, 1939, and although more than three months have expired, Germany has not followed the procedure provided by the Agreement of August 10, 1922, for filling the vacancy.

Article VI of the Agreement of August 10, 1922, contains the following:

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

Article VI (d) of the Rules of Procedure reads as follows:

" (d) When a case is submitted in pursuance of the foregoing provisions, the proceedings before the Commission in that case shall be deemed closed, unless opened by order of the Commission."

Article VIII, of the Rules of Procedure adopted by the Commission, reads as follows:

" DECISIONS

" (a) The two National Commissioners will certify in writing to the Umpire for decision (1) any case or cases concerning which the Commissioners may disagree, or (2) any point or points of difference that may arise in the course of their proceedings, accompanied or supplemented by any statement in writing which either of them may desire to make of his opinion with respect to the decision of the case or cases or point or points of difference certified.

" (b) The Umpire shall at all times have the right to the complete record in any and all cases and to hear oral argument in his discretion.

" (c) The Umpire may join with the two National Commissioners in announcing — or in the event of their disagreement certified to him shall announce — principles and rules of decision applicable to a group or groups of cases for the guidance as far as applicable of the American Agent, the German Agent, and their respective counsel, in the preparation and presentation of all claims.

" (d) All decisions shall be in writing and signed by (1) the Umpire and the two National Commissioners, or (2) by the two National Commissioners where they are in agreement, or (3) by the Umpire alone when the two National Commissioners have certified their disagreement to him. Such decisions need not state the grounds upon which they are based."

On March 20, 1929, the Commission entered an Order providing additional rules governing the sabotage cases, reading as follows (Report of the American Agent, 1934, p. 177):

" IT IS ORDERED BY THE COMMISSION that special additional rules applicable to this group of ' sabotage cases ' are adopted as follows:

" (1) The Umpire will sit with the National Commissioners throughout the argument.

" (2) Each member of the Commission will carefully consider the entire record and the points and arguments put forward in the briefs whether the Agents and counsel refer thereto in their oral arguments or not. This will enable counsel for both sides to confine their arguments to those points which they believe to be most essential without incurring the risk of waiving a point not mentioned on the oral argument but considered relevant by any member of the Commission.

" (3) If any member of the Commission considers a point not orally argued one which should be taken into account in the Commission's decision, counsel's attention will be called thereto during the progress of the argument or subsequent thereto, and counsel for both parties will be given an opportunity to discuss same on the oral argument or to file written or printed briefs within a time to be fixed by the Commission covering such particular point or points.

" (4) Where either party has for lack of time or other reason (other than a lack of diligence by such party) failed to produce evidence in rebuttal of that filed by the other party, and in the opinion of any member of the Commission such evidence in rebuttal is material; or where in the opinion of any member of the Commission further evidence on any point should be presented to aid the Commission in reaching a sound decision, the Commission will, within the time to be fixed by it, give the party or parties an opportunity to prepare and file such additional evidence. Where such additional evidence is not strictly in rebuttal the adverse party will be given a reasonable opportunity, within a time to be fixed by the Commission, to file evidence in rebuttal thereof.

" (5) Where, under orders of the Commission, evidence is filed during the progress of the oral argument or subsequent thereto, both parties will be given an opportunity, within a time to be fixed by the Commission, for the filing of written or printed supplementary briefs dealing with the evidence so filed."

Ever since these additional rules were adopted, the Commission has functioned in the sabotage cases as an arbitration body with three members, and the Umpire has sat with the two National Commissioners at each hearing, both during the examination of witnesses and the argument of counsel and has participated in the opinions.

By the very terms of the Agreement of August 10, 1922, and by the express terms of Article VIII of the Rules of Procedure, " any cases concerning which the Commissioners may disagree " and " any points of difference " may be decided by the concurrence of the two Commissioners, or by the concurrence of the Umpire and one National Commissioner.

Thus it appears that, under the organic law by which the Commission was created, and under its own Rules of Procedure, unanimity is not required, and the concurrence of only two is necessary for a decision, and this has been the practice ever since the Commission started functioning.

After the Hamburg decision was announced, that decision was attacked by the American Agent on the ground that it was irregularly rendered, because the Umpire participated in the deliberations of the National Commissioners and in the opinion of the Commission.

On March 30, 1931, the Commission, in a unanimous opinion, answered this ground of attack as follows:

" This question is raised by the American Agent's claim that the decision was irregularly rendered because the Umpire participated in the deliberations of the National Commissioners and in the opinion of the Commission. The Umpire participated in the deliberations of the Commissioners and in the opinion in accordance with the usual practice of the Commission in cases of importance since its foundation in 1922, a practice never before questioned and not in our judgment of doubtful validity even if it had not so long been accepted by all concerned."

Thus, both before the special additional rules were adopted and after they were adopted, the Umpire has participated in the deliberations of the Commissioners and in the opinions of the Commission.

Under the organic law governing the procedure of the Commission, that is to say, the Treaty of Berlin, the Agreement of August 10, 1922, and the Rules of Procedure adopted by the Commission, and under the practice which has obtained, since the Commission was established, is it possible, after a case has been submitted to the Commission and the two National Commissioners are in disagreement as to the direct issue before the Commission, for one National Commissioner to retire and prevent a decision by the remaining members of the Commission?

If it be possible for one National Commissioner, whether under the express order or with the tacit consent of his Government, thus to bring to naught and render worthless the work resulting from the expenditure of thousands of dollars and years of careful research, and thus to defeat the very purpose for which the Commission was constituted under the Treaty of Berlin, such a result would make a mockery of international arbitration.

A somewhat similar case is the case of *Republic of Colombia* v. *Cauca* (1903), 190 U.S. 524 (modifying and affirming s.c., 113 Fed. 1020; s. c. 106 Fed. 337).

In that case the Republic of Colombia brought a suit in equity in the Circuit Court for the District of West Virginia against the Cauca Company and the Colombian Construction and Improvement Company, two corporations organized under the laws of the State of West Virginia. The purpose of the bill was to obtain a decree canceling an award made by two of three arbitrators, acting under an agreement of arbitration between the Republic of Colombia and the Cauca Company in connection with a contract for the construction of the Cauca Railway. The award was signed by two of the three arbitrators and was in favor of the Cauca Company for a large sum of money. One of the grounds for claiming that the award was invalid was because it was signed by only two of the three arbitrators.

It was alleged in the bill of complaint (U.S.S.C. Transcripts of Record, p. 28165) as follows:

" That in and by such Agreement [of Arbitration] it was provided in Article 6, that should any of the members of the commission decline to act or resign from the commission or for any reason cease to act, the proceedings of the commission should not thereby be invalidated, but the commission should be *restored* by a new appointment which was to be made, by the party who appointed the member who failed to act, within thirty days, counting from the date on which said failure to act should occur. If such party should not comply with such obligation, the Secretary of State of the United States of America and the Minister of Colombia at Washington should proceed by agreement to appoint a person to fill the vacancy."

It was further alleged that, after the Commissioners were duly appointed, they held thirty-four sessions, and at the 35th session " the Commission was notified by Manuel H. Pena, the Commissioner named by the Minister of the Treasury of complainant, that he had resigned to the said Minister of the Treasury who had appointed him, the office of Commissioner, and he transmitted to the other commissioners, through its secretary, a copy of his letter of resignation addressed to the said minister; that the said resignation was the independent act of the said commissioner — not done by the order of, or with the knowledge of the complainant, the Republic of Colombia, which only had knowledge of it after the resignation, which was to take effect from its date, was actually transmitted to the Minister of the Treasury of this complainant."

It was further alleged that no request had been made by the defendant or either member of the commission or the complainant, or any member of its government, or its representative in the United States, to restore the commission by filling the vacancy; that notwithstanding the voluntary retirement and resignation of Pena, the remaining members, without any notice to the complainant or anyone representing it, and without request or opportunity for restoring the commission by the appointment of a third member, but immediately, on the same day that said Pena resigned, assembled together and assumed to continue the functions of said commission in the absence of Pena, and finally formulated a pretended decision or award; that the commission, after the retirement and resignation of Pena, was wholly incompetent in law to proceed further or to make any decision or award, or to do any other matter until the commission had been restored in accordance with Article six of the agreement under which the commission existed, that is to say, by the appointment by the complainant of another person in his place and stead.

It was further alleged that the two remaining members of the commission, in disregard of their duty of fairness and impartiality, misconducted themselves in the last two sessions; that one of the arbitrators was guilty of misconduct as an arbitrator; that the two commissioners received wholly incompetent evidence.

One of the prayers was, that the pretended award promulgated by the two commissioners might be decreed to be utterly null and void and of no effect.

Honorable Nathan B. Goff, Judge of the United States Circuit Court of the District of West Virginia, heard the case and wrote the opinion. After stating the facts upon which the suit was founded, he described the terms of the agreement by which the arbitration was effected (106 Fed. 337, 342). He then described the organization of the commission and stated (106 Fed. 343):

" The Commission decided at its second meeting * * * that all of its decisions should be by majority vote of the members, and at its third session it was resolved that, in case of disagreement between the members of the Commission, the chairman should decide the question at issue."

In summarizing the action taken by the sessions of the commission, Judge Goff says (106 Fed. 344):

" At its thirtieth session, * * * the Commission commenced the consideration of the testimony — oral arguments and briefs of counsel having been made and filed — for the purpose of formulating its award."

Then follows a description of the awards in certain sums for different purposes.

And then Judge Goff states (106 Fed. 344):

" At the meeting of the Commission held on October 19, 1897, it was moved to award the company as interest on the cost of physical construction to January 26, 1897, the sum of $48,668.18, and the questions relating thereto were discussed, but the vote thereon was postponed. * * * The meeting was the thirty-fourth of the Commission, and all the members of the same were present, as they had been at all previous meetings; all the members had heard the testimony and the arguments, and all had taken part in the discussion and deliberations relating thereto, * * * "

At the thirty-fifth session, Pena did not appear, but he caused to be presented his letter of resignation. In his letter to the Minister of the Republic of Colombia he based his determination to resign upon the declared intention of the other two members of the Commission to allow the Cauca Company large amounts for the alleged expenditures having no relation to either construction

expenses or the purchase of material, and, therefore, Pena claimed that the Commission had no jurisdiction to pass upon or allow such expenditures; and, further, that the Commissioners had departed from the terms of the convention and proposed to act wholly beyond their official powers. Therefore he expressed his intention to refuse to act further as a commissioner and to decline to remain a member of the Commission until the illegal intentions of the Commission should have been carried out (106 Fed. 345).

The two remaining Commissioners met and passed a resolution setting out a short history of the resignation of Pena and the failure of the Republic of Columbia to appoint a successor, then it was resolved that the Commission should proceed forthwith to make its award and formulate its decision as to the matters involved in the convention.

After setting out the above facts, Judge Goff formulated the question involved in the following language (106 Fed. 347):

" Is the award defective because only signed by two of the three arbitrators? "

In discussing this question it was held that a unanimous decision was not required in express words, and that in a case of this character it should not be implied, and that, if Pena had not tendered his resignation and had he been present at the session when the award was made and had he then entered his dissent, still the award would have been binding on the parties unless some other good cause could have been shown to render it void.

Then Judge Goff said (p. 348):

" In addition to this, I think that the submission was in the nature of a public contention; that the compromise and adjustment of the same through the medium of the commissioners was based on a public law, — an act of the congress of the republic of Colombia; and that, therefore, under the well-established rule applicable to such controversies, the decision of the majority will conclude the minority, and their act will be the judgment of the whole number appointed. The dispute was, at least, brought to an issue by an act of the congress of the republic of Colombia, by which the franchise of the railway claimed by the Cauca Company was in effect forfeited. The submission was evidently the result of the friendly suggestions emanating from the secretary of state of the United States, and conveyed to the government of the republic of Colombia through the minister of the United States residing at Bogota. The third member of the commission was chosen, not by the parties nor by the commissioners appointed by them, but by the representatives of the governments of the republic of Colombia and of the United States. The original concession to Cherry recognized the enterprise he was authorized to carry out to be of public utility, and conceded to him all the rights usual under such circumstances. In such cases, unless there is a special provision to the contrary, unanimity in reaching a decision is not required of the commissioners. Co. Litt. 181a; Grindley v. Barker, 1 Bos. & P. 236; Ex parte Rogers, 7 Cow. 526."

In later discussing the question as to whether there really was a vacancy or not, Judge Goff said (p. 348):

" Clearly, it was not the intention of the parties to the convention that the existence of the commission should be destroyed by a resignation of the character of that presented by Commissioner Pena. It would be an impeachment of the common honesty of the parties to the agreement, and a travesty on their evidently honorable intentions, to hold that they designed it should thus be in the power of one man — actuated by, to say the least, not commendable motives — to render worthless the work resulting from the expenditure of thousands of dollars and months of careful research, in an effort to amicably adjust an unfortunate controversy, that was rapidly reaching the point of embarrassment because of its national and diplomatic character. The testimony forces me to the conclusion that Commissioner Pena's only motive in withdrawing from the Commission was to prevent, if possible, a conclusion from being reached, or to render the award invalid should one be

made. This conduct — keeping in view all the circumstances surrounding him and the commission of which he was still a member — was not only reprehensible in character, but was fraudulent in its tendencies."

As in the *Cauca Case*, so in the *sabotage cases*, one is impelled to the conclusion that the German Commissioner's only motive for retiring from the Commission was to prevent, if possible, a conclusion from being reached, or to render the award invalid should one be made.

This case was carried to the Circuit Court of Appeals for the Fourth Circuit and in a *per curiam* decision, that Court said (113 Fed. 1020):

" We have carefully considered the opinion of the Circuit Court, the subject matter of appeal in these two cases. We can add nothing to the clear statement of the facts of the case made by the learned judge who delivered the opinion of the court (106 Fed. 337), and we can add nothing to the reasons which led him to his conclusion, in which conclusion we entirely concur. The decree of the Circuit Court is affirmed."

When the case came before the Supreme Court of the United States (190 U.S. 524), that Court reversed the case as to the amount of the award that had been granted but affirmed it in other respects. The decision of the Court on the question as to the necessity of a unanimous vote is set out in the second syllabus, as follows:

" Where the parties to a controversy have submitted the matter to a commission of three who have the power to, and do resolve that all decisions shall be by majority vote, an award by a majority is sufficient and effective."

The decision on the question of the power of one party to an arbitration or dispute to defeat the operation of the submission after receiving benefits thereunder by withdrawing, or by adopting the withdrawal of its nominee, is thus stated in the third syllabus of the case:

" In an arbitration between a sovereign State and a railroad company and affecting public concerns, whatever might be the technical rules for arbitrators dealing with a private dispute, neither party can defeat the operation of the submission after receiving benefits thereunder, by withdrawing, or by adopting the withdrawal of its nominee, after the discussions have been closed."

Mr. Justice Holmes, after stating the facts leading up to the arbitration agreement, related the terms of the arbitration agreement and discussed the effect of the resignation of one of the arbitrators as follows:

" The essential features of the agreement were that the company by the second article surrendered the railroad, and that Colombia agreed to pay a just indemnity, the scope of which will be considered later, and which was to be determined by the commission. The commission consisted of three — one appointed on behalf of Colombia, one on behalf of the company and the third by agreement between the Secretary of State of this country and the Colombian Minister at Washington. The Commission, spoken of in the agreement in the singular, was to ' determine the procedure to be followed in the exercise of the power conferred upon it, both as to its own acts and as to the proceedings of the parties'. In pursuance of this power it resolved that all decisions should be by majority vote. Thereafter the casewas tried, and several items were allowed to the company which it was contended by the representatives of Colombia were not within the scope of the submission. At the end of the trial, when hardly anything remained to be done except to sign the award, the questions remaining open concerning only matters of interest which have been disallowed, the Colombian commissioner announced his resignation to the commission.

" The agreement gave Colombia thirty days to appoint a new member, and on its failure the Secretary of State for the United States and the Colombian Minister were to appoint him. But the Commission was allowed only one hundred and fifty

days ' from its installation,' which might be extended sixty days more for justifiable grounds. It had sat two hundred and three days when the resignation was announced. Manifestly it was possible, if not certain, that its only way of saving the proceedings from coming to naught was to ignore the communication and to proceed to the award. This it did. Colombia by its bill and argument now lays hold of the resignation of its commissioner as a ground for declaring the award void.

" Colombia thus is put in the position of seeking to defeat the award after it has received the railroad in controversy and while it is undisputed that an appreciable part of the consideration awarded ought to be paid to the company under the terms of the submission. It is fair to add that the bill offers to pay the undisputed sum, but not to rescind the submission and return the railroad. We shall spend little argument upon this part of the case. Of course, it was not expected that a commission made up as this was would be unanimous. The commission was dealt with as a unit, as a kind of court, in the submission. It was constituted after, if not as the result of, diplomatic discussion in pursuance of a public statute of Colombia. It was to decide between a sovereign State and a railroad, declared by a law of Colombia to be a work of public utility. In short, it was dealing with matters of public concern. It had itself resolved, under the powers given to it in the agreement, that a majority vote should govern. Obviously that was the only possible way, as each party appointed a representative of its side. We are satisfied that an award by a majority was sufficient and effective. We are satisfied, further, that whatever might be the technical rule for three arbitrators dealing with a private dispute, neither party could defeat the operation of the submission, after receiving a large amount of property under it, by withdrawing or adopting the withdrawal of its nominee when the discussions were closed. See *Cooley* v. *O'Connor*, 12 Wall. 391, 398; *Kingston* v. *Kincaid*, 1 Wash. C. C. 448; *Ex parte Rogers*, 7 Cowen, 526; *Carpenter* v. *Wood*, 1 Met. 409; *Maynard* v. *Frederick*, 7 Cush. 247; *Kunckle* v. *Kunckle*, 1 Dall. 364; *Cumberland* v. *North Yarmouth*, 4 Greenl. 459, 468; *Grindley* v. *Barker*, 1 Bos. & P. 229, 236; *Dalling* v. *Matchett*, Willes, 215, 217. In private matters the courts are open if arbitration fails, but in this case the alternative was a resort to diplomatic demand."

As has already been shown in this opinion, it was not contemplated by the organic law under which this Commission has operated that the decisions should be unanimous. On the contrary, it is perfectly apparent that in no case has it been necessary to have the concurrence of more than two members of the Commission. It is also perfectly clear that the United States was under no obligation whatever to return the property which had been seized, but in a spirit of generosity it provided in the Treaty of Berlin that this property should be held as collateral security to pay the claims of American nationals who had suffered loss in persons or property at the hands of the German Government or its agents. *Cummings* v. *Deutsche Bank*, 300 U.S. 115, 122-125; *United States* v. *White Dental Co.*, 274 U.S. 398.

Under the Settlement of War Claims Act of 1928 (45 Stat, 254-279), 80% of the German enemy property at that time remaining was immediately returned to its former owners. The German Government, therefore, is in no position to contend that the act of its Commissioner in resigning can have the effect of preventing the remaining members of the Commission from passing upon the questions at issue when he retired.

The case of *Colombia* v. *Cauca Co.* again came before the Supreme Court of the United States in 195 U.S. 604, where it was held that nothing in the former decree prohibited the Circuit Court from allowing interest on the amount of the items allowed. In the last case (195 U.S. 604), the Court again affirmed its action in modifying the action of the Circuit Court only in respect to the amount allowed.

In *Atchison, T. & S. F. Ry. Co.* v. *Brotherhood of L. F. and E.*, 26 Fed. (2d), 413, there was an arbitration under the Railway Labor Act (45 U.S.C.A., secs. 151-163). It was held by the Circuit Court of Appeals, Second Circuit,

that an award by a majority of the members of an arbitration board appointed pursuant to provisions of the act, before expiration of time provided in agreement for entering an award, was valid, notwithstanding the refusal of certain members to participate therein, on the ground that the board had previously filed a report showing an inability to reach an agreement.

In reaching its decision, Evans, Circuit Judge, laid down the following proposition (p. 417):

" Equally well settled is the rule that one arbitrator or a minority of arbitrators cannot, after the dispute has been fully submitted to the Board, defeat an award by resigning, withdrawing, or otherwise refusing to participate in the hearings. Colombia v. Cauca Co., supra. Such a resignation or withdrawal shortly before the time fixed for the expiration of the arbitration, constitutes a fraud and, as such, defeats its purpose."

Text writers on international law seem to approve the principle of the *Cauca Case*, which was followed in the case last cited, namely, that one arbitrator, or a minority of arbitrators, cannot, after the dispute has been fully submitted, defeat an award by withdrawal or by adopting the withdrawal of its nominee, or by otherwise refusing to participate in the hearings after the discussions have been closed.

Witenberg, *L'Organisation Judiciaire, la Procédure et la Sentence Internationales*, 1937, states the rule thus:

" 24. In the calculation of majority all members of the tribunal must be counted, including those who might refuse to take part in the voting. These latter must be considered as having voted against the decision of the majority of the judges present and a report of their refusal shall be drawn up." (p. 281) (Translation from the French.)

Mérignhac has the following to say in his *Traité Théorique et Pratique de L'Arbitrage International* (pp. 276-77):

" If one or more of the arbitrators refuse to take part in the deliberations, M. Calvo feels that they should be replaced: and in case this is impossible the tribunal should be dissolved. The Institute of International Law has decided with sound reason in Article 21 [1] of its rules that the majority suffices for judgment in the hypothesis we have spoken of. It is, in effect, impossible to admit that one arbiter by bad faith, perversity, or simple negligence can paralyze the action of the tribunal."

Calvo, to whom Mérignhac refers, has said:

" When the arbitral tribunal is composed of several members certain publicists are of the opinion that the absence of one of them prevents all valuable deliberation and decision even though the other arbitrators would form the majority and would agree, for the reason that the missing member might modify the decision of the others by the exposition of his own opinion.

" However Sir Robert Phillimore takes the view that if the absence of one of them is intentional or the result of intrigue the other members have the power to continue the procedure. As far as we are concerned we think that in such a case the proof being made of the unwillingness of the missing member it would be necessary to replace him or otherwise dissolve the arbitral tribunal as would be done in the case of the death of one the members unless special provisions are prescribed in the original compromis for such eventuality." (Sec. 768, *Le Droit International Théorique et Pratique*, Vol. III, 5th edition, Charles Calvo, Argentine).

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[1] Article 21 is as follows:

" Every final or provisional decision shall be made by a majority of all the arbitrators named, even when one or more of the arbitrators refuse to take part therein."

Whether Calvo would apply this rule in a case like the instant case, where the presentation of testimony had been closed, briefs filed and arguments completed, may be doubtful; but in any event his views appear not to have the support of the other text writers.

Sir Robert Phillimore, to whom Calvo refers, says:

" If there be an uneven number of arbitrators the opinion of the majority would, according to the reason of the thing and the *Jus communa* of nations be conclusive. If one of the arbitrators were maliciously to absent himself it might be competent for the others to proceed; but if one were dead, the arbitration would be dissolved, unless provision had been made for the contingency in the original covenant." (*Commentaries upon International Law,* London, Vol. III, p. 4).

In commercial arbitration cases the trend of authorities seems to be in accord with the rule laid down in the *Republic of Colombia* v. *Cauca*, 190 U.S. 524, and followed in the case of *Atchison, T. & S. F. Ry. Co.* v. *Brotherhood of L. F. and E.*, 26 Fed. (2d) 413. See *Burtlet* v. *Smith*, 94 Eng. Rep. 587 (King's Bench); *Dalling* v. *Matchett*, 125 Eng. Rep. 1138; *Widder* v. *Buffalo & Lake Huron Ry. Co.*, 24 U.C.R. 222 (Canada 1865); *Carpenter* v. *Wood*, 42 Mass. (1 Metc.) 409 (1840); *American Eagle Fire Ins. Co,* v. *N. J. Ins. Co.*, 240 N. Y. 398, 148 N.E. 562; *State* v. *Tucker*, 166 N.W. 820 (N.D. 1918); *Toledo S.S. Co.* v. *Zenith Transp. Co.*, 184 Fed. 391 (CCA 6th, 1911).

5 Corpus Juris, p. 100, sec. 218, treating the subject " Refusal of Some of the Arbitrators to Participate after Disagreement " lays down the rule as follows:

" The refusal of one or a minority of a number of arbitrators, having authority to render a majority award, to proceed further with the hearing or discussion of the case, after a disagreement has arisen, does not divest the majority of power to proceed, in the absence of the minority, with the hearing and to render an award in accordance with their authority,"

citing, among others: *Kingston* v. *Kincaid*, 14 F. Cas. No. 7,821, 1 Wash. C.C. 448; *Witz* v. *Tregallas*, 82 Md. 351, 33 A. 718; *Sperry* v. *Ricker*, 4 Allen 17; *Maynard* v. *Frederick*, 7 Cush. 247; *Carpenter* v. *Wood*, 1 Metc. 409; *Dodge* v. *Brennan*, 59 N.H. 138; *Atterbury* v. *Columbia College Trustees*, 66 Misc. 273, 123 N.Y.S. 25; *Zorkowski* v. *Astor*, 13 Misc. 507, 34 N.Y.S. 948 (aff. 156 N.Y. 393, 50 N.E. 983); *Battey* v. *Button*, 13 Johns. 187; *Matter of Young*, 13 C.B. 623, 76 E.C.L. 623, 138 Reprint 1344; *White* v. *Sharp*, 1 C. & K. 346, 47 E.C.L. 348; *Goodman* v. *Sayers*, 2 Jac. & W. 249, 37 Reprint 622. See also 6 Corpus Juris Secundum, p. 206.

As we have already seen, these cases have been pending for more than twelve years. Thousands of pages of evidence, consisting of original documents from the files of the various government departments, affidavits, examinations of witnesses, and other instruments have been filed during that period; large sums of money have been spent in procuring this evidence and producing it before the Commission. It has been an enormous work, involving labor of many persons — experts, technicians and lawyers. The cases have been argued before the Commission on six different occasions by eminent counsel. Learned and exhaustive briefs have been filed, entailing great labor on the part of those who composed them; and every phase of the case has been fully discussed, both in written briefs and orally. The oral arguments have consumed a period of about sixty days.

On the pending petition, the cases were closed for filing of evidence and briefs on January 14, 1939.

After exhaustive oral arguments by distinguished counsel, extending through twelve days, the cases were finally submitted to the Commission on the 27th day of January, 1939. After about two weeks had elapsed, the Um-

pire and the Commissioners began their conferences. These conferences continued, but not on consecutive days, until Tuesday, February 28, 1939, when the last conference with the German Commissioner was held. Another conference was scheduled to be held on Thursday, March 2, 1939, at the office of the Umpire. Shortly before the time for the conference, the letters of the German Commissioner announcing his retirement were delivered to the Umpire and the American Commissioner, respectively. [1]

As is clearly indicated by the letter which was written by the American Commissioner to the Secretary of State, the American Commissioner and the German Commissioner were in direct disagreement as to the issues before the Commission, that is to say, as to whether the record established fraud of a sufficient character to set aside the decision at Hamburg, and, at the instance of the German Commissioner, the Commission was examining the record to determine whether the American Agent had proven his case, and specifically whether the Herrmann message was genuine, when the German Commissioner announced his retirement.

Under the circumstances set out above, to hold that one National Commissioner could, by his voluntary retirement, whether authorized by his Government or not, prevent the Commission from further proceeding with the cases, and especially from deciding the questions at issue when the German Commissioner announced his retirement, would defeat the purpose of the two Governments in establishing this Commission, would deprive the American Nationals in these cases of the remedy provided by the Treaty of Berlin and the Agreement of August 10, 1922, for American Nationals with claims against the German Government recognized by that treaty, and would raise many questions difficult of solution, as to the disposition of the funds now remaining in the Treasury of the United States, pursuant to the Settlement of War Claims Act.

Accordingly, I am of the opinion that the retirement of the German Commissioner on March 1, 1939, did not render the Commission *functus officio* and did not deprive the Commission of the power to decide the questions at issue at the time of his retirement.

Since the above opinion on jurisdiction was prepared, the American Commissioner has been furnished with a copy of a translation of a note from the German Embassy to the Secretary of State dated June 10, 1939, [2] in which the German Embassy notifies the Secretary of State that, since the withdrawal of the German Commissioner, the Commission has been incompetent to make decisions, and there is no legal basis for a meeting of the Commission at this stage, and that the German Government " will ignore the decision to call the meeting of the Commission on June 15th, as well as any other act of the Commission that might take place in violation of the International Agreement of August 10, 1922 and the generally established rules of procedure ".

The possibility that the German Government would take this position was taken into consideration in writing this opinion, and this action on the part of the German Government strengthens the decision already reached, to-wit, that the retirement of the German Commissioner on March 1, 1939, did not render the Commission *functus officio* and did not deprive the Commission of the power to decide the questions at issue at the time of his retirement.

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[1] For letters, see Appendix. (*Note by the Secretariat*, this volume, Appendix V, p. 493.)

[2] For note, see Appendix. (*Note by the Secretariat*, this volume, Appendix V, p. 493.)

II. FRAUD

The questions involved under the issue of fraud may be examined under three heads.

First, were the pleadings filed by Germany, in answer to the Memorial filed by the United States, false and fraudulent; and, if so, who participated in such fraud and what was its effect in the decision at Hamburg, October 16, 1930?

Second, was the evidence adduced to substantiate the pleadings false and fraudulent; and if so, who participated in such fraud and what was its effect in the decision at Hamburg, October 16, 1930?

Third, have the counsel who represented Germany made fraudulent misrepresentations to the Commission or suppressed evidence unfavorable to Germany; and if so, how far has this conduct affected the decision in this case?

While it is perfectly patent that the decision at Hamburg cannot be set aside on account of fraud in the pleadings *alone*, the question of fraud permeates both the pleadings and the evidence and the conduct of counsel, and it is logically, and chronologically, proper to examine the question of fraud in the pleadings first.

A. Fraud in The Pleadings

The Memorials filed by the United States charged in substance that, immediately after the outbreak of the European war, Germany ordered and conducted throughout the world a general campaign for the destruction of war supplies in neutral countries, and that this campaign of sabotage in neutral countries for the destruction of war supplies, particularly munitions, was extended to the United States while the United States was at peace with Germany. The Memorials further charged that the destructions at Black Tom and Kingsland were the result of sabotage by German agents.

In the Answers of Germany, filed December 14, 1927, in the Black Tom case, and January 17, 1928, in the Kingsland case, it was denied that, immediately after the outbreak of the European war, Germany ordered and conducted throughout the world a general campaign for the destruction of war supplies in neutral countries; and it was specifically denied that the campaign of sabotage in neutral countries was ever extended to the United States. (See Section III, p. 2 and Section IV, p. 9 of each Answer of Germany.)

In her Answers, Germany admitted that she conducted expeditions against Canada, and these expeditions were initiated from the United States, but alleged that such acts had no relation to the charge made against Germany in this case; that the acts were directed exclusively against enemy property and were not intended to do harm to American property. (See Section IV, par 12 of each Answer.)

Germany denounced as a fabrication an alleged circular, authorizing sabotage in neutral countries, and, as a further fabrication, an alleged order, expressly extending the operation of the circular to the United States; and, in making this denial, the Answers use the following language:

> " In this connection the German Agent declares again that he is authorized to state on behalf of his Government that no such order was ever issued by any department or agency of his Government." (Section IV, par. 13)

The United States had cited an intercepted cablegram or message from the General Staff dated January 26, 1915, addressed to the Military Attaché in Washington (Ex. 320, Rec. p. 802). This message as sent from Berlin on January 25, 1915, to Washington via Stockholm, reads, in the translation furnished by the German Agent, as follows:

" Translation.

" Received January 24, 1915.

Berlin, N. W. 40, January 24, 1915
Moltkestrasse No. 8

A. S. 307.

ACTING GENERAL STAFF
OF THE ARMY

Division III[b]

No. Pol. 205.

To the

Foreign Office

Secret:

Berlin.

— With reference to A. S. 56 of the 23rd inst.

It is respectfully requested to have dispatched the following telegram in cipher to the Imperial Embassy at Washington:

[For Military Attaché: People fit for sabotage in United States and Canada can be ascertained from following persons:

1) Joseph Mac Garrity, 5412 Springfield Philadelphia, Pa., 2) John P. Keating, Maryland Avenue Chicago, 3) Jeremia O'Leary, Park Row, New York. No. 1 and 2 absolutely reliable and discreet, No. 3 reliable not always discreet. Persons have been named by Sir Roger Casement. In United States sabotage can reach to all kinds of factories for war deliveries; railroads, dams, bridges must not be touched there. Under no circumstances compromise Embassy, and equally Irish-German propaganda.

Acting General Staff"]

(In the name of the Under secretary of State In mundo)."

(Ger. Ex. XXXIV, a and b)

In its Answers, Germany admitted that this message was genuine, that it had been sent by the Intelligence Division of the General Staff, and had been received by the Military Attaché at Washington, Captain von Papen. The Answers refer to exhibits filed therewith by Messrs. Nadolny, von Papen. von Igel and Count Bernstorff, and then allege as follows:

" These statements show that the sending of the message was the act of a *subordinate division of the General Staff;* that the suggestions made therein were entirely disregarded by von Papen; that the Message remained in the files of the latter and that *no action whatsoever was ever taken upon it;* that no other suggestions of this kind were even given by the General Staff, *that the whole event is but the blunder of a subordinate and that the incident had no consequences whatsoever.*" [Emphasis supplied.] (Sec. IV, par. 14 of each Answer.)

Exhibit G filed with the Answers, is an affidavit of von Papen, who was Military Attaché to the Embassy in Washington and to the German Legation in Mexico at the outbreak of the World War, and who continued as Military Attaché in Washington until he was recalled at the instance of the United States Government. In this instrument he denied that he had ever in any way given any suggestions, instructions, orders or authorizations for destroying factories and stores of munitions within the United States, and that he had lent his support to or furthered any projects aiming at such destruction. He further stated (p. 5):

" I also never received orders or instructions to commit acts of force against American munitions factories or stores of munitions, from central military authorities or other superiors. I did, however, receive one authorization for undertaking such acts, which I shall treat separately."

He denied having received the alleged circular of the General Staff authorizing sabotage or the letter in regard to said circular giving effect to such circular on American territory.

With reference to the message of January 26, 1915, he stated as follows (p. 6):

" I persisted in my opposition to sabotage acts, even when I received the telegram dated Jan. 26, 1915 (Exhibit 18 and Exhibit 320, page 35), in which the Department III-B of the Home General Staff declared sabotage on the territory of the United States to be permitted, at the same time giving addresses where information for this purpose might be obtained. From the very first I was of the opinion that it would be an indefensible decision to make use of this telegram. I did not impute to it any great significance because I was convinced that it did not spring from the initiative of a German military authority but was due to the urging of Sir Roger Casement who had, in the United States given vent to similar projects. To this was added the fact that it was not an utterance of a leading military authority, who alone could have dispatched such important questions and instruction binding for me, but instead was a communication of a subordinate department of the Home General Staff. Therefore, I did not, even in passing, consider acting on the telegram but for the reasons stated above simply considered it as requiring no further action. I expressed myself to the same effect to Mr. von Igel. Furthermore, it is my distinct recollection that I did not talk to the Ambassador. There was no necessity for that because I did not receive definite instructions for undertaking sabotage, it being left entirely to my discretion whether to initiate such acts."

In his affidavit, von Papen specifically disapproved of von Rintelen's activities and those of Dr. Scheele in the manufacture of bombs.

Exhibit B, filed with the Answers, is a statement of Nadolny. In this statement, Nadolny, the Chief of " Sektion Politik " of the General Staff, alleged that reports were coming to his office " that America was not taking a neutral attitude but was opposing Germany especially by way of effectively supporting our opponents with war materials "; that persons were coming from America who advised *taking steps against American factories engaged in supplying enemies* with *war materials* and who named to the Political Section people " who could in many possible ways frustrate such production by acts of sabotage."

Then the Chief of the " Sektion Politik " stated as follows:

" Following this advice, we in fact once sent such instruction to Washington at the beginning of 1915, if I remember it correctly. It was, however, especially pointed out therein that *acts of sabotage were only to be directed against the delivery of war materials and not against any other objects.*

" However, the Foreign Office took the position that even sabotage of that kind was not permissible as America, in spite of its war support which was contrary to the spirit of neutrality, was officially a neutral country. For that reason — as far as I know — no further instructions were sent out. As I learned later on, the first order was not carried out either, because the Authorities in Washington also opposed the execution and did not take any steps." (Emphasis supplied.)

Germany filed as German Exhibit XXXV, an affidavit of the same man, Rudolph Nadolny. In this exhibit, Nadolny claimed that the telegram of January 26, 1915, originated out of the activities of Sir Roger Casement, the Irish agitator, who had been in the United States and paid a visit to Germany, and the claim was made that it was sent at his instigation, as he was a man " easily aggravated ". Nadolny explained that he could no longer remember whether the telegram was formulated in the Political Section, or had been brought in by Casement, but he definitely recalled that the Military Attaché would be advised

" that other objects than factories must by no means be attacked and that no act whatever must be done whereby any danger could arise of compromising our representation in the United States or the German-Irish movement." (p. 3.)

It is contended by Nadolny that the telegram did not " contain an order", and, therefore, he did not communicate with the Mobile General Staff or with the Ministry of War, and the telegram was sent " on my own responsibility ". Nadolny further avers:

" From the fact that the telegram did not *contain an order, it follows as a matter of course* that Mr. von Papen, if he did not agree with it, had the *right to disregard it altogether.*" (Emphasis supplied.) (p. 4.)

He repeated a conversation with the Foreign Office where " I had to go very frequently ", to the effect that the Foreign Office told him " that sabotage in the United States must by no means be undertaken".

In the light of the subsequent history of sabotage in America while the United States was neutral, the distinction between an " order " for sabotage and " authority " for sabotage would appear to be a form of specious pleading.

To substantiate its pleadings, Germany later filed, as German Exhibit CXXIII, an affidavit of Hans Marguerre, a major in the regular army and attached to the " Sektion Politik " of the General Staff, of which Nadolny was the head. In his affidavit, Marguerre related that " Sektion Politik " had sent agents to neutral countries in order to locate establishments producing war material or selling raw material for such production; and to collect information with regard to the production of ammunition, ammunition stores, the shipping of ammunition, and in regard to transports, with the requirement that they should report thereon to undercover addresses or in coded telegrams. The purpose of collecting this information was to enable " Sektion Politik " to collect data as complete as possible about the resources of various neutral countries. He denied that these agents had orders to destroy such establishments while the countries were neutral, and then he states (p. 7, Testimony of July 30, 1930):

" It is true that *as soon as the neutral country entered the war, they* [*the agents*] *were immediately to start actions against the establishments* found by them to be essential for carrying on the war, so that the resources of the now enemy country would be *depleted* as much as possible. The agents were, therefore, when the neutral country entered the war, to remain in that country and were then *to begin actions against ammunition plants and other plants* important for carrying on the war. As long as the country was neutral, however, they were only to collect the data * * * and report thereon." (Emphasis supplied.)

In denying that their agents had been sent into America to commit sabotage against the American ammunition industry or against American ammunitions, Marguerre said (p. 8):

" It is true, *I sent agents to America* and provided them *with instructions and material to stop American establishments, essential for war, from working, if possible.* These instructions, however, were to be followed out *only in the event of America entering the war* and they were to take effect only from that date on." (Emphasis supplied.)

Marguerre related how, in February, 1916, he had a conference in Berlin with Hilken and Herrmann, in which he gave Herrmann similar instructions and furnished him with incendiary devices designed to cause fires and explosions. In justifying this act he said (p. 15):

" As I said before, in our organization we took into account all possibilities, also that of America entering the war. *On account of the great distance and the supervision of means of transport becoming closer all the time it would have been impossible to send agents and sabotage materials to America after the outbreak of the war. For this reason we had, as I said, to make our preparations in America during neutrality so that in case of America's entering the war we would have agents and material on the other side.*" (Emphasis supplied.)

Marguerre admitted that Hilken was the financial agent of "Sektion Politik" in America for the purpose of furnishing "funds to our agents". The affidavit clearly discloses that Marguerre, in his conference with Herrmann and Hilken, arranged that Herrmann should draw necessary funds from Hilken, and Hilken was instructed to pay the funds required by Herrmann up to a certain limit without requesting an accounting. Marguerre said he could not confirm Carl Dilger's claim that later he (Dilger) received from Marguerre and Nadolny a trunk with a false bottom containing incendiary devices. He did, however, testify as follows (Testimony of August 1, 1930, p. 2):

"Did you send further incendiary pencils to America after Herrmann's departure?
"A. I remember that some time after Herrmann's visit we had a trunk made with a double bottom, in order to pack *glass tubes* therein in a secret partition. I do not know who was entrusted with this trunk." (Emphasis supplied.)

He also testified that he could not deny that Carl Dilger was right in claiming that the trunk was delivered to him.

The record further shows that devices of this character were also furnished Woehst by Marguerre and brought to this country in the fall of 1916.

The record clearly discloses that the incendiary devices which were furnished to Herrmann, to Carl Dilger and to Woehst were used for sabotage in the United States, while the United States was neutral, that these incendiary devices were taken by Herrmann to Mexico for the purpose of setting fire to the Tampico Oil Fields, and that such incendiary devices were also used in the Argentine, which never entered the war. In the light of this record the explanation of Marguerre would seem to pass the bounds of human credulity, and brands his affidavit as false.

In Exhibit E, filed with the Answers, Count von Bernstorff, the Ambassador to the United States, denied that he had ever had anything to do, directly or indirectly, with acts of sabotage against munitions plants in the United States or that he had ever lent any support by word or deed or in any other way to such acts.

As to the telegram of January 26, 1915, to the Military Attaché, he denied it was submitted to him or that he ever saw it while he was Ambassador. He justified the do-nothing attitude of von Papen, since such action was in accordance with the usual procedure between him and von Papen, and he denied that the recall of the Military and Naval Attachés in 1915 had anything to do with sabotage against American property.

While Germany denied in its Answers, and specifically through the statement of the Ambassador, Count von Bernstorff, that it was responsible for the activities of Rintelen in this country, the record in this case proves conclusively that Rintelen's activities in this country were connected with inoculating horses and cattle, the destruction of piers and elevators and munitions factories; that he was furnished with incendiary devices by a German chemist, Dr. Scheele, who manufactured bombs and other incendiary material, not only for Rintelen, but for other saboteurs.

Hinsch, who was Germany's main lay witness to destroy the authenticity of the Herrmann message, admitted starting his sabotage activities after he met Rintelen in May, 1915, practically two years before America entered the war. In April, 1915, Rintelen met Hilken, the admitted sabotage paymaster in this country; and Rintelen, in his book, *The Dark Invader*, gives a clear picture of his activities showing that they were not only known to, and approved by, the Military Attaché, but also Count von Bernstorff himself.

When Rintelen arrived in this country, two telegrams were sent from the German Government in Berlin to the Embassy in Washington, the first, dated April 4, 1915, reading as follows:

" Inform RINTELEN who arrives today that (?) RICKET arrived April 21st. Inform him about PAPEN'S proposals." (Ex. 320, rec., p. 818)

The second, dated April 5, 1915:

" Inform BOY-ED as to PAPEN'S proposals for transmission to RINTELEN." (id. p. 819)

Although Count von Bernstorff in his book, *My Three Years*, and in his affidavit, disclaims reponsibility for, and knowledge of, the activities of Rintelen, this disclaimer is contradicted, not only by Rintelen himself, but by a telegram dated May 12, 1915, sent by the Ambassador to Berlin, which reads as follows (Ex. 320, Rec. p. 821):

" RINTELEN has asked me to give him a letter of introduction to a firm of lawyers who are ready to take legal proceedings against the (?LOCK) Company for supplying munitions, but who are unwilling to proceed with the matter unless RINTELEN is provided with *an official introduction.* In the circumstances I do not feel justified in *compromising the Embassy to any further extent*, as any such action on my part might be the last straw which broke the camel's back. I have accordingly the honor to request that RINTELEN may be furnished with a letter of introduction by the Ministry of War at the earliest convenience of that Department." (Emphasis supplied.)

A careful analysis of the three telegrams quoted above will show that the Government in Berlin was anxious for Papen's proposals to reach Rintelen immediately upon his arrival in the United States; that the Embassy was apprised by cable of the date of Rintelen's arrival in America; that the Ambassador *did know* Rintelen, and that Rintelen knew the Ambassador well enough to request, five weeks after Rintelen's arrival, a letter of introduction to some lawyers who were ready to take proceedings against a company supplying munitions, but who were unwilling to proceed unless Rintelen should be provided " *with an official introduction* ". The Ambassador informs Berlin that he does not feel justified in compromising the Embassy *to any further extent*, as such action on his part might be the *last straw to break the camel's back*, but he does have the honor to request his Government to furnish Rintelen with a letter of introduction by the War Department at the earliest convenience of that Department.

The fact that the Ambassador did know Rintelen and his mission in America is further proven by the following telegram sent to Berlin on December 10, 1915 (Ex. 320, Rec. p. 824, repetition on p. 825), reading as follows:

" Convinced that RINTELEN was principal reason for demanding recall of Attaché. His immediate removal is therefore absolutely necessary. [An immediate categorical disavowal absolutely necessary]. *Only connection which can possibly be traced* with us is the 500,000 dollars received from Naval Attaché and required for the goods exported." (Emphasis supplied.)

Rintelen, in his book, *The Dark Invader*, relates how, a few hours before his departure from Berlin, he provided himself with the necessary " working capital ", which he only succeeded in collecting when the train was getting up steam, and he states that in the short time at his disposal he succeeded in arranging for a cable transfer of half a million dollars as a " starter ". (*The Dark Invader*, p. 75.)

As admitted by Marguerre, Herrmann received from " Sektion Politik " definite instructions in regard to sabotage in Amerika and incendiary devices for that purpose; and Hilken was furnished with funds upon which Herrmann could draw for sabotage purposes without accounting therefor; and in the early spring of 1916, they went back to America and carried out these instruc-

tions while the United States was neutral using for the purpose various sabotage agents, chief among whom was Hinsch. Hinsch admits that, following conferences with Rintelen in May, 1915, he had been for a year engaged in sabotage against property in America. The record discloses the fact that Hinsch met Rintelen through Hilken. These agents were engaged in sabotage activities in America against horses and cattle, ships and munitions factories, wharves and warehouses and other forms of property in America.

Count von Bernstorff was examined before a subcommittee of the National Constituent Assembly of Germany which was appointed to inquire into the responsibility for the war (Ex. 511, Rec. p. 1802). In the course of this examination Count von Bernstorff, in endeavoring to show why public opinion in the United States veered away from Germany, made the following statement (id. p. 1803):

" It was stated by those who were issuing the enemy propaganda, and, I am forced to admit, is looked upon as proven as the result of the investigation by the American Senate, that conspiracies were instigated by Germany in the United States which were in conflict with American laws."

He stated that in his opinion there was no conspiracy but:

" There were only individual transactions, which, as a matter of fact, were in violation of the laws of the United States but with which we over there, or at least I personally, never had anything to do."

Again, referring to Rintelen's activities in the United States (id. p. 1806):

" I do not know even today who it was that sent Rintelen to the United States and what his mission was.

* * * * * * * * *

" It is true that it was alleged in the United States that bombs had been laid on the merchant ships of all nations, and that ammunition factories had been blown up, etc. But I can state here under oath that I do not know whether such cases actually occurred or whether they have been proved."

When pressed by the Chairman to say whether the German Government stood behind these acts of sabotage, he answered as follows (id. p. 1807):

" Witness Count v. Bernstorff: I should have to have this question very carefully put. Who was the German Government?

" The Chairman: Let us say the Foreign Office.

" Witness Count v. Bernstorff: Certainly not the Foreign Office.

" Delegate Dr. Sinzheimer: Did you know of these agents, particularly Mr. Rintelen, having been provided with money and provided, indeed, with generous amounts of money?

" Witness Count v. Bernstorff: With regard to the recall of naval attaché Captain Boy-Ed, I was officially and subsequently informed by the American Government that the reason, which it had hitherto refused to give, why Captain Boy-Ed's recall had been demanded was that proofs had been submitted to the effect that Rintelen had received a half million dollars from him."

The insincerity of von Bernstorff, the German Ambassador, is not only shown by his misrepresentation of his relations with Rintelen and of his knowledge of Rintelen's activities, but it is clearly shown by two other telegrams passing between Zimmerman and von Bernstorff, intercepted by British Naval Intelligence, the first, ordering the destruction of the Canadian Pacific Railroad, and the second, relating to Canada's demand that the officer guilty thereof should be extradited from the United States.

These telegrams are as follows (U.S. Ex. 320, Rec. p. 795):

" B. 386,
" Transmitted 3rd Jan. (should be
Dec.) 1915
(5950)

" From BERLIN
To WASHINGTON

" With reference to my telegram No. 357. Secret. The General Staff is anxious that vigorous measures should be taken to destroy the Canadian Pacific in several places for the purpose of causing a lengthy interruption of traffic. Captain BOEHM who is well known in America and who will shortly return to that country is furnished with expert informations on that subject. Acquaint the Military Attaché with the above and furnish the sums required for the enterprise.

" ZIMMERMAN."

The authority given by the above telegram was evidently executed by von Bernstorff; for under date of 11th of February, 1915, we find a telegram directly related to the above and reading as follows (Ex. 320, Rec. p. 805):

" MOST SECRET
" From WASHINGTON
To BERLIN

No. 251
11th February 1915.
(0064)

" The carrying out of your telegram No. 386 for Military Attaché, was intrusted to a former officer, who has been arrested after (causing) an explosion on the Canadian Pacific Railway.

" Canada demands his extradition.

" I request authority to protect him; according to the laws of war, the decision ought presumably to be: Non-extradition, provided that an act of war is proved.

" I intend to argue that *although the German Government has given no orders*, the Government regarded the causing of explosions on an enemy railway as being, since it furthered military interests, an act of war.

" (Signed) BERNSTORFF."

(Emphasis supplied.)

Here is proof positive that von Bernstorff had full knowledge of the organization on neutral American soil of an expedition of sabotage against the Canadian Pacific Railroad.

In addition, these messages convict von Bernstorff of a willingness to deceive. By the first, he was given instructions to take vigorous measures in order to destroy the Canadian Pacific Railroad in several places. By the second, he expressed his intention to say to the State Department of the United States that " the German Government had given no orders". If, in order to save from extradition the agent employed by him for the destruction, he was willing to inform his own Government of his intention to deceive the State Department, it is not surprising that, in these sabotage cases, he was willing to swear to a falsehood, in order to justify the false pleading filed by his Government.

Referring again to the telegram of January 26, 1915, it will be recalled that Germany, in her Answers and by the exhibits filed therewith, claimed that the transmission of this telegram was the act of a *mere subordinate*, and that it was not authorized by any responsible official or department of the Government of Germany. Upon motion of the American Agent, Germany was called on

to produce the records relating to this telegram. From these records it appeared that the telegram originated in the Foreign Office, and that the Foreign Office originally drafted the telegram and transmitted the same to Nadolny, of the General Staff, with the request that it be sent to the Military Attaché at Washington. It also appeared that, upon the original, as transmitted by the Foreign Office to Nadolny, as well as upon the original, sent by Nadolny to Stockholm for transmittal to the United States, there were imposed names and initials which proved conclusively that it not only had the approval of the " subordinate ", Nadolny, but that in his capacity as " subordinate ", he was acting for the Foreign Office and that the sending of the telegram was approved by many other responsible German officials.

In German Exhibit XXXV filed to substantiate Germany's plea, Nadolny claimed as follows:

The cable of January 26, 1915, was the result of the insistence of Sir Roger Casement. Whether the message was formulated in Section III-B or whether the text was brought or sent to him by Casement he could no longer say with certainty, but the text was formulated after his conference with Casement. The telegram contained no order and therefore left the initiative to the Military Attaché. He did not communicate in regard to it with the Mobile General Staff which alone could give orders to the Military Attaché. He did not submit Casement's propositions to the Mobile General Staff and as regards the transmission of the telegram, the " Foreign Office acted merely as a technical intermediary " and the " signature of under-secretary Zimmermann could not by any means give to the document the character of a message or instruction by the Foreign Office to Mr. von Papen ".

The American Agent asked Germany to produce the document A. S. 56 to which the telegram referred on its face; and finally the Commission requested the production of this instrument.

As illustrative of the good faith of Germany in its defense, it is interesting to read the dissent of the German Commissioner from the Order of the Commission of May 1, 1929. He said:

" The cable of January 26, 1915, was instigated by the Acting General Staff and approved of by the Foreign Office. Both authorities, and thereby Germany, are responsible for the issuance of the message and its consequences. The records referred to by the American Motion cannot add anything to this fact which is established and admitted. They would only be material if it appeared from them that von Papen's sworn statement was untrue. Then the German Government, though knowing from its files that Papen had committed perjury, would have used an illicit defence in presenting Papen's testimony.

" This most serious insinuation by the claimants is not supported by the slightest evidence. It means a reflection not only upon Papen but much more upon the attitude of the German Government itself which I am unable to agree to."

After A. S. 56 had been produced the defence which Germany had made in her Answer, her arguments and her proof that this message was the unauthorized act of a subordinate officer in Section III-B was shown to be false and known to be false.

The brief filed by Germany on the 14th day of September, 1929, contains this information about the origin of the telegram (pp. 57, 58):

" It appears from said document that the communication was drafted by one Meyer (then on temporary duty at the Foreign Office and attached to Sir Roger Casement as interpreter), initialed by two members of the Foreign Office (Count Montgelas and Count Wedel), and signed by the Acting Division Chief (signature illegible).

* * * * * * * * *

" As it appears now, the message was the result of mutual discussions between Sir Roger Casement, Meyer and Nadolny; it was formulated by Meyer, who had been attached to Casement as interpreter and kind of ' aide de camp ', and it received the sanction of the Foreign Office, not after Nadolny had made his formal request of January 24th, but before. Consequently, Nadolny was mistaken when he stated that ' the Foreign Office acted merely as a technical intermediary ' (Ger. Ex. XXXV, p. 5). As a matter of fact, it took an active part in bringing about the dispatch of the proposition suggested by Sir Roger Casement.

" *Under the circumstances the German Agent is not in a position to maintain his argument that the message of January 25, 1915, was the blunder of a ' subordinate '.*

" Apart from that, however, the arguments proffered by him in connection with this subject-matter stand." (Emphasis supplied.)

It was subsequently contended as follows:

" Since he [von Papen] did *not* act upon it, the incident is eliminated as a possible factor in the case and it does not matter, therefore, whether the cable originated with members of one or another department of the German Government." (id. p. 59)

Thus counsel for Germany were compelled to acknowledge the falsity of the German Answer, and of the exhibits filed therewith, and, in their extremity, they resorted to another equally false statement, namely, that although the authority to commit sabotage was actually given by the Foreign Office and sanctioned by many officials of the German Government, it was not acted upon, and, therefore, was eliminated as a possible factor in the sabotage cases.

But the falsity of the German pleading to the effect that sabotage against property in America and against property in other neutral countries was never authorized during the period of neutrality is conclusively shown by two telegrams that passed between the German Minister of Mexico, von Eckardt, and Marguerre and Nadolny, in charge of " Sektion Politik ", just after America entered the war. Ex. 520, Rec. p. 1847, contains the first telegram, which reads in translation furnished by the German Agent, as follows:

" A.S. 1488 pr April 17, 1917, a. m.

communic. 4/18
' Sektion Pol. Gen. Staff Berlin
Extract to II E.

Telegram

" Stockholm, April 16, 1917 1 : 40 p. m.
Received: 5 : 10 p. m.
From the I. (mper.) Minister
to the Foreign Office.

Deciphered Text.
No. 632

In cipher from Mexico: 17 April 12

[For Captain Marguerre or Nadolny, General Staff:

' Mexico, April 12. Where is Lieutenant Whost? Has he remitted about $25,000 to Paul Hilken? Either he or somebody else should send me money Fritz Quarts en Hermann.'

Referring to preceding paragraph. Hermann (slender fair, German with American accent) claims to have received a year ago order from General Staff and again last January from Hilken to set fire to Tampico oil fields and wants to put plan into execution now. He asks me if he should do it; am I not to answer that I have no contact with Berlin? Mr. von Verdy suspects him and his com-

panion Raoul Gerds to be American-English spies. I request telegraphic answer, rush.]

* * * * * * * * *

von Eckardt.
Lucius."

(Ger. Ann. 21, accompanying Report of German Agent of August 1, 1929.)

The above is one of the famous telegrams which were intercepted and decoded by British Naval Intelligence. An examination thereof, in the light of the record in this case, shows that von Eckhardt, the German Minister in Mexico, is forwarding a message from Herrmann, making inquiry as to the whereabouts of Lieutenent Woehst and about $25,000 that he expected would be sent to Hilken, for his (Herrmann's) benefit.

The reply to the above telegram is found in U. S. Exhibit 320, Rec. p. 874, and reads as follows:

" FROM: S B-2
To Mexico B-2

To Mexico
No. 38
13.5.17

" Reply to Tel. No. 17

" Hermann's statements are correct. Nothing is known of Gerds. Wohst has been retired.

" The firing of Tampico would be valuable from a military point of view, but the General Staff leaves it to you to decide.

" Please do not sanction anything which would endanger our relations with Mexico or if the question arises, give Hermann any open support.

* * * * * * * "

(Ex. 320, Rec. p. 874.)

A careful analysis of the two telegrams or messages above set out shows clearly that on the 12th day of April, 1917, six days after America entered the war, Herrmann, promptly after his arrival in Mexico City, called on the German Minister in Mexico, Eckardt, asking for money, and that he also informed the Minister that he had received from the General Staff *a year ago* a commission, which had been renewed in January by Hilken, to set fire to the Tampico oil fields, and that he now proposes to carry it out, and he wants the Minister to sanction such a plan. The Minister is not certain whether Herrmann and Gerdts, his companion, were German agents and could be trusted, and recites to Marguerre and Nadolny, of the General Staff, that Verdy believed them to be American spies, but he suggests to the General Staff that it might be well for him to deny that he was in touch with Berlin!

The answer sent by the General Staff on the 13th of May is that Herrmann's statements were correct, namely, that Herrmann, *a year before that*, had received a commission from the General Staff, which was renewed by Hilken in *January*, to set fire to the Tampico oil fields; but while the General Staff recognizes that the firing of Tampico would be valuable from a military point of view, the matter is left with German Minister von Eckardt to decide; but the Minister is warned not *openly* to support Herrmann.

These telegrams show beyond the peradventure of a doubt the falsity of Germany's Answer, and this falsity is further shown by the specious explanation given of these telegrams in Vol. II of the " BRIEF ON BEHALF OF GERMANY ",

filed November 19, 1928, where these telegrams are discussed in the following language:

" In the second case, which occurred in April, 1917, after the United States had entered the war, *authorization* was given to cripple the source of supply of the Allied Powers for one of the most important war materials (oil) by setting fire to the Tampico oil field in Mexico. At the time the execution of this authorization was under contemplation (April, 1917), the Tampico oil field was controlled by the Standard Oil Company of New Jersey and other enemy corporations.

" In spite of this fact the German Minister to Mexico objected to the plan and, after the German General Staff had left the decision to him, abandoned the scheme because to attack even enemy property in neutral territory was contrary to the German general policy. The matter of the Tampico oil field presents a certain similarity to the greatly-discussed cable of January 26, 1915, in that the former ultimately became the subject of a discretionary permission. In both instances action, if taken, would have been in violation of neutrality. In both instances discretion was granted to the local German authorities and in both instances these local authorities exercised their discretion by refraining from any action and thereby conformed with the general policy which respected the neutrality of the countries involved." (p. 294)

It is a fact, as stated in the quotation from the brief above, that the United States did enter the war in April ,1917, that is to say, on the 6th day of April, just *six* days before von Eckardt's telegram to Marguerre and Nadolny. It is also true that some of the companies operating in the Tampico Oil Field were American oil companies; but it is likewise true that Mexico was at that time and remained, during the war, a neutral country. While the brief tries to justify the authority for sabotage given in the telegram upon the ground that, when the telegram was sent, the United States was at war with Germany, it fails to notice the fact that the authority for sabotage had been given by " Sektion Politik " more than a year before the United States entered the war, and that this authority had been renewed in January, 1917, more than two months before the United States entered the war, and the brief completely ignores the fact that the acts of sabotage were to be committed on the soil of neutral Mexico.

As stated in the quotation from the brief set out above, there is a certain similarity between the cable of January 26, 1915, and the commission, given by the General Staff to Herrmann the year before the United States entered the war and renewed by Hilken two months before the United States entered the war, to destroy the Tampico oil fields; and there is a great similarity also between the plea in Germany's answer and the argument in Germany's brief.

We shall hereafter have occasion to examine with care what the record discloses about Gerdts. For our present purpose, it is sufficient to refer to the fact that on August 1, 1917, S. Le Roy Layton who had been vice consul to Colombia but had recently been transferred, as American vice consul to Canada, made a report to the Secretary of State on the subject " Plot to blow up the oil wells at Tampico, Mexico, by a German-American ". An examination of this report and of a report of Layton's successor, Claude E. Guyant, American Consul at Barranquilla, Colombia, discloses the fact that Gerdts reported to each of these gentlemen an effort on the part of Herrmann to induce Gerdts to cooperate with him in blowing up the oil fields at Tampico. Herrmann showed Gerdts for the purpose some incendiary tubes which he, in company with Gerdts, had brought from the United States through Havana to Mexico. (Ann. G to Ex. 583, Rec. pp. 2345-2348; Ann. H. to Ex. 583, Rec. pp. 2349-2354.)

This testimony, given only a few months after the United States had entered the war, absolutely corroborates the confessions of Herrmann and Hilken and disproves the false pleading of Germany and the false statements of Marguerre.

With the fraud in the pleadings as a preamble, it now becomes necessary to discuss the further question as to whether there was fraud in the evidence brought before the Commission at The Hague; and whether the conduct of the Counsel for Germany was of such a character as to mislead the Commission and to require the setting aside of the decision at Hamburg.

B. Fraud in the Evidence

In making an examination of the evidence which was before the Commission at The Hague it is pertinent and proper, so far as the Kingsland disaster is concerned, to begin with Wozniak.

(*1*) *Wozniak*

According to Wozniak's own testimony, the fire started at his bench, and all of the eye witnesses of the fire agree in one statement, namely, that the fire originated at the bench where Wozniak was working. Wozniak, himself, has made many statements with regard to the origin of the fire; but in all of these statements, whatever else may be the variation between them, he has always insisted that when he was cleaning and swabbing out the shell and pulled out the rag which was on the end of a stick, the rag was afire.

In other words, Wozniak was the *real actor* in producing the results that followed, and the main question which was before the Commission at The Hague, so far as the Kingsland disaster was concerned, was whether the fire was caused by the intentional activity of Wozniak.

In the opinion at Hamburg the Commission devoted about eight and a half pages to the Kingsland disaster, and, of these, three are devoted almost entirely to Wozniak alone. In another portion of the opinion, the Commission compared Herrmann's story with Wozniak's *statements* and *acts*, and this comparison led it to doubt Herrmann's story and to give credence to Wozniak in the following language (p. 975): [c]

" The discrepancies and improbabilities of Herrmann's story tend to strengthen our very strong impression from Wozniak's acts and *statements* at the time of the fire and shortly thereafter and from the circumstances of the fire that Wozniak was not guilty. In the same way our impression of Wozniak, derived from careful study of these acts and *statements* and circumstances, tends to increase our doubt of Herrmann's sincerity in his latest evidence." (Emphasis supplied.)

After making this comparison, the Commission devoted over three pages to the study of Wozniak and his relation to the case, and was inclined to believe that Wozniak, being a crank and smart, but naive, if he had planned to set the fire, would not have started it at his own bench.

The Commission examined the letters which were written by Wozniak to the Russian officials before the fire, and came to the conclusion that these letters were not a blind, but such letters as Wozniak, who was at heart a Russian and who intended to go to Russia, would have written, and that he was shocked at the carelessness and the corruption of the inspectors of the plant. The Commission concluded that without relying " at all on his [Wozniak's] honesty of statement he nevertheless seems to us [the Commission] to act and talk like a man who is really innocent in respect to this fire". (Decs. and Ops., p. 978.) [d]

We shall now examine the record with a view to determine whether, if the Commission had had before it the statements made by Wozniak after The Hague,

[c] *Note by the Secretariat* this volume, p. 89.
[d] *Note by the Secretariat*, this volume, p. 91.

which directly contradicted, in essential points, his evidence given before that time, and if the Commission had known that the affidavits of Wozniak, filed by Germany, had been filed only after Germany's counsel yielded to blackmail demands and paid Wozniak money for his testimony, it is probable that the Commission would have reached the same conclusion, namely, that Wozniak acted and talked like a man who was really innocent in respect to the fire.

It is pertinent, also, to note that, of the oral argument of the German Agent at The Hague, nearly fifty pages of the transcript are taken up with Wozniak, his statements and activities.

How Wozniak became a witness for Germany is recited in the affidavit of Dr. Tannenberg, dated 12th day of September, 1929, and filed on that same date (Ger. Ex. LXXXIX (a)). In this affidavit, an explanation is made as to how Wozniak's two affidavits (Ger. Ex. LXXXIX (c) and LXXXIX (d) executed on April 24, 1929) were prepared and executed. In the course of Dr. Tannenberg's affidavit, he recites the employment of Wozniak to assist the German Agent in making an investigation for the purpose of verifying Wozniak's statements (p. 16), and the agreement that Wozniak should be paid $10 a day and expenses, upon the assurance by the German Agent, in answer to Wozniak's inquiry, that such compensation would not affect Wozniak's standing as a witness, because the compensation was not for *testifying* but for *assisting the German Agent in his investigations* (p. 17); and the statement is made that he was paid $10 per day for each of 42 days during which he assisted the German Agent in his investigations (see p. 17).

Referring to the question of compensation which was paid by Germany to Wozniak, the German Agent, in the oral argument at Washington, November, 1932, stated to the Commission as follows (p. 147):

" Wozniak, during his entire examination in 1929, never asked for money. If I remember correctly, I stated in my affidavit [Sept. 12, 1929] (Exhibit LXXXIX (a)) that when he was in Washington and I informed him that of course we would have to compensate him for his out-of-pocket expenses and loss of time he stated that that could not be done; that is, *he declined to take even this compensation, to which, as a witness, he was entitled.* When our investigation continued, and we, indeed, needed the assistance of Wozniak in order to have him confronted with various witnesses and to verify his story, we paid him his out-of-pocket expenses, and a certain amount for loss of time. As I remember, the investigation required several months, a little more than two months, during which time the witness was at any time at our disposal, *no compensation was asked by him, and no compensation was paid to him for his testimony*, except his out-of-pocket expenses and his compensation for loss of time, which at that time, as I remember, was $10 a day." (Emphasis supplied.)

Wozniak's affidavits of April 24, 1929, were filed on August 20, 1929, and Dr. Tannenberg's explanatory affidavit was filed on September 12, 1929. Dr. Tannenberg, on July 15, 1929, more than a month before Wozniak's affidavits were filed, wrote in his own handwriting a letter to Wozniak in which he inclosed three certificates and in which Dr. Tannenberg explained his delay in forwarding the certificates. The last three paragraphs of this letter read:

" Just before my departure Dr. von Lewinski informed me by telephone that you had come to the German Consulate General to see him and that you discussed *our matter* with him. I hope that Dr. von Lewinski convinced you that *our relations are those of friends and gentlemen*, that you can have full confidence in himself and myself and that we shall do everything that is possible to protect and assist you. I may assure you again that I am convinced that nobody will bother you,

since your innocence in the Kingsland matter is completely established. Should somebody from the Company approach you in this matter, I would appreciate it greatly if you would inform me by letter immediately of what was said to you, or, if you prefer to do that, to go to the German Consulate General and discuss the matter there with Dr. von Lewinski.

" As regards our last conversation in New York I hope I have convinced you that we have worked and shall work together in full harmony, that I fully understand the position taken by you, and that everything will be done by me and Dr. von Lewinski. *Mr. Healy's remarks were absolutely his personal ones. I do not share them and disapprove them entirely. He was not authorized to discuss such matters with you.*

" In order to show you that your confidence in me and Dr. von Lewinski is entirely justified in every respect, I may repeat that Dr. von Lewinski and I are at any time at your disposal. If you want to discuss something with us, just send me or Dr. von Lewinski a note, or ask for Dr. von Lewinski at the German Consulate General in New York. I shall always be glad to see you, and so will Dr. von Lewinski. Any question you have in regard to our matter will always be frankly discussed between us.

" Let us always remain friends." (Ex. 977, Anns. A-B, Ex. G.) (Emphasis supplied.)

Wozniak was paid, in connection with his two affidavits of April 24, 1929, the sum of $450. On July 1, 1930, he was paid $500; and in the latter part of August, just before the departure of the German Agent in September, 1930, for The Hague argument, he was paid $350. After The Hague argument he was paid the following sums: after the return of the German Agent from The Hague — $200; April 16, 1931 — $35; and on April 21, 1931 — $500. In 1930 or 1931, Germany also paid about $1,000.00 in securing his release from a criminal charge. Remembering these payments, it is pertinent to inquire what was meant by the assurances given by the German Agent in his letter of July 15, 1929, when he states as follows:

" As regards our last conversation in New York I hope I have convinced you that we have worked and shall work together in full harmony, that I fully understand the position taken by you, and that everything will be done by me and Dr. von Lewinski. Mr. Healy's remarks were absolutely his personal ones. I do not share them and disapprove them entirely. He was not authorized to discuss such matters with you."

After the decision at Hamburg and after Wozniak found that his source of supply had ceased, he was examined under subpoena before a United States Court under the Act of June 7, 1933 (48 Stat. 117), and testified in August and September, 1933, as follows (Ex. 977, Anns. A-B, p. 42):

" A. In 1929 when I asked Mr. Healy in the Astor Hotel the first time I make affidavit if I going to get extra money for that, he said, ' No, you are going to get just for your time and expenses.' I tell this to Dr. Tannenberg. I was mad about that. He said, ' Mr. Healy has no right to discuss this with you.' "

This testimony took place before Dr. Tannenberg's letter of July 15, 1929, was filed in evidence. After that letter was introduced and filed as Exhibit G, he (Wozniak) was then examined as to the contents thereof and testified as follows (Ex. 977, Anns. A-B, p. 122):

" Q. Referring to this letter, Dr. Tannenberg says, ' Mr. Healy's remarks were absolutely his personal ones.' What did he refer to? What remarks of Mr. Healy's did he refer to?

A. Something two or three weeks after I started to work with them I asked Mr. Healy what I get for that, my job. He said, ' You are as witness just supposed to get for your time, the time and expenses.' After I told Dr. Tannenberg. He said, ' What for you fool me? ' He say ' That is not true; Mr. Healy got no right to tell you and know nothing about this.' "

After Dr. Tannenberg's letter to Wozniak of July 15, 1929, the next in sequence was the letter dated September 27, 1929, which was sent by registered mail from Wozniak to Dr. Tannenberg, the body of which reads as follows: (Ex. 977, Anns. A-B, Ex. D, filed September 15, 1933):

" For the last few Months I have not heerd from you and dont know how the matter stands.

" On my trip West I stoped in Chicago, and desided to write few words to you.

" Will you kindly let me hear from you and tell me when this matter will be finished, and what will I benefit if I help you to save the honor of Germany.

" You know what I have done for you in this matter and what I can do as yet???

" Kindly give me your emmidiate answer and tell me what I am realy worth to you in this matter.

" Expect to hear from you soon."

In spite of the threatening nature of this letter and its ugly tone, Dr. Tannenberg, on October 3, 1929, wrote Wozniak a friendly letter (id. Ex. E), expressing his regret at not having had a chance to see Wozniak and to explain his absences from New York, and promising to send Wozniak a complete set of documents, and then the German Agent stated as follows:

" You may be sure that in view of the fact that you volunteered your testimony in this matter when nobody could compel you to do so, and that due to your voluntary assistance we succeeded in locating numerous old records concerning you, your future welfare will always be a matter of deep interest to us."

To this letter, Wozniak replied, on October 26, 1929, as follows (id., Ex. F.):

" I received your letter. *But I am far from being satisfied. Not one word about reward in this matter.* When I see this matter in the News, I thought therefore, to offer my services to the Company hunting for its own profit, or to the German Government is not hunting for money, but fighting for his honor. I have come to this point that it is to Germany I am supposed to offer my services, and I went to the German Consulate under this impression that the German Government is going to be interested in, prize my services and my condition, and do his best for me without asking for it. But it looks to me as if I am forgotten already. Every one who knows something about this matter laughs at me now. They tell me I offered my services to the German Government for nothing. I was working so hard with my nerves that I became sick again. Before this investigation I weighed 150 pounds, now I weigh only 140, and all my friends dislike me under the circumstances.

* * * * * * *

" When I came to Chicago, before I realized in what kind of position and condition I am, this story was in Chicago newspaper, and now I can get no good job nor reference from anyone. I know one lawyer said to my friend (I met him in Chicago and he knew me from Scranton, Pa.) ' This man is not supposed to play open, it is a big and serious case.' They arrested him, put him in jail, deported, or bump him off, out of the way.

" Now you can understand the condition and position I am in. The last time I saw you you said, ' Germany don't care for money, but for honor.' *I care not only for honor, but for my liberty, existence and life.* I do not know now what will happen next to me. That I got for my services. But I am going to stay with you in this matter, and I advise you, don't give up. Remember this, *the final word I got* in this matter, not Charles P. Anderson, and *I have full right to take this matter to the United States Court, and sue your Company for using my name without my knowledge, for collecting money under false pretenses, something like blackmailing.*

" *These records, which you permitted me, sent to same address to Chicago, and not only my records, but also all company records, every piece of paper which contains something about me, connected with this matter.*

" *I am going to use the same as evidence against the Company, when there comes a time to start something.*

" I wish to win this case as soon as possible, and be satisfied and *don't forget about me.*" (Emphasis supplied.)

The underscored [emphasized] portions of this letter can be interpreted in no other light than that of a threat of blackmail.

In the oral argument at Washington, in 1932, the German Agent stated that after Wozniak's evidence was submitted, Wozniak left New York and went west and that they did not know where he was, and it was not possible to get into communication with him, but that Wozniak had come back again in 1930 and had been cross-examined by the American Agent.

The letters which have been quoted above show conclusively that the German Agent did know where Wozniak was and that he was able to, and in fact did, communicate with him.

In a letter dated February 10, 1932, written to the American Agent, which the German Agent read into the record in the course of his argument (Oral Argument 1932, p. 128), he used the following language:

" When I returned to this country at the end of March, 1931, I had several conversations with Wozniak. In these conversations he indicated very strongly that he *expected payment of a large sum of money by us.* I advised Wozniak that no such payment could be made. Wozniak repeated his request at every conversation I had with him and, finally, advised me that if his request was not complied with, *he would accept an offer* which *had been made to him and which would cause me great regret.* I, thereupon, broke off my relations with Wozniak and have not seen him since." (Emphasis supplied.)

In view of this statement, it is remarkable that the German Agent should have, on April 25, 1931, written Wozniak a letter, which reads as follows (Ex. 977, Anns. A-B, Ex. H):

" I received yesterday your registered letter. As I told you last week, I shall go to New York as soon as I have finished the brief which the Commission requested to be filed. This brief has to be filed by Monday next week, that is the 27th of April, so that it is impossible for me to be in New York on Monday morning, since I have to work here until Monday night. I shall go to New York, as originally planned, on Tuesday morning, that is the 28th, and will be at the German Consultate General around 2 o'clock in the afternoon. From that time on I will be at any time at your disposal. I hope I can stay there until Wednesday or Thursday. I have to be back in Washington soon because I have to prepare a further brief in the same matter during the first part of May.

" Your information that the case will be decided on or before May 1st is erroneous. As I said before the Agents still have to prepare further briefs during the first part of May and nobody can say at the present when the Commission will render its decision in this matter, particularly in view of the fact that the German Commissioner is at present in Germany. The Commission merely fixed May 1st as the time limit within which the American Agent should file the further evidence which he announced he would file in support of his petition for the reopening of the case.

" I hope that I can see you on Tuesday. We can then discuss everything and decide how to proceed."

This letter was written immediately after Wozniak had cashed the German Agent's order on the Consulate for $500.

The registered letter written by Wozniak and referred to in the above letter has never been introduced in evidence. As we know, Wozniak's demands did not begin in March, 1931, but had begun at least eighteen months earlier, to-wit, before July 15, 1929, and had been the subject of correspondence and conversations between the German Agent and Wozniak. The tone of the German Agent's reply to Wozniak's registered letter would seem to indicate that

Wozniak was anticipating the early decision of the case, and accordingly was again demanding a " show-down " as to his reward, for the German Agent is careful to correct Wozniak as to his information that the case would be decided by May 1st, and closes with this statement:

" I hope that I can see you on Tuesday. *We can then discuss everything and decide how to proceed.*" (Emphasis supplied.)

Evidently the demands in Wozniak's registered letter were of the same character as in his letters written in the summer and fall of 1929.

It will be recalled that Wozniak made a trip to Washington on April 16th, 1931, and disclosed to Tannenberg the fact that he had received an offer in regard to the sale of his story to a magazine. In regard to this offer, Wozniak testified as follows (Ex. 977, Anns. A-B, p. 128):

" I told him about this offer in Washington April 16th [1931].

" Q. That was on April 16th? A. Yes.

" Q. That you told him you had an offer from somebody else? A. Yes, and he told me, ' Don't do that,' and tell me wait; and between April 16th and April 30th I received from him $500 to make me happy.

" Q. Between April 16th and April 30th you received $500 from Mr. Carl Loerky at the Consul General's office? A. Yes.

" Q. And that $500 was paid to you so that you would not accept the other offer that had been made to you by Mr. Bishop? A. That was paid to me to believe them, they good to me.

" Q. That was paid to you for what? A. To believe in them, they good to me.

" Q. In order to make you believe that they were good to you and would keep their promises; is that what you mean? A. Yes."

And, again, on p. 120, he was asked:

" Did Dr. Tannenberg advise you what you should do about the offer? A. He said, ' Forget it.'

" Q. He said ' forget it '? A. Yes, ' Don't do that.' "

At the conference between Wozniak and Tannenberg in Washington on April 16th, he got an order for $500 which was paid him in cash at the German Consulate's office in New York; and subsequent to the receipt of this money, the German Agent wrote the letter of April 25th, 1931, in which, as we have seen above, he expresses the hope that he would see Wozniak in New York on Tuesday and that " We can then discuss everything and decide how to proceed".

In his 1932 argument in Washington, the German Agent stated that up to the beginning of 1931 he had not been in contact with Wozniak after the summer of 1930; that in the beginning of 1931 Wozniak was arrested on a flimsy charge; that they assisted in getting him out on bail, but by that time the witness had lost every bit of his courage. He had been shadowed by detectives. He had been arrested and placed in an awful situation; his rooms had been searched, and then the German Agent said:

" *He began, as I said in my letter to the American Agent, then to make demands.* * * * Of course, we could not compensate the witness even for those troubles * * *; *but finally he made a demand for money,* which I of course had to decline, and he disappeared, and, as I said before, I have never seen him again." (pp. 147, 148.) (Emphasis supplied.)

A careful study of the above and of the letters passing between Dr. Tannenberg and Wozniak up to and including April 25, 1931, discloses that, whatever demands had been made, either early in 1931 or in the registered letter from Wozniak, received by Dr. Tannenberg on April 24th, but never produced in the record, these demands could not have differed in character from the demands that began in July, 1929.

A perusal of the letter written by Wozniak to Dr. Tannenberg on August 13, 1931, and Dr. Tannenberg's reply of August 19, 1931, fails to disclose that, even as late as August 19, 1931, Dr. Tannenberg had renounced Wozniak or broken off his relations with him (See Ex. 977, Anns. A-B, Exs. I & I-1).

On the question of the amount of his compensation, Wozniak testified as follows (Ex. 977, Anns. A-B, p. 35):

" Q. How much has the German Government paid you in all for your services in connection with this case? A. Altogether I got two thousand and twenty dollars.

" Q. Two thousand and how much? A. Two thousand and twenty dollars.

" Q. Did they ever promise you any more than that? A. They promised me — they promised me a whole lot, but after they say they don't care, ' We got you where we want you, and what you going to do? You open your mouth and you are going to be arrested.' And Mr. Healy promised me Atlanta and deportation.

" Q. Healy told you they would sent you to Atlanta? A. Yes.

" Q. Which you understood to be a Federal prison? A. Yes.

" Q. And that after you served your term they would have you deported? A. Yes.

" Q. Did you ever make any demands on Germany for more money than they paid you, the two thousand dollars? A. He promised me. I tell him I want him to give me in writing.

" Q. You wanted him to give you in writing what they were going to pay you? A. Yes, I said I did not believe in promises.

" Q. That you did not believe in promises? A. Yes, because they fool me. They said German Government never going to give me agreement, because Dr. Von Lewinski promised me, he said, ' When I go to Hague and I come back we going to make some kind of agreement.'

" Q. That when he came back he would make some kind of agreement? A. Then he pay me $200, when he come back. He went to Germany and don't say a word about agreement. After Dr. Tannenberg, I told him, ' You promise me this agreement; I want this agreement.' He said, ' German Government never going to give you no agreement.' He said, when he wins his case, ' Maybe I help you something, to open some kind of speakeasy.'

" Q. Was that Dr. Tannenberg or Mr. Healy? A. Dr. Tannenberg. He told me he going to help me to open a store, something to give me a start, like speakeasy.

" Q. When was it Mr. Healy told you that he would make an agreement with you after he came back from The Hague? When was that? A. Dr. Von Lewinski, when he go to Hague, he told me in Washington that time."

In the light of this record, a careful study of the letters passing between the German Agent and Wozniak beginning July 15, 1929, and closing with Wozniak's letter of October 26, 1929, establishes the following propositions:

First, before the letter of July 15, 1929, was written, Wozniak's compensation had been the subject of a conversation between Wozniak on the one side and Dr. von Lewinski on the other, and Dr. von Lewinski had tried to convince Wozniak that their relations were those of " friends and gentlemen ". After the conversation with Dr. von Lewinski, Wozniak had another conversation with Dr. Tannenberg, and Dr. Tannenberg again assured Wozniak that " we have worked and shall work together in full harmony "; and he further assured Wozniak that Healy's statement, to the effect that Wozniak would only receive his witness' fees, were Healy's personal remarks and that he, Dr. Tannenberg, did not share them;

Second, Wozniak in an ugly mood on September 27, 1929, wrote a hold-up letter, asking when the matter would be finished, what benefit he would get out of saving the honor of Germany and demanding to know immediately " what am I really worth to you in this matter ";

Third, in spite of this hold-up letter Dr. Tannenberg replied in a very conciliatory letter, assuring Wozniak that on account of his voluntary assistance " your future welfare will always be a matter of deep interest to us ";

Fourth, upon the receipt of the letter of October 3rd, 1929, Wozniak wrote to Dr. Tannenberg his blackmail letter of October 26, 1929, which must be interpreted as containing a threat. In spite of the passage of these letters between the two, from which Wozniak's true character is shown in every page, the German Agent continued to secure and file in behalf of Germany affidavits made by Wozniak.

The first two affidavits of Wozniak, filed on behalf of Germany, were filed after Tannenberg's letter of July 15, 1929. After these letters had passed, Wozniak was finally located by the American Agent at Tupper Lake in company with Counsel for Germany; and he was finally produced by the German Agent for examination at Washington on July 22, 23, 1930, and at New York on July 28-30, 1930. (Ger. Ex. CXXII, consisting of 368 pages). After the series of letters set out above were completed, and after Wozniak's examination by the two Agents, the German Agent, on August 26, 1930, filed German Exhibit CXXXI, which consists of an affidavit with annexes from A to W, the whole comprising 133 pages.

If, as Dr. Tannenberg contended in the Washington argument, in 1932, Wozniak's degradation followed the refusal of the German Agent to continue him on the payroll, why did the German Agent bring him to Washington on April 16, 1931, give him $35 for the round trip expenses and give him an order on the German Consul for $500 which was paid on April 21, 1931?

If there was any decline in Wozniak's character which made him unfit as a witness, that decline began before Dr. Tannenberg's letter of July 15, 1929, and it continued on a fast-sliding scale following the subsequent payments to Wozniak, all of which were known to the German Agent and not only concealed from the Commission but were the subject of misrepresentation at the 1932 Washington argument. This conduct of the German Agent, relating to the suppression of the letters and of the payments to Wozniak and the misrepresentation of his relations to Wozniak, is aggravated by the innuendoes in the German Agent's argument at Washington by which he endeavored to turn Wozniak's threat to sell his information to a magazine into a representation that he was being bribed by the claimants.

As an index of Wozniak's character as a witness, it is necessary and proper to examine a letter written in July, 1932, by Wozniak to Franz von Papen, Chancellor of Germany, at Berlin (Ex. C) with Ex. 977, Anns. A-B), which was returned in the same envelope. In that letter Wozniak makes the claim that the company could not win the case without his help. He knows how important and valuable it was for Germany to win the case and

" because Company not ask for my #secrets#, ignored, I decided to offer my help to the German Government, whit belive and hope in good reward. I give up my partnership with American Foreign Claims Bureau and start work for Germany."

Then the letter goes on to state:

" At that time Dr. Tannenberg promise-good percentage, big money, good position and etc. Dr. K. von Lewinski, also promise reward, split money and to make some a agriment with me, but went to the Germany, with out nothing, Mr. T. Healy a Lawyer to thr German Government, also told me a fairy story about reward from Germany and asked if, I give him 10%, from this amount, which a get from Germany, and etc."

Later he says:

" And what sort of rewards I received or was promised from German Government, for helping to klear the Honor of Germany, and won 22.000.000.?
" NOTHING! And beside, was warned-not to tell true and change story, * * *"

And later he says:

" When I see Dr. Tannenberg last time, on March 30-1931 he talk to me in different manner, in high tone, not a like in 1929. He told me # witnes not entitled to no rewards, it is againste rule and honor, witnes should be paid-only-for his expenses and lose of time. But if Germany again won this case, maybe I could help you with something #."

This letter not only illustrates Wozniak's character as a witness, but also illustrates the fact that a bought witness does not want to stay bought and that his hungry craw must be filled in order to " keep him in line ".

Wozniak's Letters and Postcard to the Russians

The Kingsland disaster started on the afternoon of January 11, 1917. Wozniak, in the early summer of 1916, had secured employment at the Kingsland plant through the production of an identification from the Russian Vice Consul Florinsky.

Under date of December 15, 1916, he addressed a letter from Kingsland to the Russian Supply Committee, complaining that " only here something is wrong ", apprising him of his determination to write, but he did not know the address of the Russian Military Committee. This letter was forwarded to Major General Khrabroff, Chairman of the Artillery Commission, by Baron Korff, Secretary of the Russian Technical Bureau, with request that the personnel of the inspection be urgently increased at the plant and that a night watch be instituted (Ex. 725, Ann. 4, pp. 4554-4556).

Under date of December 26, 1916, Wozniak addressed another letter in the same tone, saying that something is wrong in the Kingsland factory — " It smacks of the Miassoyedov spirit " — and also saying that he knows that his letter will bring no desired benefit; that he is writing this letter *in order to avoid the reproach of someone who might say "You knew, why did you not report to those in charge."* (Ex. 725, Ann. 5, Rec. p. 4556.)

When he was cross-examined by the American Agent on the above letters, he was asked whether in 1929 he told Dr. Tannenberg about having written letters to the Russian Supply Committee. His answer was no and his reason was

" I thought this letter was destroyed — nobody know I wrote this letter." (Ger. Ex. CXXII, Wash. Tr. p. 56)[1]

And again he said (id. p. 57):

" If I know this letter still exist, I tell him; but I think this letter was not still in existence. I not want to make fool for myself."

After he had been shown the letters and he corrected the translation of the second, he admitted again that he did not tell Dr. Tannenberg about these two letters, " because I thought those letters was thrown in the basket". (id. p. 180.)

General Khrabroff in Exhibit 698 (Rec. pp. 4425, 4427), after testifying with reference to the receipt of the two letters, testified that on the day before

[1] An original executed copy of this examination has never been filed with the Commission. See Motion of German Agent filed August 13, 1930, submitting copy of Ex. CXXII.

the fire, that is on January 10, 1917, he received a further communication from Theodore Wozniak in the form of a post card which was delivered to General Kasloff and was sent, according to his recollection, to Russia with General Kasloff's reports. An English translation of the post card reads about as follows:

" Things are getting worse and worse with us. There will be a catastrophe." (id. p. 4428.)

After the fire, Wozniak visited General Khrabroff at the Flat Iron Building in New York City and admitted that he had written the second letter referred to above and the post card, and his explanation of the circumstances was not satisfactory and led Generals Khrabroff and Kasloff to believe that Wozniak had caused the fire.

In German Exhibit CXXII, Wash. Tr. p. 185, Wozniak denied sending a postal card to General Khrabroff, and in German Exhibit CXXXI, Annex E, he repeated his denial as follows:

" I never wrote a postcard to General Khrabroff or anyone else concerning conditions at Kingsland. He must suffer from hallucinations as a result of the dirty work at Kingsland."

When he was examined under subpoena in 1933 (Ex. 977, Anns. A-B), he testified that a few days before the fire he sent two letters but got no answer, then " I sent post cards." The " s " seems to be a typographical error because of the next question which was asked him by the American Agent as follows:

" Before you sent *that* post *card* or *these letters* had you heard these German spies talking about blowing up the factory? A. I hear before." (id. p. 28) (Emphasis supplied.)

He also testified to meetings with German agents both before and after the fire, and to having received from such agents small sums of money from time to time (id. pp. 20-24, 145-148, 170-171).

In his examination before the Department of Justice (Ex. 998, Ann. J (a), p. 8) he testified in regard to meeting with some German agents and discussing the question of the best method of causing a fire. One recommended an incendiary pencil. Hinsch advised nitrate, and someone else recommended phosphorus, and this was adopted. He then described how to operate a rag dipped in phosphorus in order to cause a fire, and was positive that the rags which were used at Kingsland were " prepared at Nick's house in Rutherford". Then he testified as follows:

" When they started to talk seriously how to set a fire, I remembered my promise to the Russians (only to get information what the Germans were doing) and because of my personal feelings and *that I was scared to be suspected*, I was against them, and did not want to lose the day from work, I did not go to the Russian Consulate in New York. (I missed only one day when I signed a petition to become a Russian citizen, and when I sent money to Russia). Instead I wrote a letter to my friend at the Russian Consulate, but there was no reply. Later I found out he was sick, and someone else read his letters. Then I wrote to the Russian Embassy at Washington. The letter was sent with an ordinary stamp and my return address, but again no reply. After two weeks I mailed another letter, registered, to the Russian Embassy at Washington in which I stated that at the Kingsland factory it smelled of the spirit of Myassoyedoff, but again no reply. *Then I sent a last warning on a postal card.* Two days later the fire (at the Kingsland plant) broke out. While I was preparing my statement for Germany (August, 1930) I do not remember whether I stated anything about the postal card or not. But Mr. Healy said, ' Scratch out this part, it looks bad before the Commission. You must remember everything.' Lately I have found out that those letters were sent by the Russian ambassador, B. Bakhmstieff, to the Russian Supply Committee,

which was in charge of General Charabroff and his aid, B. Brosol, but they failed to investigate and *I charge those two men responsible for a fire in Kingsland factory.* * * *" (id. p. 9) (Emphasis supplied.)

Before the argument at The Hague, Wozniak had twice denied sending a postal card. In the above quoted testimony, he now admits that he " sent a last warning on a postal card ", and " Two day later the fire (at the Kingsland plant) broke out ", and he claims that this statement was given to Mr. Healy who advised him to scratch out the part about the postal card. His reason for sending the letters was " *I was scared to be suspected* ".

In Exhibit 977, Annex B-B, being the examination in 1937 by the Immigration and Naturalization Service, Wozniak, in answering a question that had no relevance whatever to the answer given said (Exam. of April 26, 1937, pp. 8, 9):

" I sent one letter to the Russian Consulate in New York, but I didn't get an answer. * * * then I sent a post card, but no answer, and at that time the factory was destroyed; when I sent a registered letter to Washington they should send somebody to investigate what I know — if somebody come to me, they catch everything, but they ignored it.

" Q. Did these men talk to you about the explosion that was to take place?

A. Yes, many times about the explosion — they make experiments."

In the testimony given after the decision at Hamburg, Wozniak not only contradicted his previous statement with reference to the post card, but also showed conclusively that he was in touch with a gang of spies who were operating within and without the plant. He became thoroughly conscious of the fact that an effort was going to be made to burn up the plant; and, so far from being patriotic in making his reports to the Russians in regard to the conditions in the plant, he " was scared to be suspected " and, therefore, he wrote the letters. Certainly if he had no intention to become involved in the plot to blow up Kingsland, it was not necessary for him, nearly one month before the fire, to be " scared that he was going to be suspected " when the fire did take place. His careful description of the meeting of the plotters, their discussion of the best method to start the fire, his references to the chief spy, and his early denial of the post card which was sent two days before the explosion warning that " there will be a catastrophe ", not only convict him of falsehood in his early testimony but bring the fire close to his doorstep.

In his argument at The Hague, the German Agent laid great stress upon Wozniak's testimony (Oral Arguments, 1930, pp. 349 *et seq.*). He related how Wozniak presented himself to the German Consulate, and the long time it took to check Wozniak's story; and said that the story was not produced before the Commission until they were sure he was corroborated and had told the truth, and all facts had been investigated and found true. He further said:

" There was no postal card written by Wozniak to the Russian Embassy at all." (id. p. 363.)

He denied that the letters sent to the Russians were a blind, and he argued that Wozniak gave the impression of a *patriot* and *an honest man* fulfilling his duty to his country (id. p. 365). The conclusion set forth by the German Agent is as follows:

" The Russian material has shown to the Commission, among other things, that Wozniak's actions at the time of the fire, and subsequently, were those of an innocent man." (id. p. 373.) [1]

[1] This estimate of Wozniak was repeated by the German Agent as late as the Oral Argument at Washington in 1932 (p. 143).

The Commission, in its decision, agreed with the contentions of the German Agent, and concluded that the letters to the Russian Embassy were not a blind, but exactly such letters as Wozniak would compose; and the Commission seemed to ascribe to him a form of patriotism, for it indicated that he really was at heart a Russian and intended to go to Russia, and was shocked by the carelessness and corruption at the Kingsland plant, and the Commission concluded " that he acted and talked like a man who was really innocent in respect to the fire."

An honest workman, with nothing to conceal, learning of a conspiracy to destroy the plant and to imperil hundreds of lives, would not have resorted to " a letter to the Russians" but would have gone to some responsible superior in the plant or to the police; and Wozniak's failure to bring to the proper local authorities the information and fears disclosed in his letters and postal card to the Russian Embassy at Washington, coupled with his conduct at and since the fire, convict him of complicity in the design and result.

Wozniak's Contradictory Statements

In German Exhibit LXXXIX (d), Wozniak, speaking of the Kingsland fire, said:

" I did not start the fire purposely. It is not true that I wanted to set fire at the Kingsland factory and that I did so. I never had such an idea and nobody told me to do such a thing." (id. p. 5)

He also denied knowing any German spies and denied knowing Fred Herrmann or Fred March (id. p. 6).

In the examination of Wozniak before the two Agents in July, 1930, he made the same denials and denied that he was ever connected with any German agent (Ger. Ex. CXXII, Wash. Trans. p. 14). He also denied that anybody ever gave him any incendiary pencils (id. New York Trans. pp. 38-40; 44-46).

He denied that he knew Hinsch (id. New York Trans. p. 128). When confronted with Herrmann, he denied knowing him (id. p. 138).

In his testimony given after the Hamburg decision, Wozniak reversed himself on all of the foregoing points. In his examination under subpoena, he admitted that there were German spies inside the Kingsland plant, and said:

" I heard them. I meet them." (Ex. 977, Ann. A-B, p. 21.)

He said their headquarters were in Rutherford, they were well organized and he met in Rutherford the head spy named Mike, and his wife. This head spy was employed in the plant working at the next table to him; he met him a few times in December, 1916, or January, 1917 (id. pp. 20-23). He also admitted getting some money from these spies in Hoboken and Rutherford (id. pp. 170, 171).

In his examination before the Department of Justice (Ex. 998, J (a)) Wozniak admits knowing " Nick, Hinsch and the boy ", and discussing a plan how to set a fire (See *supra*, p. 50).

In his examination before the Immigration and Naturalization authorities, Wozniak swore that he met Herrmann while working at Kingsland and knew him a month before the explosion (Ex. 977, Ann. B-B, Exam. April 26, 1937, p. 6).

It will be recalled that in all of his affidavits filed before Hamburg, Wozniak always denied any responsibility for the fire and any knowledge that it had been other than an accident. After Hamburg, in Exhibit 977, Annexes A-B, he was asked to describe the plans that he had heard German agents making

for blowing up or setting fire to the Kingsland factory and the following colloquy ensued (p. 145):

" Q. What plan did you ever hear them discuss? A. I heard about this pencil and about the rag with phosphorus.
" Q. You heard the two plans, one to use the pencil? A. Yes.
" Q. And the other to use a rag saturated in phosphorus? A. Yes, one plan was used — I forget just now.
" Q. Would a rag saturated in phosphorus create a flame inside of a shell? A. I think it was, because I was not there when this job was done, where they got the rag I do not see, but I hear it.
" Q. But you know, do you, that someone set fire to the Kingsland plant? A. Yes.
" Q. You know that, don't you? A. Yes.
" Q. Do you know who it was set fire to the Kingsland plant? A. That is supposed to be I did.
" Q. Yes, but do you know who it was? Was it you? — A. I used this rag, but at that day this man, not himself but tell another man — another man give big bunch of rags to me. He said, ' Here is some more clean rags.'
" Q. A man brought you a bunch of rags? A. Yes.
" Q. You did not select the rags yourself? A. No, that was his job. It would take some time to take clean rags from me, too.
" Q. You mean it would take some time for you to leave your bench and go and get the clean rags? A. Yes."

It will be noted that when he was asked the question: " Do you know who it was set fire to the Kingsland plant? " — his answer was — " That is supposed to be I did " (id. p. 146).

In Wozniak's examination of May 13, 1931, at the Roosevelt Hotel (Ex. 977, Ann. C), we find the following (p. 6):

" Q. But supposing Commissioner Anderson asked you, would you tell him that you did set the fire on behalf of Germany?
" A. I would tell him.
" Q. You admit it? A. Yes, I admit it. That was set so easily.
" Q. No witnesses? A. No witnesses. I was scared.
" Q. You were scared? A. I was scared for myself. I had no agents helping me at that time; just a bunch of rags.
" Q. What? A. A bunch of rags."

While this testimony is vague, it is in great contrast to his testimony before The Hague where he always denied that he knew anything about anybody being responsible for the destruction at Kingsland and contended that it was an accident, although the fire started at his bench.

Wozniak's Conduct Immediately Preceding, During, and After the Fire

Exhibit 348, Rec. p. 1307, is the affidavit of Maurice Chester Musson, verified and filed March 12, 1927. Musson stated that he had been employed in the Kingsland Plant in the early summer of 1916 and remained there until the fire on January 11, 1917, as foreman of a gang of men whose duties were to remove from the spaces between the tables racks filled with cleaned shells and replace them with empty racks; that the men at the tables were supplied with pans of alcohol and rags used in polishing the shells, and that there were pails of waste alcohol under the tables; that the fire originated at the table of " Fiodor Woznayk ", whose photograph he recognized. He then testified as follows (Rec. p. 1308):

" 6. I noticed that this man Woznayk had quite a large collection of rags and that the blaze started in these rags. I also noticed that he had spilled his pan of

alcohol all over the table just preceding that time. The fire immediately spread very rapidly in the alcohol saturated table. I also noticed that someone threw a pail of liquid on the rags or the table almost immediately in the confusion. I am not able to state whether this was water or one of the pails of refuse alcohol under the tables. My recollection however, is that there were no pails of water in the building, the fire buckets being filled with sand. Whatever the liquid was it caused the fire to spread very rapidly and the flames dropped down on the floor and in a few moments the entire place was in a blaze.

" 7. It was my firm conviction from what I saw and I so stated at the time, that the place was set on fire purposely, and that has always been and is my firm belief."

In his contemporaneous statement on January 17, 1917 (Ex. 611, p. 2683), Musson testified that as soon as he saw the small blaze it jumped into a large blaze and

" Some of the other fellows threw rags on the flame."

He also said:

" Between you and I, think it was set on fire."

In Wozniak's statement, dated January 15, 1917, Exhibit 2 to Exhibit 726, Rec. pp. 4680, 4681, after describing how he dipped his brush in the solution contained in a small pan sunk in the table and with it cleaned out the inside of the revolving shell, he then said:

" I then swabbed out the inside of the shell with some cleaning rags which were not very clean. I next placed a clean swab of cloth inside of the revolving shell. I noticed it was quite stiff and upon placing this cleaning swab in the shell, a flame burst from the interior of the shell which ignited the fumes, from the pan immediately in front of it. I tried to put the flame out by throwing a cloth over it, but it spread so rapidly I could do nothing and in a moment the flames shot up along the electric light cord above the table to the ceiling and the interior of the ceiling blazed up. At the same time the flames spread along the table to the next pan and continued to run southerly along the table. There was a receptacle standing on the floor beneath the pan set in the table which had a small quantity of the cleaning solution in it, which had dripped through. This likewise took fire."

This statement, when read in connection with the statements of other eye-witnesses, particularly the references to the use of rags, is, to say the least, suspicious of an intentional effort on the part of Wozniak not only to start a fire but also to spread it when once started.

Thomas Steele, on January 12, 1917, testified (Ex. 611, pp. 2679, 2680), that he saw fire burning in the pan of the Austrian and when the Austrian was leaving, he saw a fire in his pan, and then the fire appeared in the next pan nearest to the Italian; that he took down a bucket of water and put out the fire in the Italian's pan and some workman took a piece of board from the bench and struck the Austrian's burning pan and the liquid poured out and ran along the bench, burning and setting fire along the whole bench.

In a statement by LaScola dated January 11, 1917, describing the fire (Ger. Ex. CXIX), he said:

" A Russian was cleaning a shell with a brush a spark from the shell fell on the Table where there was gas and oil, which caused a flame. The Russian tried to put the fire out with a rag which caused the rag to burn."

In his statement dated January 13, 1917 (Ex. 886, Ann. B-6), LaScola said:

" As soon as the fire started on the table the man at the machine tried to smother the fire with rags, and that set the rags afire and he dropped them and ran for a pail of water, * * *."

In his statement of January 16, 1917 (Ex. 898, Ann. C), LaScola said:

" While I was watching this man [at whose table the fire started] cleaning the shell I saw a small spark come from the shell and almost instantly I saw fire start on the table. I saw the blaze on the table and it was about three feet square. I saw one man run for water and heard men calling for water. I did not wait to see anything more * * *. I saw the spark fly from the shell and almost instantly I saw the fire on the table. * * * I am positive the fire started inside of building # 30 as I saw the spark fly from the shell and saw the fire on the table and at this time I was only ten feet away from where the fire started."

In his affidavit of August 2, 1930 (Ger. Ex. CXV, p. 7), LaScola said:

" some of the men took rags and tried to smother the fire and the rags were soaked with benzine."

He also said, p. 10, that the man at whose machine the fire started

" took rags right from the table and tried to smother the fire with them."

And, again:

" When they started to beat them with rags they got larger."

In his affidavit of April 26, 1933, LaScola (Ex. 980, Ann. E), describing the fire said:

" At the time of the fire I was about ten feet away and out of the corner of my eye I saw a small flame and saw the man with a rag saturated in benzine try to put out fire with it but instead caused the flame to spread and increase, and another man threw a pail of water on the flames spreading them more and then everybody ran."

In the statement of Anthony Adamo, dated January 17, 1917 (Ex. 886, Ann. B-1), he said:

" The first I saw of the fire was burning rags on the floor, and the man at the machine #1, a Russian, trying to stamp them out with his feet."

Here is evidence that the burning rags were put on the floor by Wozniak.

In the statement of John Sulemnob (Ex. 886, Ann. B-14), he said:

" It commenced in a rag and the man who was working at the machine, the first one, took the rag, threw it on the floor and stamped on it: trying to put the fire out. Before doing that he tried to put the blaze out with his hands on the table. I do not know whether this rag had been inside the shell or not."

If Wozniak intended to set fire to the gasoline in the pan under the table, it was easy enough to give an impression that he was trying to stamp on the burning rag.

In the contemporaneous, undated, statement of Rudolph Alexander Walker (Ex. 886, Ann. B-16) he said:

" I noticed a flame coming from the pan sunk in the table at the first machine. * * * As soon as the first pan blazed up the flame spread down along the table."

George Robbins, in his statement of January 13, 1917 (Ger. Ex. CXIX), said:

" I noticed he stalled the shell and the brush was afire when he pulled it out. He tried to extinguish the fire with rags."

In his affidavit of August 6, 1930, but only filed on September 14, 1937 (Ger. Ann. 128), Victor Frangipane, in describing the fire, said that it was due to a sparking motor on which there was a rag saturated with alcohol or benzine, which caught fire from the sparks.

In his affidavit of the 22nd day of January, 1917 (Ex. 898, Ann. B), Victor Frangipane had testified exactly the contrary, namely, that he did not see any spark or other means of communicating the fire to the place where he first saw it, but that the fire appeared to be coming from the gasoline pan on the top of the table.

In his affidavit of the 26th day of April, 1933 (Ex. 980, Ann. F), Frangipane again denied that he saw any sparks coming from the machines or motor; but in his affidavit of the 6th day of August, 1930, and also of the 26th day of April, 1933, he referred to the fact that Wozniak threw some gasoline-soaked rags on the fire.

In Exhibit 980, Ann. F, he said:

" I noticed a flame at Wozniak's bench. I saw Wozniak throw some gasoline soaked rags onto the flame and then he ran away."

And in German Annex 128, he said:

" As this rag was blazing the man, whose name I cannot remember, who was working on #1 machine, ran and grabbed the blazing rag and stamped on it. He could not put out the flame and picked up this blazing rag and ran around his work bench with it. On this bench there was a pan with alcohol or benzine in it, and while this man was running around the work table with this blazing rag in his hand this pan caught fire and began to blaze."

When the above evidence is considered in connection with Wozniak's confession that he was in touch with German saboteurs, that they planned to start a fire with phosphorus, and that he was furnished rags soaked with phosphorus, the inference seems to be clear that, in spreading the gasoline over his table and in using rags soaked with an inflammable liquid (whether gasoline, benzine or phosphorus), ostensibly for the purpose of putting the fire out, Wozniak was intentionally spreading the fire and that he purposely used the burning rags to set fire to the gasoline pan which was on his table, as well as to the pan which was under the table.

Wozniak's Character as a Witness

The Commission at Hamburg, while stating that its impression of Wozniak's innocence was not due to his protestations of innocence, compared Wozniak's character as a witness, and his statements and acts, with the character of Herrmann as a witness, and his statements and acts, in a manner that was unfavorable to Herrmann (Decs. and Ops., p. 975).[e] The Commission stated that Wozniak was a crank, in a way smart, although naïve, and so smart that it was hard to believe, if he desired to start the fire, that he would have started it at his own bench and would have behaved as he did after the fire.

The Commission expressed the belief that Wozniak was never in Mexico, that the letters he wrote the Russian Embassy before the fire were not a blind, but were exactly such letters as Wozniak would compose, and that he really was at heart a Russian and intended to go to Russia; and that he was shocked at the carelessness and corruption at the Kingsland plant; and the Commission concluded that, without relying on the honesty of his statement, he seemed to act and talk like a man who was really innocent in respect to the fire; and, therefore, in spite of Herrmann's confession, it was stated that the evidence in the Kingsland case had convinced the Commission that Wozniak did not set the Kingsland fire. The Commission did say, however, that " Wozniak's description of the starting of the fire bears some resemblance to what might

[e] *Note by the Secretariat*, this volume, p. 89.

have happened if a pencil had been used ", but that, " the resemblance is not close enough to make us suspect that a pencil was actually used". (Decs. and Ops., p. 977.) [f]

A thorough examination of the whole record, both that which was made before the decision at Hamburg and that which has been adduced since that decision, will establish the fact that Wozniak is crafty, cunning, treacherous, and rapacious. One cannot read and digest the record without coming to the conclusion that, in his greed for money, he would go to any length, and that the sentiments of loyalty and patriotism have no lodgment in his breast. In their stead, he has the instincts of the blackmailer and the heart of the typical gangster and double-crosser, and is accustomed to laugh at those whose distress he has caused. He has shown himself to be a man who is feared and suspected by his associates and whose only fear is of the penitentiary and the gallows. Herrmann, in the celebrated message, disclosed that he knew Wozniak's psychology when he wrote:

" Has Hinsch seen Wozniak. Tell him to fix that up."

On the same day that the affidavit of Wozniak was filed (Ger. Ex. CXXXI), the German Agent filed a motion praying that that Exhibit might be made a part of the record, and representing to the Commission that, in preparing the same,

" Wozniak was not only prompted by the earnest wish to clear his name and to defend himself, on his own accord and as an individual, of the charges brought against him — charges which he resents as unfounded and as based on false testimony, — but also by the wish to be helpful to the Commission in finding the truth."

The German Agent represents to the Commission that the whole of this Exhibit was written down by Wozniak, without any collaboration or assistance from anybody, but that his imperfect English had been corrected as to orthography and spelling by the German Agent's counsel.

The German Agent represents further that, in presenting this affidavit, the German Agent was prompted by a two-fold motive: First, that he is of opinion that Wozniak's statements

"are of great evidential value in the present case;"

Second, that, as Wozniak had no other opportunity of defending his name, he should be given this opportunity. The German Agent also points out that while he was *thoroughly convinced of the truth of Wozniak's presentation of the facts,* he does not identify himself with the *arguments* set forth and the *opinions* voiced by him in his statements.

Therefore, in spite of his knowledge of Wozniak's character as disclosed by the blackmail and hold-up letters, the German Agent stands behind this blackmailer and guarantees the " truth of Wozniak's presentation of the facts ". It is interesting to note that Wozniak later denominated, as a " very well polished lie ", the affidavit of the German Agent's counsel describing the circumstances under which Wozniak's original affidavits were obtained (Ger. Ex. LXXXIX a, c & d). He also said that he was ashamed of himself for having signed his original affidavit.

In his examination before the Immigration and Naturalization Service, Wozniak stated that the affidavits which he originally made in 1929 were not true, and he admitted that he was willing to make a false affidavit to assist Germany in defeating the claim because he thought it was a private claim

[f] *Note by the Secretariat,* this volume, p. 90.

and not a case of the United States Government (Ex. 977. Ann. BB Exam. of May 3, 1937, pp. 3, 4).

In view of this history, we may safely conclude that Wozniak's affidavit has not " cleared his name " nor been " helpful to the Commission in finding the truth ".

In the course of his oral argument at Washington, 1932, the German Agent read into the record the copy of his letter to the American Agent dated February 10, 1932, replying to a letter of the American Agent dated February, 2, 1932, relating to a Motion filed by the latter for the oral examination of several witnesses, including Wozniak. One of the grounds asserted for examining Wozniak was that there was serious danger that Wozniak might leave the country in the near future. In the German Agent's letter (Oral Argument, 1932, p. 128) the following language is used:

" With respect to this matter I wish to advise you that I have no information whatsoever as to the present whereabouts of Theodore J. Wozniak or as to any intention on his part, to leave the United States. The last conference I had with Theodore J. Wozniak was at the end of April 1931. Since that time I have received from Wozniak only one letter, dated August 13, 1931, in which he asked me to return to him certain original documents all of which were filed by me with the Commission, with the exception of some private letters.

" When I returned to this country at the end of March, 1931, I had several conversations with Wozniak. In these conversations he indicated very strongly that *he expected payment of a large sum of money by us.* I advised Wozniak that no such payment could be made. Wozniak repeated his request at every conversation I had with him and, finally, advised me that if his request was not complied with, *he would accept an offer* which *had been made to him and which would cause me great regret.* I, thereupon, broke off my relations with Wozniak and have not seen him since." (Emphasis supplied.)

By reading this letter, the German Agent brought before the Commission the fact that Wozniak was making demands for money and had been repudiated by Germany as a witness. Of course, this part of the letter was not argument, but pure testimony. It was, in the last analysis, a self-serving declaration, not under oath, coming from an attorney representing one of the parties.

Later, in the oral argument, in describing his examination of Wozniak in 1929, the German Agent represented (again testifying) that, while Wozniak was in Washington, he informed Wozniak that of course he would be compensated for his out-of-pocket expenses and loss of time, but Wozniak stated this could not be done and declined to take even this compensation, to which as a witness he was entitled (Oral Argument at Washington, 1932, p. 147).

The introduction of the letter above quoted, coupled with the representation that Wozniak refused to take the compensation to which as a witness he was entitled, and the refusal of the German Agent to allow Wozniak to be examined, enabled the German Agent to argue that, as Wozniak's testimony given in 1929 was not purchased, therefore it was reliable, and to insinuate that any future testimony favorable to the United States, would be unreliable, since it would come as a result of the acceptance of an offer made to him (Oral Argument at Washington, 1932, pp. 147, 148).

Immediately after quoting his letter to the American Agent, the German Agent, in his oral argument, used the following language (p. 129):

" In view of some of the statements made by the American Agent in his argument, I desire to say that I have not seen Wozniak since April, 1931. I have not been in contact with this witness at all. The last conversation took place toward the end of April, 1931, when I refused to pay that witness what he expected, and *when he threatened me that he would accept an offer.*

" We know now, from the recent evidence filed by the American Agent, that on May 27, 1931, a month after my last conversation with Wozniak, the so-called Wozniak letters were produced and were submitted by Baran to Mr. Peto of the Canadian Car and Foundry Company.

" In view of these facts, it is clear that the *German Government could not consent to the oral examination of this witness before the Commission.*" (Emphasis supplied.)

We know that on the 25th of April, 1931, just after Wozniak had cashed an order from the German Agent on the German Consulate General for $500, Tannenberg replied to Wozniak's registered letter, which had not been introduced in evidence, asking for an appointment on the 28th; but it is certain, as has already been indicated in this opinion, that, whatever demand Wozniak made at that time, it was not of a different character from that which started before July 15, 1929, and was pressed with considerable vigor both orally and in letters to Wozniak.

We also know that the German Agent's refusal to pay additional money did not take place until after April 25, 1931, when Wozniak got his last $500; and it is certain that the occasion of this payment was brought about by the fact that Wozniak informed the German Agent that he had an offer to sell his information to an American magazine. Wozniak testified that it was given him by the German Agent as evidence that Germany was " going to be good to him."

The German Agent, by innuendo, would lead the Commission to believe that the offer which Wozniak had it in his mind to accept had a direct relation to the co-called Wozniak letters, whereas the actual offer was the offer received by Wozniak from Bishop to sell his story to an American magazine.

It has been established in the course of this opinion that the Commission, in rendering the Hamburg decision, was ignorant of the following facts relating to Wozniak:

First, that the matter of his compensation had been the subject of conversations and letters between himself and representatives of Germany before his testimony was filed;

Second, that in the course of these letters he had made threats amounting to blackmail;

Third, that he had been assured by the German Agent that Healy was mistaken in informing Wozniak that his compensation would be limited to witness' fees and expenses;

Fourth, that Wozniak's total compensation paid by Germany exceeded $2,000.00;

Fifth, that none of the above circumstances were brought to the attention of the Commission or were known by the Commission.

After the decision at Hamburg and after the German Agent had broken with Wozniak, Wozniak was examined under subpoena issued under the Act of June 7, 1933, 48 Stat. 117 (Ex. 977, Anns. A-B): also by agents of the Department of Justice (Ex. 998, Ann. J (a)); and before the Immigration and Naturalization Service of the United States Department of Labor upon his application for naturalization (Ex. 977, Ann. BB). Upon these examinations he made statements directly contradicting his testimony produced at The Hague:

(a) As to the letters to the Russians;

(b) As to the post card to the Russians;

(c) As to his relations with German saboteurs;

(d) As to his acquaintanceship and relations with Hinsch and Herrmann, acknowledged saboteurs; and

(e) As to his knowledge beforehand that the explosion at Kingsland would occur.

If the Commission at Hamburg had been cognizant of the facts set out in the above summary, is it conceivable that the Commission would have put more faith in Wozniak's evidence than it did in Herrmann's, and would have found that, as to the fire at Kingsland, Wozniak's words and acts were those of an innocent man?

(2) Lyndhurst Testimony

In discussing the cause of the Kingsland fire and after giving a short description of the circumstances connected with the origin of that fire, the Commission at Hamburg said (Decs. and Ops., p. 976): [g]

" If we were called upon to guess what caused the fire from the evidence of the circumstances, we should without hesitation turn to the machine which held the shell which Wozniak was cleaning. There is strongly persuasive evidence that these machines required constant watching, that when out of order they squeaked and threw out sparks, and that fires, quickly extinguished, had previously occurred from this source, and there is some evidence from a workman close by of squeaking and of sparks from Wozniak's machine just at the time of the starting of the fire. Wozniak himself does not mention this in his contemporaneous statements, though he later mentioned it merely as a possible explanation. In fact he says that his machine was running well that day, though it had sometimes run very hot. To Wozniak the fire seemed to originate in the rapidly revolving shellcase itself and to follow the rag wound around a stick with which he was drying the shellcase when he withdrew the rag. It is interesting to find that his own statement is the only one which bears any resemblance to what would have happened if he had used one of the inflammatory pencils with which Herrmann says he supplied him."

All of the circumstances related in regard to the machines, to-wit, that they required constant watching, that when out of order they squeaked and threw out sparks, and that fires had previously occurred from this source and been quickly extinguished and that there was some evidence from a workman close by of squeaking and of sparks from Wozniak's machine just at the time of the starting of the fire, came from testimony which was taken at Lyndhurst and filed immediately before the argument at The Hague.

Since the Hamburg decision, many affidavits have been filed which throw great doubt upon the accuracy of this testimony. It is the purpose of this portion of the opinion to examine the contention of the American Agent that these affidavits were false and fraudulent, and induced by a promise of a pecuniary reward.

On August 9, 1930, Germany filed as German Exhibit CXV the affidavit of Domenico LaScola, taken before John R. Ruggiero, notary public, in the presence of T. J. Healy, counsel for the German Agent, and John W. Guidetti, Commissioner of Streets, who acted as interpreter, the deposition being given by LaScola in the Italian language and interpreted by Guidetti; also as German Exhibit CXVI the affidavit of John R. Ruggiero sworn to before R. M. Marrone, notary public, and, as German Exhibit CXVII, the affidavit of Eugene Whichel Urciuoli, sworn to before R. M. Marrone, notary public.

LaScola testified that he was working in the building about ten feet away from where the fire started, taking the shells from the truck and putting them on a table which was not a cleaning table; that the fire broke out at the last cleaning table from the main entrance, and then he states as follows (Ger. Ex. CXV, p. 7):

" I was working at the table, putting shells on it. The first thing I noticed was a kind of creaking noise coming from the last machine on that row of tables. The

[g] *Note by the Secretariat*, this volume, p. 90.

last machine was making some kind of a noise. I looked up and I saw spots of fire on the table, at the last machine on that row of tables.

" Q. Would you call them sparks?

" A. It was sparks of fire I saw on the table. From a small fire it increased to a large fire; each of these little sparks increased to large sparks on the table and some of the men took rags and tried to smother the fire and the rags were soaked with benzine.

" Q. Then what happened?

" A. The boss ' Tom ' was in the toilet and when he heard there was a fire, he came out and ' Tom ' told a man to get a pail of water and when I heard ' Tom ' ask for a pail of water, I ' made feet ' and ran because I thought something was going to happen.

" Q. At the beginning of the fire did you see the sparks coming from a cleaning machine?

" A. I heard the squeaking of the machine and that is what attracted my attention. Then I looked and saw the sparks on the table."

He was also asked if he had ever heard any of the cleaning machines squeaking before the day of the fire. He answered:

" Yes, sir, and this man Eugene used to stop them immediately and used to oil them." (id. p. 8)

He also said that when the fire started the man at the table

" got rags so that he could smother it, to stop the fire." (id. p. 9)

LaScola in this same deposition is represented as testifying as follows:

" Q. What is your opinion as to how the fire started?

" A. I don't know. I saw those sparks and that is all I saw.

" Q. Do you think that the sparks came from the cleaning machine?

" A. Yes, it came from that machine.

" Q. That is what you thought at that time?

" A. As I saw those sparks on the table I didn't think of anything. I started to run.

" Q. How big were the sparks when you first saw them?

" A. First they were small sparks and then they started spreading. When they started to beat them with rags they got larger.

" Q. Did the man at whose machine the fire started try to put out the fire?

" A. Yes, he took rags right from the table and tried to smother the fire with them. There were others who threw rags on the fire, too.

" Q. When you first saw the sparks, were they on the table?

" A. They were on the table.

" Q. Did the machine keep on squeaking when you saw the sparks?

" A. No, they stopped all the machines and shut off the motors at the same time the fire started." (id. pp. 10, 11)

Under date of April 26, 1933, an affidavit in the Italian language was obtained from LaScola throwing considerable light on the circumstances under which Mr. Healy, whom he describes an " as American ", obtained the depotition (Ger. Ex. CXV). The pertinent parts of this affidavit read in translation as follows:

" In the summer of 1930 there came to my house a man, * * * and asked me if I was Domenico La Scola, and replying that I was, and that I did not understand English, told me if he could bring Mr. John Guidetti as an interpreter, and returned at the hour of 5 p.m. with Mr. G. Guidetti and Ruggiero, and this man, an American, asked me all the questions through the Mr. Guidetti, and the American wrote with a pencil, and I told him everything regarding the fire, and after all had left, the American said he would return that night. At about 11 p.m. the American returned alone, knocked on my door, and I got of bed and went to see who it was, he extended his hand, and after turning around to leave, I found in my hand $50.

" The next day, at night, came the Mr. Ruggiero with a statement typewritten, with a few pages, and asked me to sign, but I did not read it because I could not read English.

" After six or seven months G. Ruggiero came and brought me another $50, and after another three or four months Mr. Carella sent me another $50 through my son, Salvatore.

" This is all the money I received, but the American promised me that he was going to pay all expenses regarding my operation, but I did not see him again, after he had promised to pay me good.

" At the time of the fire I was about ten feet away and out of the corner of my eye I saw a small flame [" una piccola flamma "] and saw the man with a rag saturated in benzine try to put out fire with it but instead caused the flame to spread and increase, and another man threw a pail of water on the flames spreading them more and then everybody ran, and this is all, and I told others the same thing, and everybody who asked me." (Ex. 980, Anns. D and E.)

In the same affidavit LaScola makes the following explanation as to the use of the word " sparks " described as coming from the machine as set out in German Exhibit CXV, pp. 9 and 10:

" I was working in Building No. 30 about six months and never saw any fires.

" I was told that the statement I signed three years ago for the American who came with Guidetti and Ruggiero, that the machine threw sparks [" la scintilla "], but I did not make this statement and it is not true that this machine threw sparks [" la scintilla "]." (Ex. 980, Anns. D and E.)

That the machines did not throw out sparks is likewise testified to by Wozniak both before and after the Hamburg decision. See Wozniak's affidavit of August 11, 1930 (Ger. Ex. CXXXI, Ann. F, p. 2); statement of March 3, 1931, at Hotel Roosevelt (Ex. 977, Ann. C, p. 7); and affidavit of January 12, 1934, to Department of Justice (Ex. 998, Ann. J (a), pp. 11, 12).

Ruggiero, in German Exhibit CXVI, testified that he was employed at the Kingsland plant a few months after the plant was put into operation (p. 1) and that he quit work in December, 1916, because he considered that the work was not being conducted with the proper regard for the safety of the men and the plant (p. 5); that the immediate occasion of his quitting was a defective electric motor which ran hot and on occasion emitted sparks which would have caused a fire had it not been for the fact that a piece of metal had been placed between the motor and the floor; that he called attention of the proper persons to this and he finally quit because he felt he could not be responsible for the safety of the plant and the lives of the men. He also testified (p. 3) that during the course of his employment in Building No. 30 he frequently saw machines throw sparks as a result of friction developing from defects in the machines. He was asked a long hypothetical question which assumed that the machine was squeaking at the time the fire started and that sparks were seen blowing or burning upon the table at the inception of the fire.

That Ruggiero was not telling the truth when he said in his affidavit of August 4, 1930, that:

" I quit work in December, 1916, because I considered that the work was not being conducted with the proper regard for the safety of the men and of the plant." (Ger. Ex. CXVI, p. 5)

is conclusively established by Ruggiero's own statement found in his report to the German Agent in which he says that he left " the employ of the Canadian Car & Foundry Company some three or four months before the fire " (Ex. 980, Ann. B, Ex. A attached).

The above-quoted statement from Ruggiero's report to the German Agent (rather than his contrary statement found in his affidavit of August 4, 1930)

is confirmed by the payrolls of the company that show the only Ruggiero employed in the second half of 1916 was employed under the name F. Ruggiero who appears on the payroll for July 31 - August 6, 1916, as No. 2276 (Ex. 770, Ann. 2). He subsequently appears under No. 1652 on the payrolls for the weeks beginning August 7, 14, and 21, the last day with which he was credited as working being August 26, 1916 (id. Anns. 2a, 2b, and 2c). His name was also carried on the payrolls for the weeks beginning August 28, and September 4, 1916, during which time he was not credited with working (id. Anns. 2d and 2e). A careful examination of the payrolls of the company fails to disclose the name of Ruggiero as appearing after September 4, 1916.

Urciuoli in Exhibit CXVII testified (p. 1) that he was employed at the Kingsland plant and began work there when the Company started construction of the plant and continued work until the fire, and after the fire he was carried on the payroll of the Company for two weeks. He testified that it was his duty to take care of the machines, to see that they were properly oiled, etc., and that he always kept the pulleys well oiled (p. 3):

" because otherwise the machine would get hot and begin to squeak as a result of friction. If this friction continued, the pulley would begin to throw sparks. During the time that I was employed in Building No. 30, hardly a day went by without some of the cleaning machines sparking from this cause. * * * it was impossible to prevent these machines from sparking. * * * I urged Master Mechanic Hopper and the building foreman, Tomlinson, to have these cast iron pulleys replaced with fibre pulleys, but no attention was ever paid to this request."

He reiterates several times that a hot spark would be thrown from the machines and could be seen from the center of the building and that when these sparks occurred he would hurry to the machine and throw the belt off, and that during the time he was employed in Building No. 30 one of the tables caught fire from this cause, namely, the sparking of the cleaning machine, and he put it out with an overcoat. He was asked the same hypothetical question as was asked Ruggiero and gave the same answer (p. 4).

Urciuoli's affidavit shows that he was not present in Building No. 30 at all during the week of the fire; that his father's funeral, which he was attending, was stopped by the fire.

Marrone, the notary public, before whom were executed the affidavits of Urciuoli and Ruggiero, stated that after the affidavits were executed, he heard that much money was paid to the witnesses for their statements, and that three of the people who had made affidavits for the German Government told him that they had received various sums for their affidavits (Ex. 980, Ann. A).

There is set out below correspondence between Nicholas A. Carella, a lawyer in Lyndhurst, and Dr. Wilhelm Tannenberg:

" April 10, 1931.

" Wilhelm Tannenberg, Esq.,
1010 Investment Building,
15th and K Sts. N. W.
Washington, D. C.

" Dear Sir:

" Confirming our conversation of March 30th, 1931, I have informed our witnesses as to your decision in the matter. *I have been expecting that of which we spoke of and these people are continually calling upon me for some action.*

" It is absolutely urgent that this matter be taken care of immediately because the opposition is making strenuous efforts to obtain adverse information.

" Reports will be forwarded to you within the next few days.
" Awaiting an early reply, I beg to remain
" Yours very truly,
" NAC:RMT " (Ex. 980, Ann. B, Ex. L, attached.) (Emphasis supplied.)

" April 17, 1931.

" Nicholas A. Carella, Esq.
298 Ridge Road
Lyndhurst, N. J.

" Dear Sir:

" I beg to acknowledge receipt of your letter of the 10th instant and your telegram of today. I have to apologize for not answering your letter promptly; however, I postponed my reply for the reason that *the instructions from Germany* for which I had asked had not yet arrived and I was anxious to advise you that our conversation had been confirmed.

" The unexpected delay was due to the fact that I was requested to supply our Berlin office with detailed information which was required in order to enable them to proceed as suggested by me. That does not mean that there are any obstacles. *I have no doubt that the instructions will be here by Monday of next week* (April 20th) at the very latest, and I shall not fail to inform you immediately as to when you can go to New York.

" I sincerely hope that you will understand the situation and that the unforeseen delay will not have caused you any inconveniences. I also hope that I shall have an opportunity to see you again in the near future so that I can explain to you the circumstances in more detail.

" You may rest assured that I greatly appreciate your services and that I am awaiting your reports with great interest.

" Your very truly,
" Wilhelm Tannenberg."

(id., Ex. M) (Emphasis supplied.)

On April 20, 1931, Dr. Tannenberg wrote to Carella a letter, the body of which reads as follows:

" Referring to my letter of the 17th inst. and to my telegram of the following day, I wish to advise you that I have *received authority to proceed in the matter as suggested.* If you will be kind enough to call at the German Consulate General in New York, Mr. Loerky, the gentleman whom you met there on a previous occasion, *will give you the necessary information.*" (id. Ex. N.) (Emphasis supplied.)

The " authority to proceed " and " the necessary information " was, of course, funds which Mr. Loerky was going to pay to Carella when he called at the German Consulate General in New York.

Carella had been retained by Tannenberg or Healy to obtain the Lyndhurst affidavits. From the investigation and report which is attached to Exhibit 980, Annex B, Ex. (b) it is represented to Dr. Tannenberg as follows:

" I am pleased to report through our efforts the witnesses openly and unqualifiedly refused to sign any statements but they approached me and informed me that they are holding me to the *promise* that I had made to them namely, *that they will receive some pecuniary advantage after the case has been finally adjudicated.*" (p. 2) (Emphasis supplied.)

And in the same paper referring to Whichel (Urciuoli) we find the following statement:

" Dur to the *promise* that Mr. Healy made to him to wit: *that he will receive a pecuniary advantage after the case has been finally adjudicated.* Mr. Whichell refused to make any adverse statements against the German Government pertaining to the matter in dispute." (p. 2) (Emphasis supplied.)

German Annex 103 is the affidavit of Thomas J. Healy, dated the 13th day of April, 1935, and filed the 16th day of April, 1935. He was an attorney associated with the German Agent making investigations as to the origin of the fires at Kingsland and Black Tom. He explains the circumstances under which he met LaScola and secured from him through his grandson as interpreter a promise to give an affidavit in regard to the Kingsland fire. He secured the services of Guidetti as interpreter and through him the services of Ruggiero as notary, and he relates the circumstances under which LaScola's affidavit was procured as follows: After securing LaScola's affidavit he then took the testimony of Ruggiero and Whichel (Urciuoli). He paid Ruggiero $20 for his services in taking the testimony of LaScola, and $75 for investigations, and $20 on another occasion. He paid Whichel $15 for his services as an expert witness and Marrone $30 for his services as notary. He also took $50 to LaScola's house. He made no further payments, nor did he make any promises of further payments in event that Germany was successful, nor did he give any promises nor hold out any hopes of any further payments or rewards to these witnesses. He then continues:

" Carella informed me that although all possible pressure was being brought to bear upon these witnesses they had steadfastly declined to modify in any way their previous testimony as given to me. From Carella's statements it appeared particularly that the Claimants were trying to induce these witnesses to testify that they had seen or knew of the use of incendiary pencils in connection with the fire at Kingsland. Mr. Carella urged that in view of the necessitous circumstances of these witnesses and the *temptation to which they were being exposed by the offers of the Claimants' representatives to deviate from their prior testimony*, some payment should be made to them. I paid Mr. Carella the sum of three hundred and fifty dollars at that time for his previous professional services with the understanding that out of this sum he was to pay Ruggiero, Whichel and Lascola a small amount each. My recollection is that I was later informed that he had paid each of them fifty dollars. My recollection is that this payment to Carella was made in the latter part of December, 1930." (Ger. Ann. 103) (Emphasis supplied.)

Victor Frangipane, another Lyndhurst witness, whose August, 1930, statement was not filed until 1937, and then only on request, testifies that he was paid $50 at the time his statement was taken down, another $50 at the time he signed the statement and that Carella promised him that if Germany won the case he would get not less than $500 (Ex. 980, Ann. F).

In response to a request by the American Commissioner on the 28th day of June, 1937, the German Agent on January 7, 1938, filed German Annex 142 with ten exhibits. In his sworn statement of January 7, 1938, submitting parts of documents requested, the German Agent states as follows:

" Mr. Nicholas Carella, an attorney at law of New Jersey who had been retained by Mr. Healy in connection with the procuring of evidence at Lyndhurst late in July and in August 1930 asked for the payment of fees for his own services and also for some moneys for *payments to witnesses at Lyndhurst in order to prevent them from giving false testimony to representatives of the claimants.* * * * * Mr. Loerky also transmitted to Mr. Carella the two payments of $1000.— and $1500.—; the Consulate General [New York] as such sent to Berlin directly Mr. Carella's receipt for the *first* payment made on or about April 21, 1931. * * * ." (Emphasis supplied.)

Exhibit A is a telegram dated April 18, 1931, from Washington to the Foreign Office, Berlin, for authorization for payment of $1,500 indicating a written report would follow.

Exhibit B is a draft of a proposed telegram from Tannenberg to the Foreign Office, for Director Dieckhoff, dated April 17, 1931, which recites among other things:

" Carella [1] *who is continuing to counteract energetically in order to prevent the witnesses from giving false testimony*, will make a circumstantial report concerning the [2] methods of our opponents' agents, however, he has a difficult position * * *. In order to be in a position to go on meeting effectively the intrigues which are allegedly also supported by Federal Judge Fake, Carella requests most urgently $1000.—, the more so, since *various witnesses are apparently prepared to accept the offers of our opponents. After conference with C. I consider it as indispensable and as harmless that he continues his activities* and that the requested moneys be paid." (Emphasis supplied.) (This telegram seems not to have been sent.)

Exhibit C is a telegram, dated April 20, 1931, from Dieckhoff for the Ambassador in Washington, personally, reading as follows:

" The Embassy is hereby given authorization to make available 1500 Dollars."

Exhibit D is a deleted telegram, dated May 1, 1931, from Tannenberg to the Foreign Office, attention of Dieckhoff, indicating that he has paid $1,000 to Carella as fee for his past and future services for the German Agency and as reimbursement of his disbursements.

The exhibit has the following deletions which evidently relate to the payment of money in the sabotage claims, referring to the " authorization to pay an amount of $1,500 for the purposes of the sabotage cases ":

" Thereupon I have made the following payments out of this amount:
" . . . [sic]
" . . . [sic]
" . . . [sic]
" (2) $1,000 to Carella, * * *.
" I beg to give the following reasons for these payments:
" . . . [sic]
" . . . [sic]
" . . . [sic]
" (2) Carella."

The exhibit refers to the alleged attempt on the part of the claimants

" to induce our witnesses *as well as other former workmen of the Kingsland plant* by promises of compensations to represent the former depositions of our witnesses as inaccurate and to discredit Mr. Healy's work at Lyndhurst. * * * Carella emphasized that his further efforts of frustrating the obtaining of false depositions discrediting us *would only be successful if funds were made available to him, from which he could pay his agents for their work. Furthermore, it would be necessary for him to be in a position occasionally to pay smaller amounts to other people.* * * *

" To cover these and future obligations and as fee for his work done so far and to be done in the future and for the work of his agents Carella asked for an amount of at least $1,000. * * * *In view of the extraordinary importance which the statements of our witnesses at Lyndhurst had in connection with the decision in the Kingsland case* and in view of the great danger that would arise should the agents of claimants succeed in procuring the testimony desired by them *I consider the continuation of Carella's services at Lyndhurst as indispensable.*" (Emphasis supplied.)

Exhibit E is a deleted telegram, dated December 14, 1931, from Prittwitz to the Foreign Office in which he makes a request for $1,500 for a final fee for Carella and $400 for reimbursement for expenditures for Carella. He states as reasons for his request that

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[1] The wording of this telegram would indicate that Carella was well known to the Foreign Office.

[2] Report here referred to may be the one at Ex. 980, Ex. B.

" Healy had promised to him [Carella] *a special fee*, if his *services would be successful*. [1] From my conference with Carella I have reached the conviction that the payment of the moneys requested is indispensable *to keep C. and his people in line*. I therefore request authorization by cable to pay $1900.— from funds above referred to." (Emphasis supplied.)

Exhibit F is a deleted telegram, dated December 18, 1931, signed Dieckhoff reading as follows:

" For Agent
" You are authorized to pay to Carella . . . [sic] up to nineteen hundred (1900) Dollars."

These telegrams show that in addition to the payments referred to by Healy as made these witnesses in 1930 (Ger. Ann. 103), further payments to the extent of $3,400 were authorized in April and December, 1931.

The principal purpose for which the affidavits of LaScola, Ruggiero and Urciuoli were filed was to convince the Commission that the cause of the Kingsland disaster was a defective condition of the machines which threw out sparks and caused the gasoline to ignite. It has been established that these affidavits were purchased and paid for, and that, after the affidavits were filed, Germany authorized further payments to the extent of at least $3,400, to keep these witnesses bought and *in line*. This in itself is sufficient to show that the Commission at Hamburg was misled by purchased and perjured testimony; but the evidence which has been adduced since Hamburg establishes beyond doubt that the machine before which Wozniak was working had never sparked, that none of the machines in the room had ever emitted a spark or had ever been in the faulty condition described by the three bought affidavits. The essential falsity of these affidavits was established before the Commission at Washington in May, 1936, by the exhibiting and operating of a replica of one of the machines.

It would seem clear that, if the Commission at Hamburg had had before it the evidence " autoptically proffered " at Washington, and had been conscious of the fact that the Lyndhurst testimony had been bought and paid for, and that the witnesses producing it would still remain on Germany's payroll after the decision at Hamburg, the Commission could not have stated, as it did at Hamburg, that there was strongly persuasive evidence that these machines required constant watching, that when out of order they squeaked and threw out sparks and that fires quickly extinguished had previously occurred from this source. It will be recalled in this connection that Wozniak himself has always denied that his machine was in bad order or that it squeaked or threw out sparks (Ex. 726, Ex. 4, p. 4885; Ger. Ex. CXXXI, Ann. G, p. 2; Ex. 977, Ann. C, p. 7; Ex. 998 J (a), pp. 11, 12).

This being true, it seems clear that the decision at Hamburg, without any reference to Wozniak's testimony, must be reaxamined on the question of the cause of the Kingsland disaster.

(3) *Purpose of affidavits of Ahrendt, Hinsch and Woehst*

There are three German witnesses whose affidavits were introduced for similar purposes, Ahrendt, Hinsch and Woehst. An examination of the various affidavits filed by these witnesses will show that the first purpose for which their affidavits were filed was to bolster up the affidavits of Marguerre, Nadolny, von Papen, and Bernstoff, and thus to give additional strength to the German

[1] Healy in his affidavit of April 13, 1935, denied making any payments to witnesses in addition to those made by him in August, 1930 (Ger. Ann. 103).

pleadings that sabotage was never authorized in the United States during neutrality.

The second purpose for which these affidavits were introduced was to disprove the confessions by Hilken and Herrmann: the confession of Hilken to the effect that he was the banker for various German saboteurs in this country; supplied them with funds; helped to equip them; and paid out money as compensation for the destruction of Black Tom and Kingsland; the confession of Herrmann, that he together with Hinsch, was responsible for the organization of a band of saboteurs operating from Baltimore, New York and other cities; that he supplied these saboteurs with incendiary devices; and that they were both responsible in this way for the destruction of Kingsland and Black Tom.

The affidavits of Ahrendt, Hinsch and Woehst all show this thread of design permeating their whole structure. In order to appreciate this design and purpose, it is necessary, briefly, to summarize the confessions of Hilken and Herrmann.

It is now thoroughly agreed, both by the witnesses for Germany and the witnesses for the United States, that authority for sabotage was directly given to Hilken and Herrmann in a meeting with " Sektion Politik " of the German General Staff by Captains Nadolny and Marguerre in Berlin in February, 1916.

Hilken's description of this meeting is found in Exhibit 771, Rec. p. 5782, and reads in part as follows:

" As I previously testified I was present with Fred Herrmann and I think Anton Dilger also with Captains Nadolny and Marguerre in Berlin in February, 1916, at which time sabotage against munitions and supplies in the United States was fully discussed by us all. The incendiary tubes which were described by Fred Herrmann were handled and discussed by us at the time and our instructions were to get busy on this work immediately on our return to the United States. Fred Hinsch was discussed by us and his activities were known to Nadolny and Marguerre at that time. Herrmann was not under the authority of any one of us and I distinctly remember the high recommendation with which Herrmann had been sent to the general staff of the army by the admiralty department. [1]

" In addition to the general sabotage activities in the United States, Nadolny and Marguerre urged the destruction of the Power House at Niagara Falls and also the Tampico Oil fields. * * *

" The Tampico Oil Fields was quite a sore spot to Germany as Britain was obtaining large supplies from Mexico. It was urged upon me that an effort should also be made to set fire to these wells. We did nothing about it until Fred Herrmann left the United States for Mexico in February, 1917, when I reminded him of the talk of the General Staff and suggested that he report the details to Ambassador von Eckhardt.

" The statement now made by Marguerre that the instructions which he gave us to destroy munitions and supplies in the United States were not to take effect until or unless the United States got into the war is wholly contrary to what actually took place. There was no suggestion whatever at that time of not commencing our activities unless the United States entered the war against Germany. On the contrary the prevailing opinion at that time, in January, 1916, in Berlin certainly was that the United States in all probability would not enter the war."

In addition, in the same affidavit (Rec. p. 5781), Hilken tells of Rintelen's sabotage activities and of his meeting with Rintelen on a number of occasions in Baltimore and the fact that Hinsch was instructed by Rintelen in regard to incendiary devices and he further tells of the activities of Anton Dilger.

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[1] Hilken's letter of Jan. 11, 1917, to Arnold also refers to the fact that Woehst was sent over in the fall of 1916 by " our principals abroad " with a new supply of these incendiary devices (Ex. 976, Ann. E, pp. 50, 51).

The description given above by Hilken of the meeting with " Sektion Politik " does not differ essentially from his description given in Claimants' Exhibit 583. Rec. p. 2180, Hilken's examination by Peaslee, in December, 1928. In this latter examination Hilken was able, from his contemporaneous memorandum, to fix the exact date of this meeting as February 18, 1916. In Exhibit 583 he testified that the funds which he paid to Herrmann came out of the funds made available to him by the General Staff and that the funds which he paid to Herrmann and Hinsch probably exceeded $50,000 (Rec. p. 2187). The funds sent by him to Mexico through Hinsch, Herrmann and Dilger amounted to probably more than $100,000. The amount taken by Hinsch to Mexico was $23,361.75 (Rec. pp. 2189. 2190).

He denied the statements which were attributed to Marguerre and Nadolny that the instructions to commit sabotage were to apply only if and when the United States should enter the war. He stated that at the time these instructions were given there was no thought of war, nor real expectancy of war between the United States and Germany (Rec. p. 2237; also p. 5783).

Herrmann's description of the meeting in Germany attended by Marguerre, Nadolny, Dilger, Hilken, and himself, does not differ in essential points from the description given by Hilken (Rec. p. 5431 *et seq.*). In relating the history of that meeting Herrmann gave a very accurate description of the incendiary pencils and drew a sketch showing the outer shell and the inner incendiary pencil and the two compartments; and this sketch may be found opposite Rec. p. 5444 and opposite Rec. p. 5520. He confirmed Hilken's statement that Hilken was to be the paymaster of saboteurs (Rec. p. 5446), and at this meeting Hinsch's name was brought into the conversation. Herrmann was informed in the conversation that it was safe to use these devices " because they had been doing it before " but not with these pencils (Rec. p. 5447).

He met Carl Dilger and stayed with him three or four days in Washington. He fixed up the tubes and gave them to Hinsch and explained their use and Hinsch had fifteen or twenty men, including " a coon by the name of Eddie ", who used to report to him regularly. In December, 1916, he and Hinsch made up a list of plants manufacturing munitions, including the Kingsland plant (Rec. pp. 5451, 5452).

As to Marguerre's affidavit claiming that sabotage in the United States was not allowed during neutrality, Herrmann said (Rec. p. 5460):

" Q. * * * ' These instructions did not refer to acts of sabotage on American territory, as long as that country was not at war with us.' Is that true? A. That is not true; absolutely not. *It is logical isn't it, that they would not spend the money to have me waiting there for years, when there was no* war, and paying my expenses." (Rec. p. 5460.) (Emphasis supplied.)

As to his authority to fire the Tampico Oil Fields, Herrmann testified as follows (Rec. p. 5477):

" Q. Did you suggest to Minister von Eckhardt to try to blow up the Tampico oil fields? Did you have a conversation with the Minister in regard to setting fire to the Tampico oil fields? A. To blow them up? The conversation was with the minister as to setting fire to them, and I told him that would be a hell of a hard job.

" Q. You did not suggest that to him? A. I might have suggested it." (*Supra*, this opinion, p. 34; also Ex. 320, Rec. p. 874, and Ex. 520, Rec. p 1847.)

Herrmann's description of the meeting with " Sektion Politik " is found in his examination by the two Agents on April 3, 1931 (Rec. p. 5431 *et seq.*). In this examination, after relating his history and his work in England for Germany at the beginning of the war, he tells of his trip abroad via Bergen to Germany and meeting Anton Dilger on the ship (id. p. 5440). Later he was introduced

to Paul Hilken by Dilger in Berlin. He and Hilken and Dilger visited the General Staff and met Marguerre and Nadolny (id. p. 5443), and entered into a discussion with Marguerre and Nadolny " about the destruction of munitions plants in the States ", and they were told about the glass tubes, how they were arranged, and how to use them. Hilken was to be paymaster (id. p. 5446-7). Herrmann was instructed to go back to the United States and to report to Hilken in Baltimore, and left about a week or two after the conversation (id. p. 5448). He was given $1,000 or $1,200, went to Baltimore to see Hilken, who introduced him to Hinsch and told him that Hinsch had been on different jobs and was using " dumplings ", but that they were not reliable (Rec. pp. 5449-50). These " dumplings " were being made by a doctor from the " Neckar " at Hinsch's house. He went from Baltimore to Washington and stayed with Carl Dilger, Anton Dilger's brother, three or four days. He showed Hinsch how to use the tubes and gave him the instructions that Herrmann had received from Germany.

Herrmann first met Woehst the end of November or the first of December. Woehst had come from the General Staff to report to Hilken (Rec. p. 5451). Hinsch brought Wozniak to Herrmann at the McAlpin Hotel. Herrmann made an engagement with Wozniak to meet him at the Barclay Street ferry house and three or four days later he asked Wozniak if he could get a job for another fellow. Wozniak was a funny looking fellow, nervous and excitable, and Herrmann got hold of Hinsch and said, " I do not like to trust this fellow with anything ", and he told Wozniak to come back afterwards. He met him again and spoke to Hinsch about him again and said, " I do not like the looks of this fellow." So Hinsch got him Rodriguez, and he introduced Rodriguez to Wozniak, and Wozniak said he thought he could get Rodriguez a job because he knew somebody who was doing the hiring at Kingsland. He gave Wozniak and Rodriguez incendiary pencils and paid them three or four times, $40 a week. After the fire he met Rodriguez and gave him $500, two days after the fire (id. pp. 5454, 5455).

Thus it is seen that, from the testimony of Hilken and Herrmann, the authority given by Nadolny and Marguerre to commit sabotage was confirmed; and the testimony of Nadolny and Marguerre and the other witnesses for Germany, that this authority and activity were both limited to the time when the United States should enter the war, was directly contradicted by both Hilken and Herrmann.

The issue, therefore, is clearly drawn as to whether Hilken and Herrmann were telling the truth, first, when they claimed that the authority gotten in Berlin was not limited to the time when America should go to war but was intended to apply to the period of America's neutrality, and, second, whether Hilken and Herrmann, operating through Hinsch and his subordinates and other saboteurs, did, in fact, commit sabotage against American property during the neutrality of the United States.

An examination of the record will now be made for the purpose of ascertaining whether Ahrendt's affidavits may be relied on to contradict and destroy the confessions of Hilken and Herrmann.

(4) *Affidavits of Ahrendt*

Carl O. Ahrendt has testified seven times for Germany (Ger. Exs. LXVII (a); CII; Ger. Anns. 73, 74, 75, 115, and 160). As indicated above, one of the main purposes of these affidavits was to disprove the confessions of Hilken and Herrmann.

Ahrendt is of German parentage but was born in America in April, 1888 (Ger. Ex. CII, p. 2). From 1905 to 1916 he was an employee of Schumacher

and Company in Baltimore (id. p. 32), in which firm Paul Hilken and his father were partners. This firm were the agents of the North German Lloyd Steamship Company and had been such agents since 1868 (Ex. 583, Rec. p. 2155).

In 1916 Hilken, Sr., and Paul Hilken formed the Eastern Forwarding Company, of which Hilken, Sr., became President and Paul Hilken the Vice President. The purpose of the formation of this Company was to operate the line of U-boats which Germany projected sending to America, first to Baltimore and later to New London (Ger. Ex. CII, pp. 31, 32, 33). In the years 1916 and 1917, Ahrendt was assistant to Captain Hinsch and Paul Hilken (id. p. 33).

When Hilken returned from Europe in March, 1916, after his conference with Marguerre and Nadolny, he introduced Herrmann to Ahrendt in the office of Schumacher and Company. Although Herrmann informed Ahrendt of his activities in England at the beginning of the war, Herrmann, according to Ahrendt, did not say anything about his activities in America or the purpose of his coming back to the United States, and Ahrendt claims not to know that he had any connection with the German Government at all (Ger. Ex. CII, pp. 63, 64, 65).

Ahrendt met Captain Hinsch for the first time in the office of Schumacher and Company shortly after Hinsch brought the " Neckar ", a North German Lloyd boat, into Baltimore, in the summer of 1914 (id. pp. 36, 37). Hinsch rented a house in Baltimore and lived there with his housekeeper, who later became his wife. Hinsch remained in Baltimore from about September, 1914, to about August, 1916, when he went to New London in connection with the U-boat work, and during all of the time, Ahrendt never heard of any activities of Captain Hinsch outside of the commercial submarine activities and his duties as Master of the " Neckar ". He never heard that he had been engaged in infecting horses and mules or in sabotage against vessels or employing men to destroy munitions going to England and France (id. pp. 38, 39, 40). During that time Ahrendt saw Hinsch nearly every day, as Hinsch would come to the office of Schumacher and Company very frequently and occupied a double desk with Ahrendt. Ahrendt spent a great deal of time at Hinsch's house. Their relations were very friendly (id. pp. 40, 41).

In January, 1916, Hinsch in New York phoned to Ahrendt in Baltimore requesting him to bring with him $2,000; and Ahrendt secured two one thousand dollar bills from Dederer, the Treasurer of Schumacher and Company, and took them to Hinsch in New York, although Hinsch had no account with that Company and no deposit (Ger. Ex. LXVII(a); Ex. 975, Ann. C.,[1] pp. 26, 27, 30-40; Ex. 976, Ann. A, pp. 56, 57, 68, 74).

After the United States entered the war, Hinsch fled to Mexico to evade a Presidential warrant for his arrest as an alien enemy (Ord. Ex. 343, Rec. p. 4258); and Ahrendt accompanied Hinsch to El Paso and helped him cross the border into Mexico (Ex. 975, Ann. C, pp. 98-104). Later in the year 1917 Ahrendt accompanied Hinsch's housekeeper to Laredo, Texas, and assisted her in crossing the border to join Hinsch in Mexico (Ex. 975, Ann. C, pp. 235 *et seq.*). After the war, in 1922-1923 Ahrendt lived in Hilken's apartment on West 71st Street, New York, and Herrmann visited them there (Ex. 975, Ann. C. pp. 165, 167); and in 1922, through the aid of Paul Hilken, Ahrendt entered the employ of the North German Lloyd. He had previously been employed since 1919 by Hilken in the automobile tire sales business and in the motortruck business. (Ger. Ex. LXVII (a)).

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[1] Examination of Ahrendt under subpoena by the American Agent.

The short history of Ahrendt's relations with Paul Hilken, Hinsch and Herrmann bears out Ahrendt's claim that he was an intimate associate of theirs in 1916 and 1917, so intimate that if they were connected with sabotage activities in this country during this period, Ahrendt's acquaintanceship with them should have made him fully aware of such activities.

In order to support Hinsch's claim that he did not engage in sabotage in the United States subsequent to the beginning of the commercial submarine activity, Ahrendt testified that Hinsch was in Baltimore, actively engaged in preparation for the reception of the " U-Deutschland "; was in fact during this period only away for a day or so at a time between the return of Hilken in the latter part of March, 1916, and the arrival of the " Deutschland " early in July, 1916 (Ger. Ex. CII, pp. 40,41,46); that while the " Deutschland " was in Baltimore Hinsch was not away at all (id. pp. 47-49); and that Hinsch was in New London practically all of the time from August, 1916, when the commercial submarine business was transferred from Baltimore to New London, until shortly after the United States entered the war (id. pp. 53-55). During this latter period Ahrendt claims to have seen Hinsch " every day excepting when he would go and take a short run to Baltimore or to New York " on which trips he " would never be " away " over two or three days " (id. p. 56). During December, 1916, following the departure of the " Deutschland " from New London, and January, 1917, Hinsch, according to Ahrendt, " was busy getting ready for the next submarine " (id. p. 58). While Ahrendt is not at all certain that Hinsch was away from New London some time before Christmas in December, 1916 (id. p. 60), Metzler, a fellow employee at New London with Ahrendt, is certain that Hinsch was away from New London for a few days " either in the middle of December or towards the end of December [1916], around the 20th or so." This absence of Hinsch from New London was before Christmas, 1916 (Ger. Ex. XCVIII, pp. 79, 80).

Under examination by the American Agent (Ex. 875, Ann. C) Ahrendt contradicted his previous testimony when he stated that in November, 1916, after going to Baltimore he came back to New London about a week after Thanksgiving and remained in New London until February, 1917; that they had nothing to do in New London at that time; that Hinsch was there; he saw him practically every day; that Hinsch did not go away very often but he did go either to Baltimore or New York (id. pp. 156-158, 183).

In a letter written October 2, 1916, while they were awaiting the arrival of the " Deutschland " in New London, Hilken informs Salzer, Chief Clerk in the office of A. Schumacher and Company, as follows:

" * * * during the last two weeks I might have helped you and been happy to have had something to do. This ' watchful waiting ' game is getting more than monotenous." (Ex. 976, Ann. A-D, p. 253, Ex. 51 attached.)

And in a letter dated October 18, 1916, Salzer wrote to Ahrendt, c/o Eastern Forwarding Company at New London, as follows:

" I presume that you will have plenty of time to get up a scrap book for Captain Hinsch, as there is a long time between sailings of the U-boats." (id. p. 254, Ex. 49 attached.)

The " Deutschland " actually arrived on November 1, 1916; and these two letters prove conclusively that, during the time of " watchful waiting ", there was no necessity for Hinsch to remain continuously on the job at New London.

When Hinsch fled from the United States to Mexico in order to evade a Presidential warrant for his arrest, Ahrendt accompanied him to El Paso and assisted him in getting across the border (Ger. Ann. 74; Ger. Ex. CII, pp. 84-91; Ex. 975, Ann. C. pp. 98-108); and subsequently Ahrendt accompanied Hinsch's

housekeeper (later to become his wife) to Laredo (Ex. 975, Ann. C, pp. 235-238). Ahrendt claimed that after Hinsch arrived in Mexico he had one letter telling about his arrival and that that was the only letter he had from him; that Hinsch did not tell him what he was doing in Mexico nor did anyone else inform him about Hinsch's activities in Mexico. He understood Hinsch was simply living there because it was a country which was neutral (Ger. Ex. CII, p. 92).

After the Herrmann Message was produced, Ahrendt was examined with regard to letters written with secret inks (Ger. Ann. 75, filed August 15, 1932). He then testified that he received from Dr. Dilger, who had returned to the United States on July 4, 1917 (Ex. 943), instructions as to how to write with the new fluid and how to develop the secret writing. Some time after this incident a letter was received from Hinsch, intended for Paul Hilken and Hilken turned it over to Ahrendt to develop. After he developed the letter, he found that it was a secret message concerning certain supplies which Hinsch needed for a wireless station which he wanted to build in Mexico. Thus we have Ahrendt contradicting himself when he stated in his first affidavit that he never heard from anybody what Hinsch was doing in Mexico.

It is pertinent to note that Ahrendt assisted Hilken in writing a secret message to Hinsch answering the prior secret message (Ger. Ann. 75, p. 4).

This incident is confirmed by Hilken's examination in September, 1933 (Ex. 976, Ann. E, pp. 8 to 10). See also examination of Ahrendt, Exhibit 975, Ann. C, pp. 210, *et seq.*, where Ahrendt denies that his development of the secret message from Hinsch in Mexico to Hilken, requesting material for the wireless, was the act of a spy; but he excused himself on the ground that he was a misguided youth (of over 29 years (Ger. Ex. CII, p. 2)), and should have had better sense. He also admitted that there was a second letter received (Ex. 975, Ann. C, p. 214), a short time after the first one (id. p. 213), and that he developed the same and gave it to Mr. Hilken (id. p. 216). At the time that he developed the second letter he was not working for Hilken but for the Old Bay Line (id. p. 217).

When we take into consideration the close association between Ahrendt and Hinsch, Ahrendt's denial of any knowledge of Hinsch's activities is, to say the least, remarkable. Ahrendt knew Hinsch while Ahrendt was an employee of A. Schumacher and Company, and he testified that he was a deskmate and close companion of Hinsch throughout Hinsch's connection with the Hilkens in Baltimore, and he saw Hinsch almost every day from 1914 to 1917 (Ger. Ex. CII, p. 40).

One of the main purposes for which German Exhibit CII was introduced was to prove that Ahrendt had never heard or known of sabotage being conducted by Herrmann or Hinsch with disease germs, bombs or incendiary devices and especially that he had never heard of pencils containing glass tubes and that Hinsch had never shown him any explosive tubes or glass tubes. In that exhibit the following occurs on page 60 *et seq.*:

" Q. During the time you were together with Hinsch in New London, you were in close contact with him?

A. Oh, yes.

Q. Did you get the impression from what he was doing that he attended, also to other matters?

A. No.

Q. Did Captain Hinsch show you at any time during the years 1915, 1916, and 1917, any *explosive tubes, little glass tubes?*

A. No.

Q. Did he show you at any time *pencils that contained little glass tubes?*

A. No.
Q. There is some testimony in the record that certain men had *glass tubes* containing sulphuric acid and other material which could be put into pencils. These *glass tubes or pencils*, it is claimed, were to be used in order to start fires. It is said that by cutting off the upper end of the *pencil* and cutting off the closed end of the *tube*, a rather strong flame would be produced; that after the sulphuric acid had run down and had ignited some material in this *pencil*, then there would be a flame about one foot or two feet long, and that these *pencils* were to be used in order to start fires: Did you ever hear anything about such devices?
A. No.
Q. Did you ever see such devices ——
A. (interposing) I didn't know ——
Q. (continuing) — in Captain Hinsch's possession?
A. Not at all.
Q. Did he ever tell you about such devices?
A. No.
Q. Have you any reason to believe that he had such devices?
A. No, I have not.
Q. You stated that you met Friedrich Hermann in Baltimore while the Deutschland was there in July and the beginning of August, 1916?
A. Yes.
Q. Did Hermann tell you at any time about these *explosive tubes or pencils?*
A. No.
Q. Did you ever see in his possession any of such *pencils or tubes?*
A. No, not at all.
Q. Did he ever tell you that he had such devices?
A. No, he didn't." (Emphasis supplied.)

When an effort was made by the American Agent to examine Ahrendt under subpoena, under the Act of June 7, 1933 (48 Stat. 117), Ahrendt resisted the effort to compel him to give testimony; and there was employed for that purpose counsel who was also counsel for certain German ship owners holding awards of the War Claims Arbiter. Ahrendt finally submitted himself for examination (Ex. 975, Ann. C).

During this examination Ahrendt repeated his previous denials of knowing anything about German sabotage activities in the United States during neutrality and especially the sabotage activities of Herrmann, Hilken and Hinsch.

After he had made these specific denials the following questions and answers ensued:

" Now, in the face of this record, do you still insist on your oath that you knew nothing of Hinsch's and Herrmann's admitted sabotage activities and that they were never discussed either by Hinsch or other parties with you or in your presence?
A. I do.
Q. In the face of this record, are you willing to submit your testimony to the Commission on your denial that you know anything about the activities of Herrmann and Hinsch, and that they were not discussed or revealed to you at any time, and are you willing to ask the Commission to believe your denial in the face of this record?
A. Yes." (Ex. 975, Ann. C, p. 260)

The American Agent filed with his brief of September 13, 1938, an original letter written by Ahrendt to Paul Hilken dated January 19, 1917. This letter was located among the files of the Eastern Forwarding Company. The body of the letter seems to be confined entirely to business matters, apparently connected with the business of the Eastern Forwarding Company. Appended to the letter is a postscript entirely in the handwriting of Ahrendt which reads as follows:

" Yours of the 18th just received and am delighted to learn that the von Hindenburg of Roland Park won another victory. Had a note from March who is still at McAlpin. Asks me to advise his brother that he is in urgent need of another set of glasses [sic]. He would like to see his brother as soon as possible on this account."

It will be recalled that the Kingsland plant was destroyed by a fire that raged January 11th and 12th, 1917.

In spite of the ingenious attempt on the part of the German Agent to break the force of the disclosure in the postscript quoted above, this postscript convicts Ahrendt of knowing that Herrmann (March) was in fact engaged in sabotage activities and that he desired another set of incendiary glasses or tubes. It also discloses the fact that Ahrendt was congratulating Hilken, the " von Hindenburg of Roland Park " and the paymaster of the saboteurs in America, upon " another victory ".

This record abounds in references to the incendiary tubes and to the fact that they are constantly called " glasses " (see Rec. p. 5586, Herrmann's Washington Examination, Rec. pp. 5443 *et seq.*, pp. 5516 *et seq.*, Rec. p. 5651; also Ger. Ex. CXXIII, pp. 14, 16; Ex. 764, Rec. p. 5649 *et seq.*).

In the light of this record, the claims of Ahrendt, (1) that Hinsch had never shown him any explosive tubes or little glass tubes, (2) that he had never seen any such devices, (3) that Herrmann had never told him anything about explosive tubes or pencils and (4) that he knew nothing of the sabotage activities of Hinsch and Herrmann are clearly disproven by the postscript to his letter to Hilken written January 19, 1917.

When we come to examine Hinsch's affidavit as to his absences from Baltimore and New London after the U-boat enterprise had been undertaken by him, Hinsch's claim that he never left the submarine bases just before and after the arrival and departure of the U-boat will be shown to be false, and Ahrendt's affidavit given for the purpose of corroborating Hinsch will also be proven to be false.

It has been shown above that Ahrendt's testimony was false when he stated in his first affidavit that he never heard from anybody what Hinsch was doing in Mexico. Thus it clearly appears that Ahrendt's efforts to corroborate Hinsch have failed and that Ahrendt's affidavits cannot be used to destroy the confessions of Hilken and Herrmann.

In Exhibit 986, Ann. A, p. 167 et seq., Herrmann while testifying under subpoena, under the Act of June 7, 1933 (48 Stat. 117), stated that upon his arrival in the United States from Berlin he met Paul Hilken and Captain Hinsch at the Hansa Haus in Baltimore in 1916; that Ahrendt was an employee of Hinsch or the North German Lloyd, working (in the Hansa Haus) as a member of the office force of Schumacher and Company. He states further that Ahrendt was Hinsch's " go-between " in sabotage work (p. 167); that when he (Herrmann) went to Washington to help Carl Dilger with the germ cultures and preparing the incendiary pencils (p. 168), he would usually bring them up to Baltimore and deliver them to Carl Ahrendt, if Hinsch or Hilken was not there. Ahrendt also at times went to Laurel, which was halfway between Baltimore and Washington, where Carl Dilger and Herrmann would meet him with a car and deliver the tubes and germs to him at the red railroad station in Laurel. At times when Herrmann delivered the germs and tubes to Hinsch, Ahrendt was used to distribute them to the different colored agents whom Hinsch had working for him, one of whom was Eddie Felton (id. p. 168). Herrmann met Ahrendt in New London, New York, Philadelphia, and in Norfolk or Newport News, always in reference to the germ work and the incendiary tubes (id. pp. 169-171).

In the light of the fact that Ahrendt's affidavits drafted and introduced for the purpose of refuting Herrmann's testimony have been proven to be false, this testimony of Herrmann's with reference to his relations with Ahrendt has unusual significance.

In the decision rendered at Hamburg on October 16, 1930, the opinion of the Commission has this to say about Hinsch (Decs. and Ops., p. 993): [h]

" One is rather inclined to regard Hinsch's story that he gave up sabotage when he took over the *Deutschland* work as quite likely to be true. He may not have done this at once, but it seems more than likely that he would not while the *Deutschland* was at Baltimore have been active in sabotage. We do not regard the question whether Hinsch was absent from Baltimore during the two days before Black Tom as important in itself. He did not need to be absent, if they had been planning Black Tom for some time. Its importance relates only to Hinsch's credibility, and it does not have much importance from this point of view. It has some bearing on the credibility of other witnesses also. Our impression is that Hinsch was not absent from Baltimore at this time.

" The fact that Hinsch let Herrmann stay around Baltimore, and that Herrmann probably did some things or talked of some things in connection with sabotage at this time, and the talk about the pencils which Herrmann seems to have had with him at this time, tends against Hinsch's claim that he cut loose from sabotage. We would guess that Herrmann was not really doing much but talk and plan, and that Herrmann himself, particularly when the *Deutschland* was there, was doing nothing but work about her. And it is of course conceivable that we are wrong in disbelieving Marguerre's evidence that Herrmann was to take no action against munition plants or American property unless the United States entered the war. We do not believe that Hinsch would have mixed up sabotage so closely with the *Deutschland*, either by taking part in it himself or by letting Herrmann work on the *Deutschland* if Herrmann was then active in sabotage."

In another part of the opinion, in comparing contradictory statements made by Hinsch with statements made by Hilken and Herrmann with reference to Wozniak which were contradicted by Hinsch, the Commission said, page 971: [i]

" Hinsch, the man whom Herrmann connects with himself in the story, has denied it. His denial contains plausible details, but we could not rely on it if we felt that Herrmann was now telling the truth, for though we have no evidence that Hinsch is a liar, there is a strong presumption that he might be under circumstances which pointed to his guilt."

Thus the Commission seems to have credited Hinsch's story that he gave up sabotage when he took over the " Deutschland " work and was under the impression that Hinsch was not absent from Baltimore while the " Deutschland" work was going on. The Commission also seems to have been under the impression that Herrmann, during this time, was doing nothing but work upon the " Deutschland ", and the Commission expressed the opinion that Hinsch would not have mixed up sabotage so closely with the " Deutschland ", either by taking part in sabotage work himself or by letting Herrmann work on the " Deutschland " if Herrmann had been active in sabotage. It becomes necessary, therefore, to make a thorough study of the record in order to show clearly what was the relation of Hinsch to Herrmann and Hilken, and also, to ascertain whether Hinsch's affidavits, in which he denied engaging in sabotage after the U-boat enterprise started, were truthful.

Hinsch made nine affidavits in behalf of Germany; and, as we have seen before, the object of his affidavits was, first, to strengthen the plea filed by

[h] *Note by the Secretariat*, this volume, p. 100.
[i] *Note by the Secretariat*, this volume, p. 86.

Germany that no sabotage was authorized in the United States during the neutrality of that country, and second, to show that, although men and material for sabotage were sent to the United States in 1916, the definite instruction was given that no active work of sabotage should be committed unless and until America entered the war.

In order to establish these propositions, Hinsch's affidavits were drafted to deny a great many statements which were contained in the confessions of Hilken and Herrmann. Therefore, after a study of the record to determine what were the relations among Hinsch and Herrmann and Hilken, it will be necessary to make a minute examination in order to ascertain whether the affidavits of Hinsch, contradicting the confessions of Hilken and Herrmann, are worthy of belief.

B. Fraud in the Evidence

Hinsch's Relations with von Rintelen

We have seen in another connection that Captain Hinsch brought the German steamer " Neckar " into Baltimore harbor and we shall develop thoroughly Hinsch's connections with Hilken, Herrmann and Woehst.

Rintelen in his book, *The Dark Invader* (Ex. 990, Ann. E), after telling of the founding of the fictitious firm called " E. V. Gibbons Inc." (p. 94), then tells of his contacts with Dr. Scheele, the German chemist who came to him with a letter of recommendation from von Papen and brought with him one of his " cigars ", made out of a lead pipe with two compartments separated by a circular disc of copper, one compartment being filled with picric acid, and the other with sulphuric acid. The thickness of the disc determined how long it would take the two acids to eat their way through and cause an explosion (pp. 95-96).

Rintelen met Karl von Kleist and received from him the suggestion that they make use of interned German sailors, and that they should get hold of Paul Hilken and Captain Hinsch of the Lloyd steamer " Neckar " (pp. 103-104). Likewise, through the suggestion of von Kleist, the headquarters were established on the German ship " Friedrich der Grosse ", which was tied up in New York harbor (p. 106); and the activities on that ship are thus described by von Rintelen (p. 107):

" During the following nights the great dark ship was the scene of ghostly activity. I had purchased large quantities of lead tubing through my firm, and my assistants carried it at night to the steamer, where it was cut up into suitable lengths. I had likewise obtained the necessary machinery through the firm, and after the lead had been cut up, and the copper discs prepared in various thicknesses, the little tubes were taken away again, under cover, in darkness, to Dr. Scheele's laboratory, where they were filled with acid. We had got to this stage when one morning one of my sailors appeared in the office, carrying a case of medium size under his arm. I was sitting at my desk, and he said to me: ' Excuse me, Captain, just move your legs a bit! ' I removed my legs, and he stowed the case in one the drawers of my desk. It was a disturbing neighbour to have!

" The detonators were all fixed to go off in fifteen days, so they had to be disposed of as soon as possible. I took the man into the other room where Weiser was sitting and asked him to summon the captains, the sailors, and the Irish, whom I had meanwhile initiated into my scheme, for the same evening, so that we might start our dangerous work immediately.

" ' All right,' said Weiser, ' I'll round them all up.' "

On page 109 the following occurs:

" One night, as I was leaning over the rail of the *Friedrich der Grosse*, gazing at the peaceful scene bathed in brilliant moonlight, all of a sudden the thought

struck me: Why not go to the root of things? Why not go after the piers themselves, the piers at which the munition carriers were tied up? Gradually, this thought became a desire, the desire a resolution, and the resolution an instruction! "

Von Rintelen then describes his trips to the various piers and shows how measurements were taken, distances paced out and possibilities were studied as to where motor launches could be comfortably fastened (p. 114). He then tells of a trip to the New Jersey piers and describes his visit to Black Tom as follows (p. 115):

" One of our visits took us to ' Black Tom,' a rather curious name for a terminal station. It remains clearly in my recollection because of its quaint conformation, jutting out as it did like a monster's neck and head. I suppose that it was for this reason that it had derived the name of ' Black Tom.' To judge from the numerous railway tracks converging here, it appeared to be one of the chief points for the Allies' export of munitions.

" I could not help urging upon myself the advisability of giving Black Tom a sound knock on the head — its mere name sounded so good to me: We could run little risk from paying Black Tom a compliment of this kind. Some peaceful summer evening — all arrangements properly made — a powerful speedboat at hand for us to disappear into the vastness of the Hudson River — it was all so remote from observation, from possible harm that might be done to human life!

" About a year later, when I was a prisoner of war in Donington Hall, one hot summer morning my eyes fell upon a large headline in *The Times*:

EXPLOSION OF CHIEF PIER
OF ALLIED SHIPPING
' BLACK TOM ' BLOWN UP
BY ENEMY AGENTS

" I had my own opinion as to how it had come about, and who were the men behind the scenes! "

The relations between von Rintelen, Hilken and Scheele are clearly set out in a report of William R. Benham, Special Agent, made to the Department of Justice, dated September 13, 1916, made the 11th,[1] in connection with the case of U. S. v. Franz von Rintelen, et al., in which Rintelen was indicted with others for violation of antitrust laws, in placing bombs on ships engaged in foreign commerce (Ord. Ex. 140, Rec. p. 3794, *et seq.*).

Benham made a report of a converstation that he had with Hilken in regard to his connection with Rintelen. In this report Hilken stated that sometime during the early part of May, 1915, he was in New York on business stopping at the Hotel Astor; that Rintelen called at the hotel and presented a letter of introduction from Captain W. Bartling,[2] an official of the North German Lloyd S. S. Co., Bremen, Germany. During this first meeting Rintelen spoke at length on the un-neutrality of America in the matter of financing the manufacture of munitions.

The next time Hilken met Rintelen was the latter part of May or early part of June, 1915, at Baltimore where Rintelen was Hilken's guest for two nights. Hilken took him to the Baltimore Country Club and to lunch at the Lawyers' Club in New York shortly after his visit in Baltimore. Again in June, 1915, Hilken came to New York where he met Rintelen and they went to the theatre together and he saw Rintelen again the same month in New York. The last

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[1] Hilken's 1916 Diary for September 11, 1916, has an entry reading " Benham from Washington interview."

[2] For Hilken's correspondence with Bartling see Ex. 906 - A, D, E, and P.

time he saw Rintelen was in Baltimore the latter part of June or early July. [1]

In a statement dated November 17, 1915, of Mr. Henjez (Ord. Ex. 133, Rec. p. 3758), given in re: Hamburg-American Line cases, Henjez reported to Assistant United States Attorney, John C. Knox, that a man named Stein or Steinberg came to his office and wanted him to meet a man by the name of Hansen (Rintelen), who had been sent over by Captain Bartling of the North German Lloyd. (Hansen was an alias used by Rintelen.) Hansen came over to see him, said that he had been sent by Captain Bartling and that he wanted to have some men who were to blow up factories and, he believed, steamers. He said there were lots of ruffians and cut-throats in New York to be had. Henjez said:

"I told Mr. Hansen I would have nothing to do with it."

Henjez said that he visited Hansen twice in the building where the Transatlantic Trust Company was located and he was there in an office which had the name E. V. Gibbons & Company and that Hansen introduced him to a tall, dark haired man by the name of Plockman (id. p. 3763). Henjez introduced Hansen (Rintelen) to Paul C. Helken (id. p. 3766).

In the trial of von Rintelen and his associates, evidence was given that Dr. Scheele and his associates purchased lead pipe, that this lead pipe was taken to Dr. Scheele's office in his laboratory where there were different kinds of chemicals, that the factory was known as a fertilizer factory and it was shown that some of the lead pipe was delivered on the steamship "Friedrich der Grosse". The lead pipe was gotten from J. D. Johnson's on Cliff Street and taken to the " Friedrich der Grosse " in April, 1915 (Ord. Ex. 158 (1), pp. 3847, 3848).

In the same case Frederick Henjez, Jr., the same man who had made the report to Assistant District Attorney Knox, testified, that early in 1915 before the sinking of the " Lusitania ," von Rintelen was introduced to him by a party named Stein or Steinberg (id. p. 3861), that von Rintelen asked him if he would put him, von Rintelen, in touch with anyone who could supply people to blow up bridges and factories and his answer was he could not do it (id. p. 3862), that von Rintelen stated that his purpose was to hamper the delivery of supplies to the Allied governments and that he was a representative of the German Government (id. p. 3863).

In the same case George D. Barnitz, a member of the police force of the city of New York, testified as to a statement which the defendant, von Kleist, made with reference to the case. That statement is as follows (Ord. Ex. 158 (2), p. 3881):

" And he dictated a statement which I wrote down in longhand and this statement covered a period of making bombs and placing them on board ships. The substance of it was that along about 1915, the beginning of 1915 ——

" Mr. Wemple: Wait a minute. I object to this. It is all evident that is written, and I don't think it is proper for the witness to testify to the contents of a paper that is in writing.

" The Court: Objection overruled.

" Mr. Wemple: Exception.

" The Witness. (Continuing): And the defendant von Kleist said that along about, the early part of January, 1915, about that time, that a man by the name

[1] Hilken's 1915 diary shows he was in contact with Rintelen (under the name of Hansen) and Hinsch in Baltimore during the period May 29-31, 1915; in New York with Rintelen (under the name of Gates) on June 23, 1915; and again in New York with Rintelen (under the name of Gates) and Hinsch on June 27, 1915 (Ex. 583, Ann. C).

of Dr. Walter Scheele had come to him and said that he wished him to assist him in helping the Fatherland, and Scheele explained to him that what he wanted to do was to place bombs on board ships to the Allies, leaving this country for the purpose of preventing munitions and supplies reaching the allied governments. Von Kleist said that he was greatly affected himself over the fact that he, an old man, sixty-six years of age, could still be of some help to his dear old Fatherland, and they immediately went into partnership in making these bombs, and he said that Scheele said that he had received ten thousand dollars from von Rintelen, and this was to assist in making and manufacturing these bombs; that Scheele had a place in Garden Street, Hoboken, where the bombs were to be manufactured, and von Kleist said that Scheele asked him to get a good mechanic to assist him, and that he, von Kleist, mentioned the name of a plumber whose name I do not recall now, but who said he was a good man, but afterwards when Scheele met him, he said that he, Scheele, had the right man, and von Kleist said that he referred to Carl Schmidt and Becker on board the Frederick der Grosse, and it was here that the shells were to be used, where they were prepared, and it was here that the shells were to be used, where they were prepared, and after they were made they were taken to Scheele's laboratory, where they put chloride of potash on one side and sulphur on the other, and the object was that the partition between the two, the chloride of potash and the sulphur, would get on fire and it would melt the lead and it would set fire to whatever was near it. And those bombs, the defendant von Kleist stated, were placed in the holds of ships; and he said that part of it was left to Captain Wolpert and Bode. I asked him how many bombs were placed on various ships, and he said he was not positive, but, in his opinion, in the neighborhood of ten were used in the holds of each ship. That was the substance of the conversation that I had with the defendant von Kleist. I, later on, later on I went on the following day ——

" Q. Before you leave that, let me ask you: Is this the statement that you wrote at that time?

" A. This is the statement as he dictated it, and as I wrote it in longhand.

" Q. Was that signed by him? A. That was signed, each page was signed by the defendant von Kleist.

" Q. And after that statement was written by you, was it read over to him?

" A. My recollection is that it was; and I questioned him on certain points."

The defendant von Kleist was shown by Captain Tunney a bomb that came back from France and von Kleist looked at it and said, " Yes, this is one that did not go off, and this is what caused the fight between Wolpert, Dr. Scheele and Steinberg " (id. p. 3884).

Hinsch's description of his sabotage activities is contained in German Exhibit CXXVII, at p. 109, where he says:

" * * * I attempted at first to instigate strikes among the stevedores in ports, and furnished for that purpose negroes hired by me at the time with circulars which I caused to be distributed in Norfolk, Newport News and Baltimore. After that, we attempted to infect horses and mules transports with anthrax germs. I used the negroes also for that purpose. Finally, we manufactured so-called dumplings in order to cause fires on munitions ships and ships with contraband. I used Ed Felton and his negroes also for this purpose.

" Q. When did you start these activities?

" A. In May, 1915, after I had talked with Rintelen personally."

Paul Hilken in his deposition of December, 1928, first told about his contacts in 1915 with Rintelen and Hinsch (Ex. 583, pp. 2163-2171). The details of these contacts are given in his deposition of August 26, 1930 (Ex. 829, pp. 6094 *et seq.*), where he testifies as follows: He may have met Captain Hinsch when Hinsch was an officer of the North German Lloyd Steamship Company, but he certainly met him in the fall of 1914 when the " Neckar " arrived at Locust Point, Baltimore, of which steamer Hinsch was acting captain (id. pp. 6096, 6097). Rintelen, in the spring of 1915, called him from New York

and they met in Philadelphia and shortly thereafter Rintelen came to Baltimore and got in touch with Hinsch and Hinsch acted in the interest of Rintelen. Rintelen told him that he came to America

" To investigate strikes among the stevedores at various ports. In fact, that was the first thing that he talked over with me. Also, to destroy ammunition aboard ships. * * * he told me he was placing these ' cigars ' aboard ships loaded with ammunition." (id. p. 6098.)

At that time Rintelen did not mention the destruction of plants, but that came later (id. p. 6099). Hilken brought Hinsch and Rintelen together in Baltimore. Hilken received considerable money from Rintelen to pay Hinsch, probably in the neighborhood of $10,000 (id. p. 6101). The last payment which he made to Hinsch was when he (Hinsch) left for Mexico and it was in the neighborhood of $29,000 (id. p. 6101). All of these payments to Hinsch were for sabotage purposes, except the $29,000 which was to fit out a Commerce Raider in Mexico (id. p. 6101). The authority to pay money to Hinsch prior to Hilken's trip to Europe in 1916 came from Rintelen, but the authority after the trip to Europe came from Marguerre and Nadolny in " Sektion Politik " (id. p. 6101).

Was Hinsch Telling the Truth in Claiming that He Ceased Sabotage Activities after the U-boat Enterprise Started?

In German Exhibit CXXVIII, p. 107, Hinsch admitted that, when he first made Herrmann's acquaintance through Paul Hilken shortly after Paul Hilken returned from Germany in 1916, he got four or five empty small glass tubes from Herrmann, but he claimed never to have used them at all; and he further denies that Carl Dilger, in the course of the year 1916, turned over to him a trunk with secret compartments in which small incendiary tubes were hidden [1]. In making this denial he confirmed a story told by Hilken that he sent Carl Dilger to Germany with a message in invisible ink, requesting the General Staff to keep Dilger over there.

As we have seen in another place, Hinsch admitted instigating strikes among stevedores and injecting horses and mules transports with anthrax germs and manufacturing " dumplings " in order to cause fires on munitions ships and ships with contraband; and he further admitted that these activities began in May, 1915, after he had talked with Rintelen (Ger. Ex. CXXVIII, p. 109), but he claimed that after the return of Paul Hilken from Europe in April, 1916, he occupied himself exclusively with matters of submarine service and discontinued all other matters at the time of his first conference with Paul Hilken after his return from Germany.

That Hinsch did not desist from sabotage activities after the arrival of the U-boat, is shown by his relations with Carl Dilger.

Carl Dilger was the brother of Anton Dilger, who became the leader of sabotage in North and South America with respect to infecting animals by injecting them with disease germs. They were of German parentage, and Anton Dilger, a graduate of Johns Hopkins, had served in the German Army as a surgeon until disabled, when he came to this country with a supply of cultures, anthrax and glanders germs (Ex. 771, Rec. p. 5781). Anton Dilger was also present at the famous meeting in Berlin, when Nadolny and Marguerre

[1] It will be recalled that Marguerre admitted the manufacture of such a trunk and he would not deny that it was entrusted to Carl Dilger. Ger. Ex. CXXIII, Testimony of August 1, 1930, p. 2. See *supra*, this opinion, p. 27. (*Note by the Secretariat*, this volume, p. 257.)

gave their instructions to Hilken and Herrmann in regard to sabotage and supplied Herrmann with incendiary pencils.

In German Exhibit CXXVIII, filed August 21, 1930, Hinsch classifies Carl Dilger as among those who had been employed by him for sabotage before he came in contact with U-boat service (p. 90).

In denying that Carl Dilger had, in the course of the year 1916, turned over to him a trunk with secret compartments containing small incendiary tubes, Hinsch gives this description of his employment of Carl Dilger (p. 108):

" I had used Carl Dilger in 1915 and also in 1916 in connection with our enterprises against horses and mules transports. When I completely discontinued those matters in the beginning of 1916, Paul Hilken and I decided to send Dilger to Germany. He used to drink a great deal and wanted money continually. Paul Hilken wrote a report to the General Staff in invisible ink wherein the General Staff was requested to keep Carl Dilger by all means over there. Hilken then induced Dilger to leave for Germany and gave him that report to take along with him. Hilken told me later that Carl Dilger had returned from Germany and that he had a serious altercation with him. He told me also that he had learned from Dilger that he had thrown that report overboard. I, myself, never saw Carl Dilger again after his return.

" Q. Did the report which you mentioned and which Paul Hilken gave Carl Dilger contain any other communications?

" A. No, as far as I know. I had agreed with Paul Hilken that he should write a report in invisible ink to the effect that Carl Dilger should be retained in Germany."

It is important to examine the record to ascertain whether Hinsch was telling the truth when he stated in the above deposition that he and Hilken had decided to send Dilger to Germany, *after he had completely discontinued sabotage* in the beginning of 1916.

The time of Carl Dilger's departure for Europe is definitely fixed as Friday, June 2, 1916, by the following quotation from Hilken's 1916 diary:

" Lots of trouble with getting C. D. off lunch ' Astor ' — Lewis calls me on phone etc. C. P. H. K. xx " (Ex. 911, located December, 1931, and filed May 27, 1932).

From the above entry in the diary it appears that Herrmann was in touch with Hilken on the same date that they succeeded, after lots of trouble, in " getting C.[arl] D.[ilger] off ".

Under date of June 1, 1916, Hilken wrote Captain W. Bartling, German Commercial Attaché at Copenhagen, with reference to Carl Dilger and his trip to Germany:

" Herewith I send you * * * copy of a letter in the Danish language, which I am today giving to a man who is leaving here on Saturday [June 3, 1916] via steamer ' Kristianiafjord ', and who will look you up as soon as possible. You will be sure to make the arrangements necessary for the abovementioned gentleman to reach his destination as soon as possible and there find employment. *He has become unnecessary to us.*

" Will you be so kind as to inform me, by postcard, if this letter reaches you, also whether Mr. D. has called on you and has traveled on." (Ex. 906, Ann. A; filed July 1, 1931.) (Emphasis supplied.)

A second letter in relation to Carl Dilger's trip to Germany was written by Hilken on June 2, 1916, to one Haguested in Copenhagen (Ex. 906, Ann. O), and with this letter there was enclosed a letter in the Danish language addressed to Bartling and introducing Carl Dilger. The letter of introduction is as follows:

" The bearer of these lines, Mr. C. Dilger, brother of the Mr. A. Dilger with whom you are acquainted, and who shared a room with me in Kónigshof, travels

in the belief that he had to deliver important letters for me to Germany. A few of them are important, without containing government secrets.

" We are principally anxious that he may get in touch with his brother and, if possible, *be kept busy for a long time.* We have for the time being no suitable occupation for him. *I am convinced* that you will make the necessary arrangements." (Ex. 906, Ann. P) (Emphasis supplied.)

To insure so far as possible the receipt by Bartling of the information relating to Carl Dilger, Hilken on June 7, 1916, wrote Bartling in part as follows:

" I confirm my letter of the 1st inst. in accordance with the enclosed copy, and I hope that Mr. C. D. has already visited you, prior to the arrival of this letter. In any event I would wish to write you (as today there is presented an especially good opportunity to transmit a letter to you) that the person mentioned *has been made privy to certain secrets* only through his brother, Dr. Dilger, against the judgment of Capt. H. and myself. To speak plainly, *Capt. H. and I consider him to be a bluff, who would not accomplish much.* Dr. D., on the contrary, was of the opinion that he can be very useful for good and entrusted him with different missions. After Dr. D. departed we limited as much as possible the activities of his brother. Lately, however, he *has appeared to us to have become somewhat dangerous because of various statements*, and we therefore decided, as already implied, *to send him over there, in the expectation that he could be employed innocuously in Germany.* This can best be done now, I believe, and *without raising any suspicion*, while he is being, first of all, put into communication with his brother. *It goes without saying that we must, nevertheless, leave it to the gentlemen over there to do the needful.*" (Ex. 906, Ann. D) (Emphasis supplied.)

In Exhibit 764, Rec. p. 5649, Carl Dilger, on April 18, 1930, tells how he came to Washington in 1915 and lived in Chevy Chase, D. C., until March or April, 1917. He and his brother, Anton, had a house at the corner of Livingston and 33rd Streets. He states that his brother, during part of that time, maintained a laboratory in Chevy Chase for making disease cultures, and that he worked in this business with his brother for several months after he reached Washington (id. p. 5650). He was introduced by his brother to Hinsch, and Hinsch had charge of a lot of destruction work and work with cultures. In May, 1916, he was sent to Germany by Captain Hinsch and he *thought that Paul Hilken helped to arrange for his going to Germany.* He then testified as follows (Rec. p. 5650):

" When I was sent to Germany in May 1916 I was given a package containing some papers which I was told to deliver over there. I never delivered the package that I had been given, because I thought the package contained reports of fires and other things that Hinsch and his men had been doing, and I was afraid that I would be caught with them on me, so I destroyed the papers."

He went on to Germany and joined his brother, Anton, who had preceded him to Germany (id. p. 5651). He met Anton at Karlsruhe and they went together to Berlin and saw some German officials, among others, Giesler, Nadolny and Marguerre. These German officials

" fixed up a trunk for me to take back to Captain Hinsch in Baltimore with some false sides in which they placed a number of incendiary tubes for use by Captain Hinsch in his work of destroying factories and munition supplies. *Nothing was said to me in Berlin about not using them unless the United States got into the war. I never heard any such idea expressed anywhere either in Berlin or in the United States.* It was my understanding that they were to be used right away and I gave them to Hinsch for that purpose.

" I was in Germany altogether about six weeks or perhaps two months, and then I returned to the United States where I delivered the incendiary tubes to Captain Hinsch in Baltimore. *I personally saw the incendiary tubes that were in the trunk and I know that they were delivered in Baltimore.*" (id. p. 5651) (Emphasis supplied.)

He knew Fred Herrmann in the United States both before and after he went to Europe (id. p. 5652).

He had a row with Hilken about some money that his brother, Anton, had given him, and which Hilken demanded and got from him,— about three or four thousand dollars (id. p. 5652). This was in the fall of 1916. He had several conversations with Hinsch and told him that he was going to quit and did quit before the United States entered the war (id. p. 5652).

The exact date of Dilger's return to this country is not clear. His passport, however, indicates that he left Berlin on his return shortly after July 12, 1916, and that he was at the German Baltic port of Warnemünde July 13, 1916 (Ex. 1001, Ann. A, (1) (2)).

In Hilken's 1916 diary the item for October 21, 1916, is as follows:

" Washington
Lewis, C. D.
Ret to Balto.
3 p. m. meet Lewis
at Union Station " (Ex. 911).

Therefore, is it clear that Hilken was with Carl Dilger and Herrmann in Washington on October 21st, 1916, and later met Herrmann at the Union Station at Baltimore.

Herrmann's statement showing the relation of Carl Dilger to Hinsch, Hilken and himself was made on April 3, 1930 (Rec. pp. 5431, 5489).

Carl Dilger's statement, showing Dilger's relations to Hilken, Hinsch and Herrmann and giving an account of his trip to Germany and his bringing the trunk with the false bottom or sides, was made on April 18, 1930 (Ex. 764, Rec. p. 5649).

Hinsch's statement, which was designed to contradict Herrmann and Hilken, was made in Berlin August 4-8, 1930, and filed August 21, 1930 (Ger. Ex. CXXVIII).

When Herrmann made his confession (Rec. p. 5431, *et seq.*) there was nothing in the record relating to Carl Dilger's trip to Europe, which was forced upon him by Hinsch and Hilken, or his return to America bringing the trunk with the false bottom containing the incendiary tubes, and Herrmann's testimony on these points was the first reference relating thereto found in the record.

When he was examined by the two agents April 3rd *et seq.*, 1930, Herrmann first told about the fact that Woehst had come from the General Staff, with instructions to report to Hilken, but he was not sure at that time that Woehst had brought any tubes along. He was sure, however, that they got more tubes.

" through another fellow who brought over several hundred in a trunk. They were hidden away in the slats. They bored the slats out and filled them in." (Rec. p. 5489.)

At this point the transcript shows as follows (Rec. p. 5489):

" Q. Who was the other fellow? A. Anton Dilger's brother, Carl Dilger. He brought those tubes that time. Carl Dilger was working with Anton on this horse affair, these germs, and he and Captain Hintsch had a scrap, and Hintsch says ' We have to get rid of this fellow ', and they fixed up a letter for him to report to Marguerre or Nadolny, and they were to keep him over there until after the war. They were afraid he might say something over here. He got the letter from Paul Hilken and he went to Germany, and in about six weeks he came back again. We were surprised to see him and asked him what the hell the idea was, and he said he brought over a lot more of these tubes and different things. We asked him ' How about the letter? Didn't you deliver the letter? ' He said ' No, I got a scare at Kirkwall and threw it overboard.'

" Q. Do you know of anybody else who brought tubes over from Germany? A. I brought some over. I am not sure if Woehst brought some over or not.

" Q. When did Carl Dilger come back with those tubes? A. I don't. Meantime, I think we liquidated the house. We lived out here near the Chevy Chase country club, with Dilger's sister, and Dilger and myself.

" Q. You said he brought those tubes in a trunk? A. Yes.

" Q. Will you repeat that? A. He brought those tubes in a trunk. The trunk was fixed up. There were slats in the walls, and he separated the panels and bored holes to fit these tubes in, and glued the trunk together again.

" Q. What became of Carl Dilger? A. I don't know what became of him.

" Q. Was he living in Washington? A. He was living together with me, here, out here in Chevy Chase." (Rec. pp. 5489-5491.)

It was after the above testimony was given on April 3, 1930, that Carl Dilger was located and his affidavit of April 18, 1930 (Ex. 764), found in the record at page 5649, was secured.

Thus Herrmann's statements with reference to Carl Dilger were corroborated by Hinsch in German Exhibit CXXVIII, p. 108, in the following particulars: First, that Hinsch had used Carl Dilger in 1915 and 1916 in his enterprises against horse and mule transports; second, that Hilken and Hinsch had decided to send Dilger to Germany; third, that Hilken had given him a secret message to the General Staff with the request that Dilger be kept over there by all means; fourth, that Dilger had an altercation with Hilken and; fifth, that Dilger had thrown the secret message overboard. (*Supra*, this opinion, p. 95.) [j]

Herrmann is further confirmed by Dilger not only on all these points but upon the fact that Dilger returned with the trunk with false sides or bottom containing incendiary tubes and that these tubes were delivered to Hinsch.

In this connection it will be recalled that Marguerre admitted that " Sektion Politik " had manufactured incendiary pencils which contained little glass tubes; that the construction of these tubes and the method of using them were explained to Herrmann; and the incendiary pencils were turned over to Herrmann packed in cartons, thirty to a carton (Ger. Ex. CXXIII, examination of July 30, 1931, pp. 15-19).

Marguerre also recalled that sometime after Herrmann's visit " we had a trunk made with a double bottom in order to pack glass tubes therein in a secret partition ". He stated that he did not know who was entrusted with this trunk and he also stated " whether this trunk was handed over to one Carl Dilger I do no longer remember "; but " I cannot say that it was not done " (Ger. Ex. CXXVIII, examination of August 1, 1930, pp. 1-3).

The reasons given by Hinsch and Hilken for sending Carl Dilger abroad, apparently against his will, are:

(1) according to Hinsch, " he used to drink a great deal and wanted money continually " (Ger. Ex. CXXVIII, p. 108);

(2) according to Hilken " he has become unnecessary to us " (Ex. 906, Ann. A);

(3) " We have for the time being no suitable occupation for him" (Ex. 906, Ann. P);

(4) he " has been made privy to certain secrets only through his brother, Dr. Dilger, against the judgment of Capt. H. and myself " (Ex. 906, Ann. D);

(5) " Capt. H. and I consider him to be a bluff, who would not accomplish much " (Ex. 906, Ann. D);

(6) " He had appeared to us to have become somewhat dangerous because of various statements " (Ex. 906, Ann. D).

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j *Note by the Secretariat*, this volume, p. 306.

The purposes of Hinsch and Hilken in sending him abroad are stated as follows:

(1) that he be kept busy for a long time (Ex. 906, Ann. D);

(2) that he " could be employed innocuously in Germany " (Ex. 906, Ann. D);

(3) " it goes without saying that we must, nevertheless, leave it to the gentlemen over there to do the needful " (Ex. 906, Ann. D).

This correspondence, together with the confession of Dilger himself, corroborate minutely the prior statement of Herrmann and show the falsity of the claim made by Hinsch, that after the return of Paul Hilken from Germany in March, 1916, he occupied himself exclusively with matters of the submarine service and had discontinued all other matters such as instigating strikes, infecting horse and mule transports and incendiary sabotage against munitions (Ger. Ex. CXXVIII, pp. 109, 110).

In the same Exhibit (Ger. Ex. CXXVIII), Hinsch had already described (p. 16) the conversation which he had with Hilken in regard to U-boats coming to America and Hilken's plan to put Hinsch in charge of the loading and unloading of the U-boats. Hinsch became enthusiastic about the service and he told Hilken (p. 17):

" that I would undertake it only if all other matters which had been undertaken by us prior thereto would be stopped completely."

And he told Hilken distinctly:

" Paul, under all circumstances, we must drop everything else, for this matter is so important that we must not blur it, * * * " (p. 17).

Hilken's reply was (p. 18):

" During these days somebody is coming from the General Staff — an alert young fellow who, during the war, was three times in England. *He also brings new things along.* We cannot help seeing him first. *I am to support him with money.*" (Emphasis supplied.)

This alert young fellow was Herrmann, who was to be supported by Hilken with money, and he did continue the same kind of sabotage work that Hinsch had been engaged in. The pretense of Hinsch that he and Hilken were to have nothing more to do with sabotage work was an effort to support the false pleadings filed by Germany to the effect that she never authorized sabotage in America while the United States was neutral. Hinsch, by relating this conversation with Hilken, betrays the fact that he was aware that Herrmann, under Hilken as paymaster, would continue, with " new things ", the same sabotage activities which he, Hinsch, had been engaged in since May, 1915, after he had talked with Rintelen personally (Ger. Ex. CXXVIII, p. 109).

The claim of Hinsch that he discontinued sabotage activities after the return of Paul Hilken from Europe in 1916 is further disproven by the affidavit of J. Edward Felton (Ex. 761, Rec. p. 5631).

Felton had been engaged in stevedore work for the North German Lloyd from 1908 up to the time of the war. He met Captain Hinsch when the latter brought the steamer " Neckar ", the North German Lloyd ship, into Baltimore. He was employed by Hinsch to distribute circulars among the stevedores at Norfolk, urging them to go out on strike (id. p. 5632). He was next employed by Hinsch to set fire to supplies that were designed for Europe, consisting of grain, cotton, horses, and other supplies. This was early in 1915. For the purpose of causing these fires, Hinsch furnished him with " some things ", about the size of a small egg, and showed Felton how to fill them with acid and

instructed him how to cause a flame and start the fires. Felton gave them to his men to put around among the wheat and cotton and other supplies on the docks and in warehouses and on the ships, and this was according to instructions of Captain Hinsch. The first work "with these fire things" for Hinsch commenced some time early in 1915 and regularly for a year or two he was receiving and using "these things" for starting fires (id. p. 5633). These fire things started different fires that occurred later. He says we credited our men with the following fires — No. 9 Pier in Baltimore, elevators at Canton, one fire in Norfolk and several fires in ship cargoes (id. p. 5634). A few months after he was employed to start fires, Hinsch started him working with disease germs among the horses that were being collected for shipment at Norfolk, Newport News and New York City. This was the late summer or early fall of 1915 and continued for the period of nearly a year (id. p. 5634).

The fire which destroyed the Canton elevators occurred on the 13th day of June, 1916 (Ex. 842, Rec. p. 6253), more than two months after Hilken came back from Germany in March, 1916. The Eastern Forwarding Company was chartered in May, 1916 (Ex. 976, Ann. A-D, pp. 18, 227), and its officers were engaged from that time forward in preparing for the first trip of the "U-Deutschland".

Among the letters filed with the brief of the American Agent of September 13, 1938, was the original carbon copy of a letter dated June 14, 1916, addressed to Hilken, taken from the files of the Eastern Forwarding Company, in the course of which the following occurs:

> "Unfortunately I must bring you bad news, the Canton elevator burned up here. Two steamers (1 Engl. and 1 Holl) were also lost. The Englishman had munitions on board and I'm not sorry for him. But the elevator will do much damage to Baltimore and it is to be regretted because several lives were lost."

In the brief filed September 13, 1938, this letter was attributed to Hinsch (p. 36); and in the oral argument of January 16, 1939, Mr. Mitchell also again attributed to Hinsch the letter (Trans. of Argument, p. 73) and no denial has been made by the German Agent of this fact. Whether Hinsch wrote the letter or not, whoever did write it registered his sorrow at the loss of the elevator in a method which would cause one to doubt his sincerity, and this incident would seem to prove that Felton was correct in ascribing the fire to one of his men and that Hinsch was not telling the truth when he claimed that he had ceased all sabotage after Hilken's return from Europe in March, 1916.

Felton's affidavit is confirmed by George Turner (Ex. 772, Rec. p. 5784). Turner was hired by Felton to start fires among the cargoes of ships and was given devices for starting these fires. He distributed these devices at Baltimore, Norfolk and Newport News. He also inoculated horses which had arrived at a port awaiting shipment to the allies. For this work he was paid by Felton, who told him he had received the money from Hinsch.

Felton was further confirmed by the affidavit of John Grant (Ex. 773, Rec. p. 5791), who made oath that he worked for Felton in Newport News and Norfolk in 1915 in "starting fires and sticking needles into horses to make the horses sick". He began this work in the latter part of 1914 or the early part of 1915 and continued it for over a year. He did a good bit of the work himself and occasionally found two or three men whom he could trust and got them to help him; and this was in accordance with what Felton told him that he and Captain Hinsch wanted done.

The affidavit of Felton is further confirmed by the affidavit of Arthur Young (Ex. 774, Rec. p. 5793), who in addition to the same kind of work that was done by the other employees of Felton, was sent to Hopewell to get a job in the DuPont

factory in order to try to start a fire there (id. p. 5795). After getting to Hopewell, however, he was not willing to try it because the guards were very strict in searching the men and there were many rules against carrying anything into the factory and he was afraid of getting caught. The fire that took place in the Hopewell factory was some time after he left (id. p. 5796).

Further and conclusive evidence that the Hilken-Hinsch-Herrmann group of saboteurs did not discontinue their sabotage activities following the establishment of the commercial submarine service is found in the contemporaneous correspondence of the various saboteurs.

Hilken on August 7, 1916, cabled Arnold, the German saboteur then in Havana en route to the Argentine, as follows:

" Have been trying arrange meeting with you Regret impossible leaving before September if you consider advisable will send trustworthy representative to meet you Panama 21st Cable your decision " (Ex. 906, Ann. Y).

That the " trustworthy representative " here referred to was Herrmann and that Hinsch was aware of the activities of both Herrmann and Arnold is established by Hilken's letter of August 7, 1916 (through error letter dated 1917 (Ex. 976, Anns. A-D. p. 87)), to his father in which he says, reading in translation:

" Hinsch and I had already thought over in reference to Cuba that it is at present impossible for me to get away, and that we must therefore send Lewis [Herrmann] there." (Ex. 42 attached to Ex. 976, Anns. A-D)

Hilken in his letter of August 21, 1916, to Arnold describes the " trustworthy representative " as being " a young man who has been in the employ of our friends abroad " (Ex. 906, Ann. BB–1).

In a subsequent letter of January 11, 1917, Hilken wrote Arnold expressing satisfaction that his superiors in Germany had recently sent Woehst over to this country manifestly to assist in sabotage work. In his letter, Hilken approves a proposed visit to this country of Arnold and describes the purpose of such a visit as:

" * * * a good one, especially as our principals abroad, realizing that my other interests require too much of my time and make it impossible for me to devote my energies to their interests, have sent a young man, who arrived here a month ago and whom I have since initiated into our American trade. He brought with him several new samples which may also find a market in Argentine." (Ex. 906. Ann. HH)

Hilken in his examination under subpoena in September, 1933, testified as follows in relation to the cryptic references in this letter:

" First of all, who are the ' principals abroad ' to whom you refer?
" A. Nadolny and Marguerre.
" Q. Who is the young man you mentioned?
" A. What date is that letter?
" Q. January 11, 1917.
" A. That is Willie Woehst.
" Q. What is the subtle allusion to your initiating him ' into our American trade '?
" A. That is undoubtedly sabotage. It can refer to nothing else.
" Q. What are the ' new samples ' which he is supposed to have brought with him?
" A. Probably pencils, incendiary devices of some sort — I don't remember; no doubt that is what I was referring to.
" Q. You say, ' These samples may also find a market in Argentine.'
" A. Yes, Arnold was carrying on sabotage in the Argentine.

" Q. Am I correct, then, in the inference that Woehst was sent here to speed up the sabotage activities in the latter part of 1916?

" A. As I have stated right there in that letter, I was busy, Hinsch was busy to a certain extent and was taking care of Fred Herrmann, too. I was only one man. How much could one man do? They naturally wanted me to have some more men. Probably if the War continued, or if the United States had not gotten into the War, I might have had other men sent over here, too. Naturally, with all the munition plants which were at that time manufacturing munitions — powder, guns, and everything — for the Allies, Hinsch and Herrmann could only take care of a very small part, and it was natural for them to send another man over here to help out. Of course, Hinsch and Herrmann had their underlings, but we felt the need for an additional key-man to do directing, as Herrmann and Hinsch were doing directing." (Ex. 976, Ann. E, pp. 50-52.)

In the same deposition, Hilken testified as follows in relation to Hinsch's testimony that he discontinued sabotage activities shortly after Hilken's return from Berlin in the latter part of March, 1916:

" There was never any thought of Hinsch or Herrmann, and their men, quitting sabotage activities. In fact, Herrmann had brought with him the new incendiary devices, the tubes, and it was from that time onward that sabotage could be practised with greater effect. After my return from Germany, instead of quitting, the work was carried on with greater intensity.

" I remember distinctly the meeting that we had up in the attic of the Hansa Haus, all three of us together, Hinsch, Herrmann and myself. Although we all realized and agreed that we must be discreet in our activities, so as not to jeopardize the submarine work, we had no idea of suspending sabotage." (Ex. 976, Ann. E, pp. 53, 54.)

The Absence of Hinsch and Herrmann From Baltimore Before and After the Destruction of Black Tom

One of the purposes for which German Exhibit LXXXIV, the affidavit of Hinsch, was filed was to substantiate Hinsch's claim that neither he nor Herrmann could have participated in the destruction of Black Tom, which occurred early on the morning of Sunday, July 30, 1916. In this affidavit, Hinsch alleges that he was entrusted with making preparations for the arrival, unloading and loading of the " Deutschland " in Baltimore; that she arrived " in the middle of July " and started on her return voyage on August 2, 1916, that is, three days after the explosion of Black Tom. He then alleges as follows:

" *At this period I stayed permanently in Baltimore.* My energy, attention and care were up to the last degree devoted to the idea to let the submarine for which six war vessels were waiting outside the territorial waters safely reach the open sea." (Emphasis supplied.) (p. 6.)

In German Exhibit CXXXIII, Hinsch states that, from the end of April or beginning of May, 1916, until the sailing of the " U-Deutschland " from Baltimore, he was away from Baltimore *only twice*, the first time when he went to Norfolk and Newport News with Paul Hilken in order to ascertain whether they could find a suitable place there for the submarines, the second time, sometime during the last week of June, when he went out on the tug " Timmins " for the purpose of waiting for the " U-Deutschland " there.

We have already shown that Ahrendt (in Ger. Ex. CII, pp. 37–41) claimed to be very intimate with Hinsch and that it was impossible for Hinsch to have any activities outside of caring for the " Neckar " and his U-boat enterprise. A careful examination of the record contradicts both Hinsch and Ahrendt in these claims.

On Saturday, July 22nd, Hinsch was in New York, as is shown by a letter from Dederer, Treasurer, dated July 22nd, addressed to Captain Hinsch in New York (Ex. 976, Anns. A-D, pp. 235-238, " Dederer, Ex. 55 ").

For the week beginning the 25th of July and ending the 1st of August. Hinsch was away from Baltimore for two days during the latter part of that week. In Exhibit 811, Rec. p. 6019, 6023, Fesmire testified as follows:

" The Deutschland was scheduled to leave Baltimore on July 26th or 27, 1916. For some reason which was never explained to me, the departure was deferred and the boat did not leave Baltimore until August 1st, 1916. Hinsch was away from Baltimore for two days during the latter part of the preceding week about three or four days before the Deutschland sailed. His absence must have commenced, as near as I can fix it, about the 28th or 29th of July. He was away over at least one night, and I think for two nights. I do not know where he was. He did not tell me and I never ascertained. I remember the circumstances very distinctly, however, because I know that we were looking for Captain Hinsch to ask him about some matters and no one seemed to know where he was. He was missing from Baltimore for about two days."

And again on p. 6028 Fesmire said:

" Hinsch did not confide in me regarding the various activities which occupied his time during the spring, summer and fall of 1916, except the work with which I had strictly to do, namely, in connection with the two arrivals of the Deutschland. I should estimate that this work of the Deutschland did not take more than about one-third of Hinsch's time during my acquaintance with him, which commenced around the end of March or the first of April 1916. I knew that Hinsch was engaged in other activities. I associated him in my mind with the destruction of one of the grain elevators in Baltimore and the fire on Pier 9 in Baltimore."

On Thursday, August 3rd, Hinsch was at Norfolk and left the tug boat " Timmins " for Hoboken (Ex. 811, Rec. p. 6025, original telegram at Norfolk dated August 3, 1916, sent by Hinsch to Eastern Forwarding Company filed with brief of September 13, 1938).

On Friday, August 4th, Hinsch attended a party on the roof of the Hotel Astor given by Hilken in celebration of the Black Tom explosion. (Hilken's diary for 1916, Ex. 911, Ann. A; Ex. 976, Ann. E, p. 58; Ex. 986, Ann. A, p. 76).

On Saturday, August the 5th, the North German Lloyd Steamship Co. granted Captain Hinsch a leave of absence while he was present at Hoboken, New Jersey (Ger. Ann. 161, Ex. A (1)).

On Sunday, August 6th, Hilken, Hinsch and Herrmann (Lewis) were registered at the Mohican Hotel in New London, and on the following day, Tuesday, Hinsch was again registered at the same hotel (Ex. 831, Anns. 1 and 2).

On Tuesday, the 8th of August, he was in New York at the Hotel Astor and remained until Wednesday, when he went to Baltimore (Ex. 911, Ann. A; Ex. 976, Ann. E, pp. 61, 73; Ex. 976, Ann. A; Ex.41).

Thus it is seen that both before and after the departure of the " Deutschland " Hinsch was frequently away from Baltimore and the U-boat enterprise did not take up all of his time; and Hinsch's affidavits on this subject have been proven to be false.

Absence of Hinsch from New London Before and After the Kingsland Fire

As in the case of the Black Tom explosion Hinsch claimed to have been so thoroughly taken up with U-boat activities that he could not leave Baltimore, so, also in the case of the Kingsland fire, which occurred on the 11th day of January, 1917, Hinsch again claims that he was so closely confined to the U-boat base at New London that it was impossible for him to have participated in any

sabotage activities (Ger. Ex. CXXVIII, pp. 79–82; Ger. Ex. CXXXIII, pp. 16, 17). It was also claimed for him by Ahrendt that he (Hinsch) was in New London so regularly that it was impossible for him to have been in Kingsland or concerned with any of the sabotage work at Kingsland (Ger. Ex. CII, pp. 55 – 60).

These claims neglect the fact that New London and New York were only a few hours apart, and one could have been present carrying on his business activities in both cities on the same day. An examination will be made of the record, however, to ascertain whether Hinsch's and Ahrendt's affidavits are true when they claim that Hinsch was constantly in New London both before and after the Kingsland fire.

On Wednesday, January 3, 1917, Hinsch arrived in Baltimore. Hilken's diary for January 3, 1917, has the following entry:

" Wednesday 3 X
Lv. N. H. noon arrive N. L. 4. p m. Capt. H. lvs. for Balto. Lyceum [illegible] " (Ex. 583, Ann. D, Rec. p. 2326).

Under date of December 30, 1916, Hinsch wrote a letter from New London, Connecticut, to H. G. Hilken in which he stated as follows:

" I shall arrive in Baltimore on Wednesday evening, January 3rd. so we will be able to talk this matter over during my stay there." (Ger. Ann. 156, Ex. T.)

On Friday, January 5th, 1917, and probably on the preceding day Hinsch was away from New London; for on January 5th Paul G. L. Hilken wrote a letter to A. Schumacher and Company from New London in which he stated as follows:

" The writer will remain at New London until the return of Capt. Hinsch next Monday [January 8th] * * * ". (See letter from the Eastern Forwarding Company files, filed with brief of September 13, 1938.)

On Saturday, January 6, 1917, Hinsch was away from New London as was indicated by the last letter quoted above. See also, however, letter of Hoppenberg dated February 3rd to the Eastern Forwarding Company where he sends a voucher dated New York, Jan. 6, 1917, to " expenses entertaining Mr. Böhme & Capt. Hinsch — $11.30". (Eastern Forwarding Company's files, filed with brief of September 13, 1938.)

On Sunday, January 7th, Hinsch was away from New London as was indicated by the item for Friday, January 5th, *supra.*

On Monday, January 8th, Hinsch was in New London. See letter of Hilken to his father of January 7, 1917, from the Eastern Forwarding Company files; also telegram, New London, January 8, 1917, Hinsch to Hilken, Sr., German Annex 156–U; also letter of Hinsch to Henry G. Hilken dated January 8,1917, German Annex 156–V.

The record is silent as to Hinsch's whereabouts on January 9th, 10th and 11th, but on Friday, January 12th, he was in New London (see Ger. Ann. 163, L, telegram of Hinsch to Hilken, Sr., dated at New London).

The claim of Hinsch and Ahrendt that Hinsch was not away from New London preceding the fire at Kingsland is contradicted by Carl Metzler in Ger. Ex. XCVIII. Metzler was paymaster at the North German Lloyd Steamship Company and had been in their employ since May 1, 1898.

When asked whether Hinsch was away from New London at any time, he said (p. 28):

" A. Capt. Hinsch was away from New London as far as I can remember now, either in the middle of December or the end of December — I cannot remember

distinctly — but I remember that Capt. Hinsch told me, ' Metzler, I am going away for a few days to Baltimore in my car. Take good care of our work.' That is all he said.

" Q. And he left New London by car — by automobile?

" A. I did not see him myself, sir, but he told me that he would make the trip to Baltimore and back to New London with his own machine. * * * it was winter and very cold — plenty of snow in New London."

He stated that Hinsch was not away from New London more than three or four days. And again at page 79 he said that his office was in the same building with Hinsch and

" I saw him every day with the exception of a few days in December, but I could not remember what date in December. If my memory does not fail me, it was either in the middle of December or at the end of December. Then Capt. Hinsch told me that he would be absent for a few days because he wanted to go to Baltimore in his machine. Whether he did so or not I do not know. I just state what Capt. Hinsch told me."

Jeremiah Dillon, a Deputy Collector of the United States at New London, who had been in the service for many years, was at New London in the years 1916 and 1917 in his capacity as Deputy Collector. He knew Hinsch, who had a house in Neptune Park, from the latter part of August, 1916, until nearly the time when war was declared on April 6, 1917, and he testified that Captain Hinsch " was in New London off and on during that time ", and that Captain Hinsch was " away from New London for two or three weeks during the early part of January, 1917 and/or the latter part of December, 1916". He was able to fix the date on account of the death of his brother-in-law on the 20th of January, 1917 (Ex. 813, Rec. p. 6034).

Hinsch — His Sabotage Activities in Mexico after the United States Entered the War

We have already seen in another connection that before the United States entered the war Herrmann went to Mexico and got in touch with the Minister to Mexico, von Eckardt, and that on April the 12th, 1917, six days after America entered the war, von Eckardt forwarded to Berlin a message from Herrmann making inquiry as to the whereabouts of Woehst and as to $25,000 which had been promised him. The Minister doubted his authority and represented that Herrmann claimed to have a commission to fire the Tampico Oil Fields. " Sektion Politik " confirmed Herrmann's claim and stated that the destruction of the Tampico Oil Fields would be of great military advantage but left the decision to von Eckardt as to whether this should be done (*supra*, pp. 34, 35, this opinion).[k] These telegrams confirmed Herrmann's confession that his sabotage activities in the United States did not await the entry of the United States into war, but that the sole purpose for which he was employed and sent to the United States was to carry on sabotage in the United States irrespective of her entry into the war.

That Herrmann continued his sabotage activities in neutral Mexico is thoroughly established by two contemporaneous reports made to the State Department.

On August 1, 1917, four months after the United States entered the war, and therefore years before any claims for sabotage were ever formulated or presented, S. LeRoy Layton, American Vice Consul then in Canada, made a report to the Secretary of State, of a " plot to blow up the oil wells at Tampico ". In that report he related a story told him by Gerdts, at Barranquilla, Columbia, prior to Layton's departure from his post as Vice Consul in Colombia to his new post

[k] *Note by the Secretariat*, this volume, pp. 262-263.

in Canada. From that story, it appears that, when Herrmann fled from the United States to Mexico, he took with him the incendiary tubes which he had been using against munition factories in America. He showed them to Gerdts, and offered Gerdts a weekly salary and a large bonus if Gerdts would accompany him to Tampico and assist in blowing up the oil wells (Ex. 583, Ann. G, Rec. pp. 2345–2348).

This story is confirmed by a report to the Secretary of State made on August 24, 1917, by Claude E. Guyant, American Consul at Barranquilla, and who gave a careful account of his interview with Gerdts. (Ex. 583, Ann. H, Rec. pp. 2350–2354.) Both reports are confirmed on this point by the affidavit of Gerdts (Ex. 626 (a), Rec. pp. 2765, 2774.)

In May, 1917, Hinsch went to Mexico (Ger. Ann. 71, p. 2) and the record shows clearly that he continued in Mexico the same kind of sabotage activities which he had been carrying on in the United States.

An examination of the intercepted messages passing between Mexico and Berlin, usually through Madrid, and between Buenos Aires and Berlin, usually through Madrid (Ex. 320, Rec. pp. 880 *et seq.*), will show that not only Herrmann but Hinsch and Jahnke and Arnold were continuously engaged in sabotage matters after the entry of the United States in the war. Quotations will be made from some of these intercepted telegrams, but no attempt will be made to quote from, or to digest, all in this series.

On December 8, 1917, the Military Attaché (in Mexico) sent a telegram in which he stated as follows:

" In the interval I have started sabotage in the States with the assistance of * * * HINSCH who is representing me for the time being. * * * " (Ex. 320, Rec. p. 881).

On December 27, 1917, a message was forwarded to Berlin from which the following is taken (Rec. p. 883):

" From a conversation DELMAR [A. Dilger] has received the impression that not alone JAHNKE is not self-reliant but that he is not entirely reliable. Therefore and because I have up to the present received no reply to Telegram 365 I have handed the contents of No. 196 to the messenger for Captain HINSCH especially as he is a German and also because he enjoys the confidence of the Minister. * * * "

On January 4, 1918, in a message from Berlin to Madrid for Delmar, the following occurs (Rec. p. 884):

" The Admiralty has withdrawn the commission to JAHNKE for sabotage undertakings, and contemplates appointing HINSCH instead. As the latter is already in service with you, the Admiralty agree that HINSCH shall remain under your orders and shall be occupied in naval business in January. * * * "

The next telegram in the series contains a message from Berlin to Madrid from which the following sentence is taken:

" Agree to the employment of Hinsch." (Rec. p. 885.)

Another intercepted telegram bearing on the same subject is found in Exhibit 320, Rec. p. 903, reading as follows:

" From: Madrid
To Berlin
28.3.18
No. 178 of March 26th.
" Our Minister in MEXICO has sent the following telegram for the Foreign Office to the Military Attache under No. 1073, to be passed on the General Staff Political: —

" 'Co-operation between ?JAHNKE and HINSCH is, in consequence of their mutual distrust impossible.
" ?JAHNKE'S work must not be interrupted and he is therefore receiving financial support through me.
" In consequence of very grave discoveries I request permission to (dismiss) DELMAR, HINSCH and — from my (Intelligence) Service, (approval to be indicated by telegraphing the word ' (dismiss) '
von ECHARDT 21st February, 1918.' "

Exhibit 320, Rec. pp. 905-912, contains messages from Madrid to Berlin and from Berlin to Madrid bearing on the contest between Jahnke and Hinsch, and refers to their " S. service " and " S. undertakings " and contains a message from Jahnke to the Chief of the Admiralty Staff at Antwerp (No. 368) objecting to his being placed under Hinsch's orders. No. 369 of that series reads as follows (p. 907):

" DELMAR [A. Dilger] similarly fears that JAHNKE will none the less despatch a letter finding fault with HINSCH and DELMAR. Finally he asks definitely to be allowed to work independently, as he expects great independence, and has himself collected the sum of 100,000 pesos for the Legation in Mexico. JAHNKE further reports — *The destruction of war factories and provisions in the U.S.A. is working satisfactorily.* Since May, 1917 my people report as destroyed, the English S.S. CLARK, Japanese S. S. ITFH (?SHINNO) " (Emphasis supplied).

On p. 912 is the following:

" From: — Berlin
To: — Madrid D-3
" No. 25122 of April 16th [1918]
"With reference to Telegram 1172 of April 1st
" ARNOLD'S return to Germany is not advisable because of the risk of seizure. Communication with Ireland and America is important. *Arnold is to try to win over people for the U.S.A., if possible organizers, on the one hand for sabotage and on the other hand for increasing the inclination for peace.*
(Emphasis supplied.) GENERAL STAFF."

Exhibit 320, Rec. p. 913, contains a copy of a message from the Admiralty Staff in Berlin to the Naval Attaché at Madrid which reads in part as follows:

" *undertakings against the PANAMA Canal are highly desirable.*" (Emphasis supplied.)

The rest of the message authorizes monthly expenses not to exceed 100,000 marks and certain rewards for undertakings proved to be successful:

" For warships and trading ships one-fifth per cent of the value of the ship and cargo; for all other objectives, a lump sum not exceeding 50,000 mks and varying according to the importance and extent of the damage * * *
" The reward is to be paid at the discretion and after the investigation of the Minister."

An examination of the above telegrams discloses the fact that, in Mexico, Delmar (Anton Dilger) and Hinsch, had come from the United States, just as Herrmann had done, and they probably found antagonism among saboteurs already present in Mexico. Therefore, they incurred the doubt and enmity of von Eckardt, who wished to dismiss them from his service. These saboteurs, however, did not cease their activity after America entered the war, but simply transferred their base to Mexico, and were authorized by the Admiralty Staff to spend not exceeding 100,000 marks per month; and they were to receive as reward for their undertaking, if their undertaking should prove successful, one-fifth per cent of the value of the ship and cargo, and for other objectives a lump sum not exceeding 50,000 marks, varying according to the importance and extent of the damage.

Hinsch's Denial of the Veracity of Thorne

In order to destroy the affidavit of Thorne (Curt Thummel), Exhibit 977, Annex K, Hinsch attacks this affidavit at what he considers to be an essentially weak point. To get the complete picture it is necessary to give a brief resumé of Thorne's affidavit and his connection with this record.

Thorne was the son of a German by name of Thummel, who had been a Lieutenant in one of the crack regiments in the German Army, and Thorne had a great many relatives in the German Army, his uncle and his uncle's sons. He came to this country in 1902 or 1903 and joined the Coast Guard in 1913 under the name of Thorne (Ex. 977, Ann. K. p. 4). At the beginning of the World War, his sympathies were with Germany, and he reported to the German Consul at Baltimore where he met the German officers of the ships which were interned at Baltimore, among whom was Hinsch (id. pp. 5, 6). Hinsch told Thorne that he, Hinsch, was working in the interests of Germany and was endeavoring to prevent the shipment of ammunition from this country to the Allies, and was trying to destroy munitions factories in this country, boats that were going out loaded with ammunition, and doing such other things as might be beneficial to Germany's cause (id. pp. 8, 9).

At the Hotel Emerson bar Thorne was introduced by Hinsch to Herrmann under the name of Lewis. He visited Hinsch in Walbrook, a suburb of Baltimore, and Hinsch offered him a job, which he declined; but he resigned from the Coast Guard in May, 1916, and went to see Hinsch either on the interned steamer " Neckar ", or at the Emerson bar. A few days later he accepted from Hinsch a position as courier, taking messages from place to place, and for that purpose Hinsch secured for him a job as pantryman on the " St. Paul ", under the name of Chester Williams (id. pp. 9-14). After he had gotten this job, a man of Swedish appearance named Peterson or Anderson, whom he met through Hinsch, furnished him with a bundle of letters to be taken to England, and he was informed that there would be a return package. When he returned, the return package was brought to this Swedish man in sealed packages with no address. He made four trips on the " St. Paul ", the last leaving New York on August 26, 1916, and returning on September 17, 1916. He gave up the job as courier after the Swedish man told him there was nothing more to carry (id. p. 20).

This Swedish man, named Peterson or Anderson, gave him a job in the Agency of Canadian Car & Foundry Company plant at Kingsland, where he was employed as assistant employment manager through the recommendation of Anderson or Peterson. When he came back on his last trip Anderson told him that Hinsch was in New London so he went to New London on a Sunday and met Hinsch and several others in the Griswold Hotel. The testimony on that point is as follows (id. p. 21):

" Yes, when I came back from the trip Anderson told me Hinsch was up in New London, and I immediately went up to New London, I think it was a Sunday if I remember right when I got in. I do not want to be held to the date, it is so long ago I cannot remember it, but it was a Sunday I think. I immediately went up to New London on the next train and met Hinsch and several others there at the Griswold. *They were expecting the ' Bremen ' in, the submarine Bremen, and there was great excitement and giving parties, and everybody seemed to be very happy and expectant.* I went up to see Hinsch and could not talk much to Hinsch because he was very busy with preparations for receiving the ' Bremen ', and he sent me back to New York that night to see Anderson, and that is how I came — and Anderson then told me to get employment in the munition plant — Anderson or Peterson, or whatever it is." (Emphasis supplied.)

As we will see later, this portion of Thorne's statement is directly attacked by Hinsch's affidavit (Ger. Ann. 104, p. 4).

Besides Hinsch, Thorne met Paul Hilken at the Griswold Hotel; but, as he had not been paid off for his work on the " St. Paul", being in New London on leave, he had to return and get his pay (Ex. 977, Ann. K, p. 22).

His job at Kingsland was hiring men and assigning them to the different departments. He sometimes hired two hundred men a day, and Hinsch sent him at various times, men to be hired (id. p. 23). In December, 1916, or January, 1917, Hinsch sent him a man with a German name to be hired and he put him to work in the plant. He understood that the purpose for which Hinsch was putting these men in the plant was sabotage (id. pp. 23 and 24). This man, hired at Hinsch's request, asked for and received a transfer from one department to another. Before that time Hinsch had discussed at various times with Thorne the destruction of the Kingsland plant, the discussion taking place at Meyer's Hotel in Hoboken (id. p. 25).

Hinsch mentioned Wozniak's name to Thorne but he never met Wozniak (id. p. 26). Thorne was in the plant when the fire occurred (id. p. 27).

Three or four days after the fire he met Hinsch at the Hotel Astor and Hinsch said it was a good job that was done at Kingsland (id. pp. 28, 29).

After the fire Thorne became associated with the German-American Employment Agency in Newark, New Jersey, and this was done at the suggestion of Hinsch. They changed the name of the business and sent out hundreds of people to various munitions plants (id. pp. 29, 30).

German Annex 104, executed by Hinsch on April 14, 1934, and filed April 16, 1935, was introduced for the specific purpose of contradicting Thorne's affidavit. In this affidavit Hinsch summarized the important points of Thorne's affidavit and denounced it as " a lie from beginning to end ". He denied that he had ever known Charles Thorne or Thummel, or that he had ever known any person employed in the Kingsland plant, or a man who was in a position to employ a worker there. He denied ever knowing a Swedish man called Peterson or Anderson; denied sending Thorne to Anderson or Peterson to be employed as a courier. The last statement in Hinsch's affidavit is as follows:

" The allegation that in New London where Thorne claims to have arrived about September 17, 1916, he found my people in a happy and joyful mood is manifesty a lie too. At that time the ' Bremen ' had already been due for about 10 or 14 days, all of us were highly concerned as to what might have happened to her; nothing was more remote to our minds than to be in a happy mood and to arrange parties."

The fact that Thorne correctly described conditions in New London on Sunday, September 17th, is abundantly proven by Exhibit 977, Annex U. That exhibit contains three pages from " The Day ", a daily newspaper published in New London, Connecticut.

The first page is from the publication of Saturday afternoon, September 16, 1916, and contains an article, the headline for which is this: " THOUGHT U-BOAT WAS IN HARBOUR ". The article relates how the people were excited on State Street by the cry, "The Bremen is coming, the Bremen is coming! ", and relates that there was a grand rush in the direction of the water front. The object which caused the mistake was a floating fence, about 125 feet in length. Then the article goes on to state as follows:

" The arrival of the undersea craft is now considered only a question of hours. Paul Hilken and other officials of the Eastern Forwarding Co. are here and all is ready for the big show. Collector of Customs James L. McGovern and numerous

newspapermen and photographers came in on the early afternoon trains. No information is available at the terminal, but the impression was strong late this afternoon that the merchantman is near at hand."

The second sheet is for Monday afternoon, September 18th, and contains an article, the headlines for which are as follows: " BREMEN RUMORS STIR UP THE CITY". The article is in part as follows:

" A wildly expectant throng lined the waterfront Sunday evening at 9 o'clock and positively identified every light shimmering in the outer harbor as the bow watch of the long anticipated German submersible. * * *

" The brain storm was started by an apparently well authenticated report that the famous merchantman had been sighted off Ocean Beach. No sooner had the message reached the centre of the city than telephone wires began to buzz in every direction. Custom officials, moving picture operators, photographers, newspapermen and the general public hastened to the water's edge. * * *

" Color was lent to the rumor by the fact that the Scott tug T. A. Scott, Jr., put out hastily with representatives of the Eastern Forwarding Co. on board. Evidently they were also of the impression that the submarine was close at hand. Right on the heels of the tug went Julius Fleischmann's yacht Whirlwind, carrying a heavy cargo of camera men and reporters."

The third sheet is for Wednesday afternoon, September 20, 1916, and has the headlines: " WATCHFULLY WAIT FOR THE BREMEN ". It relates how the out-of-town and local newspapermen and photographers were getting weary, and recites the fact for three days the tugs of the T. A. Scott Co. had patroled the waters from Fishers Island to Montauk Point in a vain search.

An examination of Exhibit 977, Annex S, affidavit of Paul G. L. Hilken, executed January 8, 1936, verifies beyond a doubt that the " Bremen " was not expected in New London before September 17th but that on that date she was expected. The " Bremen " did not leave the Weser estuary earlier than August 24th and probably not until the 25th or 26th of August. The " Deutschland " had taken 25 days for the crossing, and, on the same basis, it was calculated that the " Bremen " would be in New London on September 17th, and Hilken made his preparation for her arrival on September 17th, going to New London on September 16th. This is confirmed by the register of the Mohican Hotel which shows that on September 16th Hilken, Hoppenberg and Hammar registered at that hotel, and this is further confirmed by Hilken's diary, which shows that on Friday the 15th Hilken lunched at the Astor in New York and left New York at 4 p.m., arriving at New Haven at 8:30 p.m.; and on Saturday the 16th he left New Haven at 9:30 a.m. and arrived in New London at 11:05; had lunch in the " Willehad ", dinner at the " Mohican " and saw a bum show. It is further confirmed by entry in his diary for Sunday, the 17th, which shows that Wheeler, Reuterdahl, Schmidt, Hammar, Hoppenberg, and Hilken were at the Griswold Hotel and that he was at Hinsch's house for supper and he made this entry on his diary —

" False alarm Bremen arrival ".

The diary for Monday, September 18th, has the following entry,

" Lunch Willehad
Schmidt and I go out on tug ".

In addition, in Exhibit 977, Annex S., Hilken annexes thereto a letter from his father, dated the 13th day of September, 1916, at Baltimore, written in German, a translation of which contains the following:

" All cargo and stevedore tackel, etc. is now enroute excepting the contents of the barge ' George May ' which goes forward this afternoon as one carload.

" Prusse leaves to-morrow on Pennsylvania Railroad at 11.06 and is due at 3.13 in Pennsylvania station. If you have time you could take him to Grand Central Station, where he will take the 5 o'clock train. I have written Hinsch to meet him. However, I gave him detailed instructions regarding the transfer from one station to the other so that your help is not really necessary. Prusse has recovered and is happy to go to New London."

The cargo and stevedore tackle, referred to in the letter, were for unloading the " Bremen". Mr. Prüsse had come over on the " Deutschland " to supervise the operation of discharging and unloading the U-boats and did not leave Baltimore for New London until September 14, 1916, on which date he registered at the Mohican Hotel, as is shown by the first sheet, Ann. A, to Exhibit 977, Ann. T.

Hilken's affidavit also calls attention to the fact that Wheeler, of the Wheeler Syndicate, Inc., and Reuterdahl, an artist, came to New London on September 17, 1916, in order for Reuterdahl to make sketches of the "Bremen " as soon as she arrived, which sketches were to be distributed and published through the Wheeler Syndicate. Wheeler had already syndicated some sketches which Reuterdahl had made of the " Deutschland".

Hilken's affidavit is further verified by the newspaper articles, which related that on Sunday, September 17th, around 9 p.m. a rumor came that the " Bremen " was approaching the harbour and the tugboat "T. A. Scott, Jr." put out to meet the " Bremen ", following by a yacht containing reporters and cameramen. The tug remained out until early morning, and this was the first time anyone went out in expectation of meeting the " Bremen".

These incidents and records show conclusively that Hinsch's deposition, German Annex 104, taken at Bremen April 14, 1934, was false, when he made the following closing statement:

" The allegation that in New London where Thorne claims to have arrived about September 17, 1916, he found my people in a happy and joyful mood is manifestly a lie too. At that time the ' Bremen ' had already been due for about 10 or 14 days, all of us were highly concerned as to what might have happened to her; nothing was more remote to our minds than to be in a happy mood and to arrange parties."

It will be recalled that in making an affidavit designed to show that Hilken did not know Gerdts until he brought the Herrmann Message, Hinsch changed the affidavit as drafted by the German Agent so as to make it appear that theretofore Gerdts was unknown to " us " (Hilken and Hinsch) instead of unknown to " me " (Hinsch).

In this affidavit designed to show that Thorne was a liar, we have another example of Hinsch's changing the facts in his affidavit to meet the needed proof.

Hinsch's False Claims That Gerdts Was Unknown to Hilken and Himself Before He Brought the Herrmann Message From Mexico

After the Herrmann message had been introduced in evidence, an affidavit was secured from Hinsch (Ger. Ann. 71), the object and purpose of which was to destroy the authenticity thereof by showing: (1) that Gerdts was *unknown to both Hilken and Hinsch* before the message was delivered, and (2) that the *sole purpose* of the message delivered by Gerdts was to introduce and identify Gerdts, and, therefore, the lengthy message (Ex. 904) was forged.

In this affidavit (Ger. Ann. 71), Hinsch for the first time admits that Herrmann did in fact send a message in secret writing, through a messenger, to Hilken, and that this secret message was developed by Hilken (p. 1). He states that, in the spring of 1917, he was asked to go to Baltimore, and on a Sunday he visited

Hilken at his residence in Roland Park. Hilken showed him a book from which the unprinted white front or back flyleaf had been torn or cut out, a book printed in the English language. Hilken told him that the book had been brought to him by a man named Gerdts, " who had been unknown to *us* up until then". Hilken showed him the page containing the developed writing, on which something like the following English text could be read:

" The bearer of this message is Raoul Gerdts who carries a personal message to you. You can trust him in full."

In German Annex 132 there is a statement of the German Agent, and filed therewith is Exhibit C, containing a draft of the same deposition, which the German Agent, after a prior conference with Hinsch in Germany, had prepared in America and had returned to Germany for Hinsch's execution. The corresponding portion of the draft, as prepared by the German Agent, is as follows:

" Hilken told me that this book had been brought to him by a man named Gerdts, who had been unknown to *me* up until then."

The only change in the sentence as drawn and as executed was in the change of the word " me " underscored [emphasized] above, to " us ", by which Hinsch tried to persuade the Commission that Gerdts was *unknown* both to *himself* and to *Hilken*.

In order further to prove that Gerdts was unknown both to himself and to Hilken before he brought the Herrmann message from Mexico to Baltimore, Hinsch changed the original form of the affidavit as prepared by the German Agent and added thereto the following:

" Hilken reported that Gerdts had stated to him certain particulars with regard to the submarine enterprise, which only Herrmann could have known. I was then of the opinion that Gerdts *had really come from Herrmann and was not, by any chance, an agent of the American Intelligence Service* who had taken this book away from a messenger of Herrmann at the border." (Ger. Ann. 71, p. 4.) (Emphasis supplied.)

All of these statements were afterthoughts and not in accordance with the facts.

In Hinsch's affidavit of July 22, 1932 (Ger. Ann. 72, p. 3), he reiterates the statement:

" Hilken and I saw Raoul Gerdts for the first time at the end of April, 1917, when he brought the message from Herrmann."

An examination of the Hilken-Hoppenberg-Lowenstein correspondence, taken from the files of the Eastern Forwarding Company and filed September 13, 1938, with the brief of the American Agent, disproves Hinsch's claim.

On January 13, 1917, Hilken had lunch with his friends, Hammar and Lowenstein, and, following that lunch, he on January 18, 1917, wrote Hoppenberg, his clerk in New York, a letter, mentioning the fact that Gerdts had called on him and Hoppenberg in New York on Saturday, January 13, 1917; and he requests Hoppenberg, if Gerdts should return to the office, to send him to Lowenstein " with the enclosed letter of introduction". In the enclosed letter of introduction Hilken, on January 18, 1917, recalls to Lowenstein that he had spoken to him at lunch on Saturday, January 13th, " about a young Spanish-American German, who speaks German and Spanish fluently and some English". He goes on to state that the " letter will serve to introduce the young man, Mr. Raoul Gerdts; should you have an opening in your works, I shall appreciate your considering his application". The reply of Lowenstein on January 30, 1917, acknowledged Hilken's letter and shows that Gerdts had called on Lowenstein. Lowenstein writes Hilken:

" I have asked this young man to write me a letter explaining what he can do and I shall try my best to place him with one of my interests."

Thus it will be seen that in January, 1917, before America entered the war, before Herrmann and Gerdts had left America for Mexico, and less than five months before Gerdts came back to Baltimore with the Herrmann message, Gerdts was so well known to Hilken that he was recommending him to his intimate friend, Lowenstein, for a job, and that he gave Gerdts a letter of introduction to Lowenstein.

When Gerdts came to Baltimore with the Herrmann message, he was a guest in Hilken's home in Roland Park (unwelcome to Mrs. Hilken) for two or three days, and he amused himself with the piano player (Ex. 972). Hinsch confirms this statement as follows:

" As I entered Hilken's home, a man not known to me was sitting at the piano in an adjoining room, who afterwards was introduced to me by Hilken as Gerdts." (Ger. Ann. 71, pp. 3, 4)

Hilken's check stub books on his Corn Exchange Account show the following payments to Gerdts under the name of Raoul Sala:

" No. 206 Date Apr 27 1917
Pay to A S & Co
For a/c Raoul Sala 175 "

" No. 207 Date Apr 30 1917
Pay to A Schumacher & Co
For do 1000 " (Ex. 909, filed May 27, 1932).

Hilken testified that the foregoing entries referred to checks drawn by him to the order of the firm A. Schumacher & Co. for cash payments which he made to Raoul Gerdts shortly after the time Gerdts brought the Herrmann message to him in Baltimore (Ex. 909).

The following entries in Hilken's 1917 diary fix the date that Hilken and Hinsch left New London as Saturday, April 28, 1917, and the date that Hinsch and Hilken had dinner with Gerdts in Roland Park as Sunday, April 29, 1917:

Entry for Saturday, April, 28th, reads:

" 4 a. m. with Capt.
H. leave 11 a. m. train
and Congressional
for Baltimore ".

Entry for Sunday, April 29th, reads:

" Capt. H &
Cousin Raoul dine
with us Roland
Park " (Ex. 583, Ann. D. Rec. pp. 2330, 2331).

Hilken in his testimony under subpoena of September, 1933, identifies the entry " Cousin Raoul " in his diary as follows:

" In my diary for Sunday, April 29, 1917, there is a notation which bears out my recollection of a dinner at my house in Roland Park, which says, ' Captain H. and Cousin Raoul dined with us at Roland Park.' I remember that we called Raoul Gerdts ' Cousin Raoul ', because we have distant cousins in Venezuela. And so that the children, which were then of an age beginning to take notice, would not be suspicious, we introduced him to them as ' Cousin Raoul ', and they all called him ' Cousin Raoul.' " (Ex. 976, Ann. E, p. 121)

Hinsch in his affidavit of June 28, 1932 (Ger. Ann. 71, p. 5), confirms the payment at this time of $1,000 to Gerdts in the following language:

" Hilken and I then decided that Gerdts should receive $1,000, which Hilken first had to withdraw from his bank. Gerdts was to inform Herrmann that I would go to Mexico in a short time and would bring money with me."

In Hinsch's affidavit of July 22, 1932 (Ger. Ann. 72, p. 3). he reiterates the statement that:

" Hilken and I saw Raoul Gerdts for the first time at the end of April, 1917, when he brought the message from Herrmann."

The foregoing record discloses the following facts showing the relations between Hilken and Gerdts:

On January 13, 1917, Hilken knew Gerdts well enough to speak about him to his friend, Lowenstein, at lunch; and on January 18th, Hilken gave Gerdts a letter of introduction to Lowenstein and a recommendation for a position.

On Friday, April 27th, Hilken gave Gerdts $175.00, and on that same date he became a guest in Hilken's home while Hilken went to New London to see Hinsch. When Hilken and Hinsch returned on Sunday, they found Gerdts still a guest in the home and unwelcome to Mrs. Hilken on account of his cigarette smoking and piano playing.

On that date, Sunday, April 29th, Hinsch and Gerdts dined with Hilken in his home in Roland Park, and Hilken and Hinsch decided to give Gerdts $1,000 and send him back to Mexico. On the following day, Monday, April 30th, Hilken gave to Gerdts the sum of $1,000 for Herrmann, and Hinsch sent him to Mexico with a message that he would soon follow with the balance of the money requested by Herrmann.

Surely, in the light of this record, neither Hinsch nor Hilken needed any statements in the message or disclosures by Gerdts, revealing a knowledge of particulars about the submarine enterprise, to convince them that Gerdts was not " an agent of the American Intelligence Service, who had taken this book away from a messenger of Herrmann at the border ".

The change made by Hinsch in the affidavit as originally drawn by the German Agent shows that Hinsch was willing to fabricate statements in order to make the affidavit conform with the needed proof.

(6) *Testimony of Willie Woehst*

In the history of sabotage by German agents, Woehst is not an important figure, in comparison with Hilken, Hinsch or Herrmann. Most of his affidavits were introduced for the specific purpose of substantiating Hinsch's affidavits, prepared for the purpose of destroying the confessions of Herrmann and Hilken and refuting other statements in the record connecting Hilken, Herrmann and Hinsch with sabotage. In order, therefore, to test the accuracy and truthfulness of Woehst's affidavits, it is necessary first to examine the record and ascertain therefrom what were Herrmann's statements towards which Woehst's affidavits were directed.

In Exhibit 729, Rec. p. 4865 *et seq.*, Edwin Herrmann, the brother of Fritz Herrmann, told of Fritz Herrmann's several trips to Germany and of his meeting with Nadolny and Marguerre and William Kottkamp. He stated that Fritz came back to this country and made arrangements with Kottkamp for opening in New York an office under the name of " European Textile Company ", which was a blind for importing incendiary devices into the United States for use against ships and for operations against munition factories (id. p. 4869).

He also stated that Willie Woehst (who was known as " Rupp " and " Hauten "), Clucas, Thorne, Raoul Gerdts, Kurt Jahnke, Lothar Witzke, Paul

Hilken, Hinsch, Wozniak, and Siegel were all known to him personally (id. pp. 4869–4870); that Fritz, Woehst and some of the others had an apartment located on the west side of New York City in the Luxor Apartment house and had another apartment in Newark, New Jersey (id. p. 4870); that Woehst spent considerable time at the Prince George Hotel in New York as well as at the Hotel McAlpin.

He identified the letter, Annex I–1 to Hilken's affidavit (Ex. 583), as having been signed by his brother, Fritz Herrmann.

Frederick or Fritz Herrmann in his examination by the two agents, April 3, 1930, Rec. p. 5431 et seq., testified as follows about Woehst:

Woehst arrived in this country on November 27, 1916 (Ex. 995, Anns. B & C); and met Herrmann shortly thereafter (Rec. p. 5451). He told Herrmann that he came from the General Staff with instructions to report to Hilken and through Hilken to get in touch with Hinsch and Herrmann " about blowing up these things " (id. p. 5489). Herrmann was not sure whether Woehst brought tubes with him, but he was sure that Carl Dilger brought several hundred in a trunk with a false side or bottom (id. p. 5489). Woehst told Herrmann that he had left a package of tubes with Hinsch, and Woehst also brought over some new germs at the same time (id. p. 5582). Woehst reported that his instructions were the same as Herrmann had gotten, namely, to get in touch with Hinsch and Herrmann for the purpose of destroying munition plants.

Woehst, Herrmann and Gerdts were all under suspicion as alleged German secret agents early in 1917 (See report of A. G. Adams to Department of Justice, dated February 21, 1917, Ex. 583, Ann. K, Rec. p. 2359; also report of John Kaba to the Department of Justice dated May 19, 1917, Ann. X to Ex. 583, Rec. p. 2406 *et seq.*; also report dated May, 33, 1917, Ann. Y to Ex. 583, Rec., p. 2410 *et seq.*).

When the World War started, Woehst was employed by the shipping concern, D. Fuhrmann, in Hamburg as manager of the department, Hamburg–Boston and Hamburg–New Orleans, having been employed by the firm about ten years.

In German Exhibit CXXIV, Woehst gave his personal history, stated he had visited the United States in 1902 and 1903 [1] and told of his experience in the war until he was taken ill (pp. 4, 5). He then reported to Berlin and was sent to the Great General Staff, " Sektion Politik " (p. 5), and on account of his knowledge of English, was selected for the purpose of going to Italy via America, to appear as a German-American. After being specially trained for propaganda activities in Italy and being instructed in the Intelligence Service, deciphering secret codes, writing with invisible ink and developing letters written with invisible ink, he was called to Berlin and received an order to go by the quickest route via Norway to New York (id. p. 7).

He reported to Captain Marguerre who instructed him to call on Paul Hilken in Baltimore in order to get assistance in obtaining a visa for Italy on a false passport (id. p. 8). He left Germany on his trip on October 1st or 2nd, 1916, booked passage by a Danish steamer, " Frederick VIII ", appeared on the passenger list under the name of Hermann Rupp with a false Swiss passport and arrived in America in the beginning of November, [2] 1916. He then went to Baltimore, met Paul Hilken and asked him to assist in obtaining a visa for Italy, but found that that was not possible, because a law had been promulgated which provided for a sharp control of passport visas to belligerent countries (id. pp. 11, 16, 17).

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[1] At the time of this visit, he enlisted in the U. S. Navy but deserted after eight months' service (Ex. 583, Ann. Y, p. 2411).

[2] He arrived Nov. 27, 1916 (Ex. 995, Anns. B & C).

As he could not get a passport to Italy, he stayed in America, was introduced by Hilken to Herrmann and became a close friend of Herrmann and lived with him a considerable time and he also became well acquainted with Hilken. He did not know and was not informed that Hilken worked for the Great General Staff (id. p. 12). Hilken placed Hoppenberg's office in New York at Woehst's disposal (id. p. 20).

Hilken's reason for introducing Herrmann to Woehst was that the second U-boat trip had come to an end, and, therefore, Hilken had nothing for Herrmann to do; so Hilken thought it would be best for Woehst to " take him " and try to find something to do together (id. p. 31). He tried to get some employment from Hilken in connection with the " U-Deutschland " work and went to New London between November 20th and 25th and met Hilken in the Mohican Hotel. He was introduced at this time by Hilken to Captain Hinsch at New London (id. pp. 23–25).

In order to meet the affidavits of Herrmann, Hilken and Edwin Herrmann, Woehst made the following denials:

(1) that he ever received instructions in Berlin to be carried out in event he had to remain in America (id. p. 42);

(2) that he had ever planned to destroy munitions supplies or have them destroyed by others (id. pp. 52, 53);

(3) that he had ever employed people to blow up munitions factories or munitions supplies or to bring about fires (id. p. 53);

(4) that Herrmann ever told him that he, Herrmann, had carried on sabotage against munitions factories or munitions supplies, or that he had blown up anything, or that he and Hinsch had carried on sabotage in America (id. p. 53);

(5) that he ever possessed devices for bringing about fires, or small glass tubes, or that he had seen or heard of small glass tubes, or that he had ever seen them in Herrmann's possession (id. pp. 54, 55);

(6) that Herrmann had ever shown him such devices or ever talked to him about such incendiary devices (id. p. 55);

(7) or that he had ever seen such devices as were sketched by Herrmann as Exhibits 1 & 2 with his testimony (id. p. 56).

Woehst further denied:

(1) that Hinsch was ever mentioned in connection with the Black Tom explosion (id. p. 57);

(2) that he had ever discussed the Black Tom explosion with Herrmann (id. p. 57);

(3) that he ever became acquainted with Witzke, Jahnke or Kristoff (id. p. 57);

(4) or that he had ever met Theodore J. Wozniak (id. p. 59), or Rodriguez (id. p. 60).

He further denied:

(1) that Herrmann ever told him anything about the Kingsland plant; that he knew anything about the place, or that he ever discussed with anybody setting fire to that factory, or that he discussed the same with Herrmann, or that he ever proposed to Herrmann to undertake sabotage against munitions factories, or that he ever came in contact with laborers who were employed in munitions factories in order to cause sabotage acts through them (id. pp. 60, 61);

(2) he further denied that he ever introduced Wozniak to Herrmann (id. 61);

(3) or that he ever heard that Herrmann cooperated with a man named Wozniak or with a man named Rodriguez (id. p. 61);

(4) or that either Herrmann or Hinsch had anything to do with the Kingsland fire (id. pp. 61, 62, 63);

(5) that he ever met a man by the name of Edwin Herrmann or ever knew that Herrmann had any brothers (id. pp. 65, 66);

(6) or that the meetings of German agents ever took place in his hotel or at any place (id. p. 66);

(7) he denied meeting Thorne, Chester Williams or Carroll Clucas (id. p. 66);

(8) he admitted meeting a man named Gerdts in the month of December, 1916, in the house of the pianist, Louise MacPherson (id. p. 67);

(9) and that he introduced Gerdts to Herrmann in their apartment in Luxor House, and that Gerdts drove their automobile as a chauffeur (id. p. 68);

(10) Woehst denied that he ever had anything to do with enterprises to infect horses or mules with anthrax germs or that he ever heard of plans to infect them, or that he ever saw such tubes in Herrmann's possession (id. p. 70);

(11) he further denied that he was ever told anything at the General Staff about such enterprises against horse and mule transports, or that he was ever in possession of such glass tubes containing anthrax or other germs (id. pp. 70, 71);

(12) Woehst also denied that he stayed at the Prince George hotel, New York (Ger. Ex. XCI).

Woehst claimed that the only subject he took up with Hilken was in regard to obtaining a passport with an Italian visa (Ger. Ex. CXXIV, p. 16); and Marguerre testified that:

> " Woehst was quite exclusively intended for Italy and only in transit in America where he should get the necessary documents." (Ger. Ex. CXXIII, Exam. Aug. 1, 1930, p. 13.)

Woehst further claimed that his activities, after he found out he could not get to Italy, were, in connection with Herrmann, to ascertain the movement of munitions over the various piers for transfer to transatlantic steamers (Ger. Ex. CXXIV, p. 41). These activities began about the first days of December, but he (Woehst) took his instructions from nobody and specifically did not receive instructions in Berlin to be carried out in the event he had to remain in America (id. p. 42).

Marguerre testified that he gave Woehst no instructions for agents in America; and that he gave him no instructions for America, in case he would not be successful in getting to Italy, and that when Woehst returned and reported that he could not get to Italy, he was dismissed immediately " because he was a failure in our eyes " (Ger. Ex. CXXIII, Exam. of Aug. 1, 1930, p. 14).

Woehst's " unauthorized " activities, he says, were carried on at night, principally in the freight yards of the Lehigh Valley, New York Central and the Hoboken switching yards, and reports were sent by telegram to the Admiralty Staff (Ger. Ex. CXXIV, pp. 42, 43).

He saw Herrmann daily and Herrmann was not engaged in any other matters of secret service nor did Herrmann receive any moneys whatsoever from Hilken or carry on any sabotage work in America of any kind (id. pp. 47, 51–53).

Woehst's affidavits show a meticulous study of the record and were designed to deny every fact which would connect Hilken and Herrmann with sabotage.

As we have seen above, Hilken stated that when he met Woehst in Baltimore he recommended to him the Prince George Hotel in New York and that Woehst stayed there a while and moved to the McAlpin (Ex. 976, Ann. E, pp. 90, 91). As we also have seen, Edwin Herrmann, the brother of Frederick Herrmann, also testified that Woehst spent considerable time at the Prince George Hotel in New York as well as at the Hotel McAlpin (Ex. 729, Rec. p. 4871).

The question as to whether Woehst ever stopped at the Prince George Hotel would not seem to be important enough to dignify it with a denial; but the record was searched for an opportunity to contradict Hilken and Herrmann, and,

therefore, Woehst was particular specifically to deny this statement. See German Exhibit XCI where he says:

" Entirely untrue is the statement concerning my stay at the Prince George Hotel in New York. I never entered the said hotel."

In Exhibit 733–B, Rec. p. 4894, there is a letter dated December 19, 1916, written by Edwin W. Hauten (Woehst) to March (Herrmann) in which the following sentence occurs:

" I am staying at Hotel McAlpin not at Prince George, which was impossible on some reason."

Thus the record seems to verify the statements of Hilken and Edwin Herrmann and to contradict the statements of Woehst on this point.

Woehst testified that he was with Herrmann so frequently and constantly, that, outside of making investigations of the movements of munitions across the piers to translatantic steamers, Herrmann did not attend to any other matter of the secret service, and that he could not have done so (Ger. Ex. CXXIV, pp. 46, 47).

Before the United States entered the World War, Woehst was under the suspicion of Federal agents, and on February 24, 1917, they found in his room a letter from Herrmann addressed to Whoest containing the following:

" Dear Hauten [Woehst's alias] —

" If letters come for me from Perth Amboy, open them & heat them. If there is any news, you can forward it to the right party. * * * If you think it best that he discontinue the work there just write a short letter to Mr. E. Adams, Hotel Madison, Perth Amboy, New Jersey. * * *." (Ex. 583, Ann. I, Rec. p. 2356.)

As indicated by the report of Department of Justice agent Stone dated October 19, 1918, the date of the " Dear Hauten " letter is undoubtedly around February 2, 1917. Stone reports that an inspection by him of the Hotel Madison, Perth Amboy, New Jersey, disclosed the fact that " E. Adams, Newark, N. J." was registered on February 2, 1917 (Ex. 593, Rec. p. 2489).

On the sheet containing this letter, there were the names of ammunition plants, as to which Hilken testified later that they had them " on the spot " (Ex. 976, Ann. E, pp. 95, 99).

The reference to " heating " the letters refers to the fact that Herrmann was expecting letters to be written in lemon juice. Such letters Woehst is directed to develop by heat (id. p. 98).

When this letter was shown to Woehst, he pretended not to know whether the letter was genuine; but he claimed that the letter could not have had

" any connection with acts of destruction of an ammunition plant, since Herrmann, as long as I knew him, did not engage in such activities." (Ger. Ann. 22 (a), p. 6.)

This letter substantiates Herrmann's testimony as to Woehst's participation in sabotage, and also shows that Woehst was testifying falsely when he claimed that Herrmann never operated apart from him. This claim is also disproved by a letter written by Woehst to Herrmann on December 19, 1916, containing the following:

" I tried to get you to-day but failed * * *. I am staying at Hotel McAlpin not at Prince George, which was impossible on some reason." (Ex. 733-B, Rec. p. 4894.)

As Woehst registered at the McAlpin for the first time on December 11, 1916 (See Ex. 938), and Woehst notified Herrmann on December 19, 1916, that he

was staying at that hotel, it would seem clear that for eight days, at least, Woehst was not in contact with Herrmann. Woehst claimed that on December 11, 1916, he again took " lodging at the Hotel McAlpin on coming from Rochester " (Ger. Ann. 76, p. 2). He had been in Rochester four days; therefore we must conclude that on the 19th of December, 1916, Woehst and Herrmann had not been associating with each other for a period of at least twelve days. It was during this period that Herrmann was having his meetings with Wozniak and Wozniak was writing his letters to the Russian authorities (Rec. pp. 5452–5455, 5499–5503, 5589, 5623; Ex. 725, (4) and (5), Rec. pp. 4554, 4556).

How often did Woehst see Hinsch? In March, 1930, before the Herrmann confession, Woehst testified that he saw and spoke to Hinsch in Baltimore and New York three or four times, and that he did not know whether Hinsch had anything to do with the affairs of secret service (Ger. Ex. XCI, p. 3).

In attempting to destroy Herrmann's confession, Hinsch denied that he had been in New York at all during the time that Woehst and Herrmann were associated with each other, to wit, from early in December, 1916, to February 14, 1917 (Ger. Ex. CXXVIII, pp. 79 *et seq.*).

In July, 1930, Woehst made an affidavit for the purpose of bolstering up Hinsch's affidavits and of contradicting Herrmann's confession. In that affidavit he stated that, after thinking the matter over, he had concluded that his prior affidavit was erroneous and that he had become certain that he had met Hinsch only once, and that it was in New London, not New York, and it was in the Mohican Hotel " between November 20 and 25 ", where he claimed that he stayed under the name of Edw. W. Hauten. He also claimed that Hilken had reserved a room at the Mohican and he met Hilken there (Ger. Ex. CXXIV, pp. 24–28). An examination of the register of the Mohican Hotel for the period fails to disclose that Woehst registered there under his own name or under his aliases, Hauten or Rupp (Ex. 976, Ann. Q). Hilken was not in New London between November 19 and the evening of November 24, 1916 (Ex. 911; Ex. 976, Ann. E, p. 93). Woehst did not arrive in the United States until November 27, 1916; and between November 20 and November 25, 1916, he was on the high seas on board S. S. " Frederick VIII ", with a false passport in the name of Hermann Rupp (Ex. 995, Anns. B and C).

Woehst testified that he disembarked at Hoboken in the beginning of November, 1916 (Ger. Ex. CXXIV, pp. 10, 11). As to the date of his arrival he was, as we have seen above, mistaken since he did not get to the United States until November 27, 1916.

After disembarking at Hoboken he testified that he stayed for two days in New York arranging some personal matters in connection with the shipping concern, D. Fuhrmann (id. pp. 13, 14). He then went to Baltimore where he stayed four or five days and claims to have seen Paul Hilken on or about the 5th or 6th of November (id. pp. 15–17). During the month of November, 1916, Hilken was only in Baltimore from the evening of 21st to the morning of the 23rd and again on the 30th — Thanksgiving (1916 diary, Ex. 911).

How Woehst became mixed upon his dates is not clear from the record, but it is clear that he was not in New London between November 20th and 25th and that he did not meet Hinsch in New London between those dates.

Woehst's Movements after the Kingsland Fire

In April, 1930, Herrmann testified that Woehst went to Rochester with incendiary devices (Rec. p. 5581). Later in his examination of October, 1933, Herrmann spoke of Woehst's nervousness after the Kingsland fire, as a result of which he left town (Ex. 986, Ann A, pp. 93 – 94). Woehst's testimony is directly

to the contrary. In July, 1930, and in August, 1932, Woehst testified that when he came from Rochester on December 11, 1916, he stayed continuously at the Hotel McAlpin up to the time when he moved to the apartment house on January 20, 1917 (Ger. Ex. CXXIV, p. 33; Ger. Ann. 76, p. 2). On the day following Herrmann's flight from the United States to Mexico, an agent of the Department of Justice searched Herrmann's room and found therein a telegram, sent by Woehst from Rochester to Herrmann at the McAlpin Hotel, dated January 16, 1917 (Ex. 583, Ann. N, Rec. p. 2368), thus proving the falsity of Woehst's claim, and corroborating Herrmann.

It is thoroughly established, also, by Woehst's own cousin, Hildegarde Canfield (née Jacobsen) that immediately after the Kingsland fire, Woehst was nervous and persuaded her to spend the week end with him at Montclair Hotel, in Montclair, N. J., after which they spent several days in Rochester, N. Y. At that time Woehst practically admitted some complicity in, and responsibility for, the fire (Ex. 995, Ann. A, p. 3). Subsequently in Germany, Woehst referred to his false testimony and regretted that he had not been in a position to tell the truth (id. pp. 4, 5).

His conduct as to the spots appearing on Hildegarde's face showed that he feared he had infected her with some of the disease germs he had been handling (id. p. 4).

As indicated elsewhere, Woehst, Herrmann and Gerdts were under suspicion by the Department of Justice shortly before and after the United States entered the war, and were the subject of several reports by A. G. Adams, Special Agent (Rec. pp. 2359 *et seq.*), and by John Kaba, Special Agent (Rec. p. 2406 *et seq.*).

In the course of his investigation, Kaba met Mary Hildegarde Jacobsen of Rochester, New York, and on May 23rd, 1917, made a report of an interview which was held by Special Agent Adams in Kaba's presence, Rec. p. 2410.

Mary Hildegarde, who later married one Canfield, in 1930 made a visit to Germany. Under date of May 31, 1935, she made an affidavit which was filed as Exhibit 995, Annex A.

The contemporaneous Kaba report and the 1935 affidavit of Jacobsen-Canfield disclose a set of facts which entirely contradict Woehst in his denials of the statement of Herrmann and Hilken.

In the Kaba report it appears that Miss Jacobsen was introduced to Woehst, her first cousin, by her father at the Pennsylvania station in New York just after Woehst arrived from Baltimore early in December, 1916. The details of this report connected Woehst with Herrmann and Gerdts as German agents who had fled from America and gone to Mexico and disclose the fact tht Raoul Gerdts had recently come from Mexico and looked Miss Jacobsen up at her apartment, 106 West 13th Street, and asked if she had had some money from Willie Woehst. The statement further disclosed the fact that, on the day Woehst returned to Germany, Herrmann told her she would receive a large sum of money from Willie Woehst which she should deposit in bank until called for by him or Raoul, and she was to explain the receipt of this money by stating it had been left to her by a deceased relative in Germany. She told of seeing Woehst using invisible ink on a letter written in a regular way and he explained to her the process of making the same legible. Woehst spoke of March (Herrmann) as stupid looking, but very shrewd and able, and one who had done good work in Europe. Woehst rented a furnished apartment in New Jersey and sent March to live in it. The night before Woehst left he, Herrmann, Miss Jacobsen and a Miss McPherson had a party together in Woehst's apartment.

In the affidavit given by Mary Hildegarde Canfield in 1935 (Ex. 995, Ann. A), she explained that when she made the Kaba statement she was concerned about the investigations

" because *I knew that my cousin had been acting secretly for the German Government in preventing shipment of munitions, and that he had been connected in some way with the blowing up of a munitions factory.* I was very much afraid not only that what I might say would result in harm to him but also to myself because of my knowledge of what had been done. On that account, the information which I gave in May 1917 was limited insofar as it was possible for me to do so under the pressure and threats to which I was subjected by Department of Justice officials." (Emphasis supplied.) (p. 1.)

She told of her trip to Germany in April, 1930, with her two children, where she stayed until May, 1931. While in Germany she met her cousin, Willie Woehst, a number of times. She stated that she learned Willie Woehst was in the United States in November, 1916, and met him about Thanksgiving, and that shortly thereafter Woehst visited her father and mother in Rochester. She then stated as follows:

" My cousin first told me that he had come here in connection with the paying off of various German seamen whose vessels were interned in the United States, but after a short time *it rapidly became apparent that this was only a subterfuge for his real purpose.* He had plenty of money to spend, and *finally himself admitted that he had come to this country on orders from the German Government, to try to stop the shipment of all kinds of war materials* which were being sent from the United States to the English and French. He maintained that his activities were directed against Germany's enemies and not against the United States.

" As he became more frank, Wilhelm Woehst told me that he was associated with Paul Hilken and Fritz March, the latter of whom he stated was a very successful German spy and had worked with great distinction in England during 1915. Woehst also stated that March, whose real name was *Herrmann, was one of the most active of those engaged in destructive work in the United States* and in fact painted such a glowing picture of Herrmann's fearlessness and daring that it was at my request that I was introduced to Herrmann, on an occasion which I distinctly remember, on the mezzanine floor of the McAlpin Hotel. I cannot remember the exact date, and have no records to fix it, but I do know that I met Herrmann before Christmas 1916." (Emphasis supplied.) (pp. 2, 3.)

She met Herrmann on several occasions and he spent considerable time in Perth Amboy and made a trip to Savannah and telegrams were sent by Herrmann to Woehst from Savannah. After Woehst returned from Rochester in December, she saw him practically every day until immediately after the fire and explosions of munitions which took place in Kingsland, New Jersey, in January, 1916. Then she states:

" On the morning following that fire, Woehst called at the Three Arts Club at about 9 a. m., and told me that it was important for him to leave town at least for a few days and he wanted me to go with him. He was very insistent on going somewhere where there were few people, and where it was quiet. I inquired the reason for this and Woehst referred to the article in the newspaper about the fire. I asked him if he had anything to do with it, and he avoided a direct reply shrugging his shoulders and laughing. [1]

" Although Woehst did not at that time tell me whether he had been implicated in the fire, yet his actions and manner convinced me that he knew who had been responsible for it, and that it was desirable for him to get away for a few days. I went with him to Montclair and stayed at the Hotel Montclair for three days, over a week-end from Friday morning until Sunday night. The hotel had a large open fireplace and a skating rink on the pond at the foot of the hill.

" On the Sunday night we rushed off to Rochester, N. Y., because spots had appeared on my face and *my cousin was afraid that I had contracted an infection from him,*

[1] This confirms the statements previously made by Herrmann as to Woehst's nervous condition and visit to Rochester immediately after the Kingsland explosion (Ex. 986, Ann. A, pp. 93, 94).

as he said that he had been handling some materials which might give me an infection, and which might have serious consequences. On this account my cousin refused to permit me to go to a doctor in New York but took me immediately to Rochester where I was examined by our family doctor. My cousin was tremendously relieved when the doctor diagnosed my complaint as German measles." (Emphasis supplied.) (pp. 3, 4.)

She further states that soon after arrival in Germany in the spring of 1930 she spent a few days at Altona and visited her cousin, Willie Woehst, and his family. She stayed at a hotel and not at their home. Then she states as follows:

" I found that my cousin was greatly worried over the fact that *Hilken had accused him of sending blackmailing letters after the war*, and he said that in view of those statements by Hilken, he, Woehst, might suffer severe punishment in Germany. Before leaving Germany in 1931 I saw Woehst again and he told me that *he had been able to 'square himself' with his Government, in respect to Hilken's statements.* [1] Woehst said that he was thoroughly disgusted with the whole business and gave me to understand that if he could have secured employment outside of Germany *he would have been glad to have told the full truth about his activities in America.*

" Woehst told me that under the circumstances he had no alternative but to deny any knowledge of the Kingsland fire and of any other unlawful activities of Herrmann and Hilken in the United States." (Emphasis supplied.) (pp. 4, 5.)

Thus it appears from the Kaba report and Mrs. Canfield's affidavit that nearly all of the statements made by Hilken and Herrmann and denied by Woehst were admitted by him to Mrs. Canfield (née Jacobsen).

With claimants' Exhibit 583, examination of Paul G. L. Hilken, December 7th–19th, 1928, there were filed as Annexes AA–1 and BB, a letter from Woehst to Hilken, Sr., dated December 4, 1920, translated at Rec. p. 2287, and another letter dated May 9, 1921, to Paul Hilken, translated at Rec. p. 2290. The first letter reads in part as follows:

" I hope that you have in the meantime come into the possession of my letter of eight days ago. I have made an effort in Berlin to find out from the former gentlemen of the Great General Staff, whether there is any possibility of having refunded to me by the German Government my personal property which I lost abroad. I regret to say that these gentlemen can give me little hope, as this Department was dissolved immediately after the outbreak of the revolution, and all papers were burned at once. *Now, as at that time your son gave an order on Berlin to send for us $15,000, and as this remittance arrived too late (after the outbreak of the diplomatic relations), this money could not be used and must therefore still lie to the credit of Mr. Paul Hilken's account.* Of course the money cannot be returned to the former Department as the former existence of this department naturally is not now to be spoken of. I would be extremely grateful to you if you could persuade your son to pay me, out of this account, the amount of my account which was seized abroad. If you consider that it is not a large sum, probably about $1,000, as I find myself in grave necessity on account of my family of four. I see no other means and ask you to help me in this matter at once. The gentlemen of the former staff have helped me with the best will, and from a charity fund have paid me a small sum, which, of course, will last only a short while. I have received from Capt. P. Koenig who has become nautical director in Bremen, a letter in which he expresses the wish that I may be successful in recovering my property which was seized abroad. It is probably out of the question for me to expect the American Government to pay this to me as I lived under a different name while there." (Emphasis supplied.)

The second letter to Paul Hilken reads as follows:

" As I unfortunately have received no answer from you to my last letter, I was forced to hand in my claim for damages to the proper authorities for foreign claims, and *I have been asked by them to submit a confirmation, that I was active in New York and*

[1] This was probably effected by his affidavit confirming Hinsch (Ger. Ex. CXXIV).

Baltimore from October 1916 until February 1917. I request you, therefore, to confirm this so that I will be able to use your statement with the Department in question.

" I would not like to bring the gentlemen, Marguerre, Capt. von Hülsen and Mr. Nadolny into difficulties, and, therefore, must ask you for your assistance.

" Respectfully

" Willy Wohst
Altona
Molkestrasse 22.

" P. S. In case I do not receive this confirmation from you I am unfortunately forced to make my demands for payment from the funds (G. G. St.) of that period." (Emphasis supplied.)

In the light of this record, it is clear that Woehst was making false statements when he claimed that he was not authorized by the gentlemen of the Great General Staff to carry on any activities in America and did not carry on such activities. His plea that he was ignorant of sabotage activities is likewise disproven. His ignorance of the activities of Herrmann and Hinsch can no longer be maintained, and his claim that he was ignorant of enterprises to infect horses or mules with anthrax germs must likewise be classified as false.

Although he claimed that the maximum amount of money received by him from Hilken was $1,000, he makes the claim in his letter to Hilken, Sr., that Paul Hilken had given an order

" on Berlin to send for us $15,000, and as this remittance arrived too late (after the outbreak of the diplomatic relations), this money could not be used and must therefore still lie to the credit of Mr. Paul Hilken's account."

And in the same letter he argues that as Paul Hilken has in his account $15,000

" which cannot be returned to the former Department, as the former existence of this Department is not now to be spoken of "

therefore Paul Hilken has the money with which to reimburse him for the loss of his personal possessions.

He claims to have been sent to America simply for the purpose of getting a visa on a false passport to Italy, but he endeavors in 1921 to secure from Hilken a confirmation " that I was active in New York and Baltimore from October 1916 until February 1917 ", and he gives as his reasons for asking Hilken's assistance on this point that " I would not like to bring the gentlemen, Marguerre, Capt. von Hülsen and Mr. Nadolny into difficulties ".

Although, as we have seen above, Marguerre testified that he gave Woehst no instructions as to activities in America and he dismissed Woehst upon his return " because he was a failure in our eyes," we now have Woehst endeavoring to secure a portion of $15,000 of money coming from " Sektion Politik ", in payment of his activities " in New York and Baltimore from October, 1916 until February, 1917 ".

It will also be noted that when Woehst presented to the German Government his claim for damages, he had been asked to submit a confirmation that he was " active in New York and Baltimore from October, 1916, until February, 1917 ", and he requested Paul Hilken to confirm this activity, so that he might be able to use Hilken's statement with the Department in question, and significantly he adds:

" I would not like to bring the gentlemen Marguerre, Capt. von Hülsen and Mr. Nadolny into difficulties "

and in the postscript he says:

" In case I do not receive this confirmation from you I am unfortunately forced to make my demands for payment from the funds (G. G. St.) of that period." (Rec. pp. 2290-2291).

Another letter written by Woehst to Hilken was lost, but according to Hilken it was very sharp in its demands (Ex. 583, Rec. p. 2291).

Those letters, denominated by Hilken as " blackmailing ", [1] were introduced into the record on December 19, 1928 (Ex. 583, Rec. pp. 2287, 2290), but were not made the subject of any comment by Woehst in any of his four examinations — affidavit of August 24, 1929 (Ger. Ann. 22 (a)); affidavit of March 11, 1930 (Ger. Ex. XCI); deposition of July 24, 25, 1930 (Ger. Ex. CXXIV); or affidavit of July 8, 1932 (Ger. Ann. 76), or by Marguerre in either his affidavit of July 17, 1929 (Ger. Ann. 22), or his deposition of July 30, Aug. 1, 1930 (Ger. Ex. CXXIII), each filed after February 9. 1929, the date of filing of Ex. 583; and they not only convict Woehst of " blackmailing ", but they also convict Woehst and Marguerre of falsifying the record when they claimed that Woehst had no authority for his activities in America.

How Woehst's Expenses in This Country Were Paid

In German Exhibit CXXIV, p. 14, Woehst testified that when he came to this country he exchanged in New York his Swiss money which the General Staff had given him, about four or five thousand francs, into American money and it netted him only about $650. This was the amount given him by the General Staff to cover his expenses of travelling from Germany to Italy via the United States; and he received no other money for this purpose. He had, however, about $250 " and about eight hundred to one thousand German Reichmarks " of his own money. He was asked whether he received money from anybody else, and he stated that he was

" an employee of the shipping concern Fuhrmann and could have raised money from the Gans Line ",

but he was " not entirely sure " that he raised money there. He believed he did let the Gans line pay only his expenses in connection with his private business of the S. S. " Hohenfelde ".

At page 49 he was asked:

" How did you pay your living expenses during your stay in America?

" A. During the first time with the moneys I brought along. Since, however, I had to pay also for Hermanns' living expenses, Mr. Hilken placed further funds at my disposal."

When asked how long he lived with the money the General Staff gave him, he said it was difficult to be exact as to the date, he thought

" that Mr. Hilken gave me the moneys which we needed for our maintenance and expenses since the end of December or the beginning of January." (id. p. 49.)

These moneys he received from Hoppenberg in New York with whom Hilken had arranged a credit for Woehst (id. p. 49). He was asked whether he could say how much money he received from Hilken through Hoppenberg and stated that it was a very difficult thing to give exact figures:

" All I can say with certainty is that I got small amounts from time to time which, all in all, did by no means exceed the sum of $1,000 ". (id. p. 50.)

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[1] It will be recalled that, according to Woehst's cousin, Hildegarde Jacobsen, Hilken had accused Woehst of sending " blackmailing " letters, and Woehst felt that he " might suffer severe punishment in Germany ", but that " he had been able to square himself with his Government." (*Supra*, this opinion p. 134.) (*Note by the Secretariat*, this volume, p. 333.)

He used this money to pay for rent, food, wearing apparel, small tips which had to be given to the freight yard watchmen as well as pocket money for Herrmann. The amounts of money he paid the freight watchmen were small, a dollar or two at a time (id. p. 50). He also stated that Herrmann did not receive any money from Hilken while he was with him, as Hilken told Woehst expressly to pay also for Herrmann's subsistence and to give him the necessary pocket money. He claimed to have given Herrmann only $15 per week for pocket money (id. p. 51), and he recalled that at a celebration in New York and when they were together in New York at Rector's and the mezzanine restaurant in the McAlpin — probably three or four times — Herrmann had very little money and Woehst had to pay for him (id. p. 51). Beyond the money given to Herrmann for pocket money, he gave him nothing except $300 or $400 with " which I sent him to Savannah for Captain Huelst ". Herrmann never had large sums of money at his disposal and he always came to see Woehst if he needed money. He met Herrmann's father once and got the impression that the finances of the family were not in good shape (id. pp. 51, 52). [1]

An examination of the record shows that Woehst was guilty of deliberate falsehood in making the above claims. Hilken's check stubs (Ex. 909, Ann. B) have the following items:

Date	Amount	Check Stub Number	Notation
December 1, 1916	$300.00	146	" Cash Lewis "
December 5, 1916	100.00	149	" Lewis "
December 13, 1916	500.00	152	" Cash Hauton "
December 21, 1916	500.00	157	" Cash Fred. & Edw. J "
December 28, 1916	500.00	159	" Lewis & Haut."
January 13, 1917	1,000.00	166	" W & L "
January 23, 1917	1,000.00	169	" a/c W & L "

There is no dispute that the above items totalling $3,900, were paid for sabotage activities with which Herrmann and Woehst were connected. Woehst claims to have paid all of the living expenses of himself and Herrmann and to have allowed Herrmann $15 a week for spending money. The balance, if Woehst be telling the truth, went to Woehst's own account.

In his brief filed on the 16th day of November, 1938 (p. 32 *et seq.*), the German Agent contended that the words " set of glasses " contained in the Ahrendt postscript meant either " $1,000 " or " sum of money ". In order to sustain this contention, the German Agent was forced perhaps unconsciously, to repudiate Woehst's claim that he never received from Hilken more than $1,000 and also the claim that he furnished Herrmann all of his money.

The Ahrendt postscript was appended to a letter written by Ahrendt to Hilken dated January 19, 1917, and read as follows (see original letter filed September 13, 1938, with brief of United States):

" Yours of the 18th just received and am delighted to learn that the von Hindenburg of Roland Park won another victory.

" Had a note from March who is still at McAlpin.

Asks me to advise his brother that he is in urgent need of another set of glasses. He would like to see his brother as soon as possible on this account."

In the brief of the German Agent filed November 16, 1938, we find the following (p.35):

[1] Hilken testified that from the time he got back from Germany in April, 1916, until the United States entered the war in April, 1917, he paid Herrmann and Hinsch more than $50,000 (Ex. 583, Rec. pp. 2186-2187).

" The second paragraph of the postscript, when translated into plain language therefore has this meaning:

" ' Had a note from Herrmann who is still at McAlpin. Asks me to advise you that he is in urgent need of another $1000.— (or another sum of money) he would like to see you as soon as possible on this account.' "

In order to sustain this contention, the German Agent refers to Exhibit 909, stubs 166 and 169. As found in Hilken's check book, these stubs are as follows:

" No. 166 Date Jan. 13, 1917
Pay to C. Hoppenberg
For W & L 1,000.00 "
" No. 169 Date Jan. 23, 1917
Pay to C. Hoppenberg
For a/c W & L 1,000.00"

The German Agent calls attention to the fact that Herrmann and Woehst obtained from Hilken the sum of $1,000 on January 13, 1917, and a like sum of $1,000 on January 23, 1917, and argues that the language " another set of glasses ", used in the postscript on the 19th, had reference to the prior payment on January 13th of $1,000. In making this argument the German Agent said (p. 35):

" In the light of the foregoing facts, the conclusion is inescapable that Herrmann's note to Ahrendt emphasizing his urgent need and his desire to see Hilken at the earliest convenience was an appeal for funds. The fact that Herrmann in his note to Ahrendt used veiled language is in noways surprising and only in line with the procedure observed by Salzer at Hilken's request on the above mentioned occasion, when Herrmann wanted to meet Hilken on December 11, 1916. Manifestly Hilken was anxious to preclude from written communications any references that might link him to Herrmann and to payments made to Herrmann. [1] The expression ' *another* set of glasses ' is easily explained in the light of the foregoing set of facts. A very short time prior to that date (on January 13, 1917), Herrmann and Woehst obtained from Hilken the sum of $1,000.— (U. S. Ex. 909, stub No. 166), and apparently asked for and received on January 23, 1917 another $1,000."

Here we have the German Agent admitting that Woehst had been the recipient of at least $2,000 of Hilken's money within ten days time, although the German Agent had filed on August 18, 1930, German Exhibit CXXIV in which Woehst claimed that he never received from Hilken more than $1,000 out of which he paid to Herrmann $15 a week and no more. (As to how German saboteurs were financed, see *infra*, this opinion, p. 151.) [1]

Herrmann's Testimony as to Woehst's Sabotage Activities Is Confirmed by the Hilken-Arnold Correspondence

From Herrmann's confession of April, 1930, before the two Agents, we learn that he met Woehst about the beginning of December or the end of November, 1916, when he came from the General Staff to report to Hilken (Rec. p. 5451); and Woehst stated that his instructions from the General Staff were to report to Hilken and

" Through Hilken get in touch with Captain Hinstch and I about blowing up these things "

and he was

" to go over there and help Hintsch and to use those tubes." (Rec. p. 5489.)

[1] If Herrmann was not engaged in sabotage, why should Hilken have been anxious not to be linked with payments made to Herrmann?

[2] *Note by the Secretariat*, this volume, p. 345.

An examination of the Hilken-Arnold correspondence confirms in detail Herrmann's testimony regarding Woehst.

On December the 12th, 1916, J. A. Arnold, who was prominent among the German saboteurs in South America and who was financed by Hilken, wrote Hilken a letter from Buenos Aires which contained the following:

" I have noted that you will sign your cables by a name commencing with H. [1] and I will sign mine by a name commencing with A. I thought it was safer to sign my last cable by S's F. than by my name, because I did not want the cable office to know my being in connection with you. At the same time I wanted to be absolutely sure that you knew the cable came from me. I did not believe that the name S. was known to anybody here or there, and I am thankful to you for your warning. In the meantime you will have received my letters of Oct. 14, 18, and Nov. 16, & 24.

" I am sure you have been very busy all the time, as I have read so much about your work in the papers, and I congratulate you on account of your success! My business has been pretty good here and the prospects are far from being bad. With regard to our meeting I have come to the conclusion, that it will be better for us that I go to see you. I shall have to speak to men of different branches and got my informations from specialists." (Ex. 906, Ann. GG).

Under date of January 11, 1917, Hilken replied acknowledging receipt of the letter quoted above and other letters written by Arnold, and then he says:

" Of course, I was greatly interested in all you wrote me regarding the progress of your business, the difficulties you have met with, etc. etc. I think your idea to come here a good one, especially as our principals abroad, realizing that my other interests require too much of my time and make it impossible for me to devote my energies to their interests, have sent a young man, who arrived here a month ago and whom I have since initiated into our American trade. He brought with him several new samples which may also find a market in Argentine.

* * * * * * *

" Only a few days ago I wrote my friend H. Arnold of the North German Lloyd at Buenos Aires to pay you on demand up to $1,000.— gold equal about 2000 pesos, but referring to your letter of November 24th, I have decided to remit an additional $1000.— gold for account of Mr. F. O. H. Thomae. I shall probably send this through the Guarantee Trust Co. direct to the Banco Aleman Transatlantico for credit to account of Mr. Thomae. This is all the money I can spare at present; but I have written to our principals abroad requesting them for additional funds, also asking for order from them to remit additional amounts to you." (Ex. 906, Ann. HH).

In his examination under subpoena, Exhibit 976, Annex E, Hilken testified that when he came back from Germany, after his meeting with Nadolny and Marguerre:

" there were two men sent over, I might say three, although one arrived here a little before I did — that was Fred Herrmann; the other two were Arnold, who was to go to South America, and whom I financed, and Willie Woehst, who arrived here in November, 1916." (id. p. 49).

He further testified that Woehst came from Nadolny and Marguerre for sabotage work and was added to the sabotage forces which were working under him and reported to Hilken in Baltimore (id. p. 49). He then was shown the carbon copy of the letter of January 11, 1917, addressed to J. A. Arnold which is quoted above and testified as follows:

" First of all, who are the ' principals abroad ' to whom you refer?

" A. Nadolny and Marguerre.

[1] For evidence of this practice by Hilken see his 1915 diary, Ex. 585, Ann. C; also Ex. 976, Ann. E, pp. 87, 88.

" Q. Who is the young man you mentioned?
" A. What date is that letter?
" Q. January 11, 1917.
" A. That is Willie Woehst.
" Q. What is the subtle allusion to your initiating him ' into our American trade '?
" A. That is undoubtedly sabotage. It can refer to nothing else.
" Q. What are the ' new samples ' which he is supposed to have brought with him?
" A. Probably pencils, incendiary devices of some sort — I don't remember; no doubt that is what I was referring to.
" Q. You say, ' These samples may also find a market in Argentine.'
" A. Yes. Arnold was carrying on sabotage in the Argentine." (id. pp. 50-51.)

He was asked whether Woehst was sent to speed up the sabotage activities in the latter part of 1916 and he explained the necessity for an additional key man due to the activities of Hinsch and Herrmann in connection with sabotage against all the plants which at that time were manufacturing munitions (id. p. 52). He was asked whether Hinsch was correct in his claim (Ger. Ex. CXXVIII, p. 110) that, after he, Paul Hilken, had returned from Germany, Hinsch had discontinued his sabotage activities and destroyed the balance of his supplies and in reply to this he stated as follows:

" There was never any thought of Hinsch or Herrmann, and their men, quitting sabotage activities. In fact, Herrmann had brought with him the new incendiary devices, the tubes, and it was from that time onward that sabotage could be practised with greater effect. After my return from Germany, instead of quitting, the work was carried on with greater intensity." (id. pp. 53-54.)

From the foregoing quotations it is perfectly clear that Hilken, Herrmann, Hinsch, and Woehst in America, and Arnold in South America, continued their sabotage activities after the U-boat enterprise started, and in this connection it is to be noted that Woehst arrived in this country on November 27, 1916 (Ex. 995, Anns. B & C). He was sent here by Nadolny and Marguerre and he first appeared on Hilken's payroll as receiving $500 on December 13, 1916, almost exactly one month prior to Hilken's letter to Arnold (Ex. 909, Ann. B).

(7) *The Arnold Correspondence Proves Sabotage by German Agents in Neutral Countries Including United States*

In the Answers of Germany, it was specifically denied that there was a campaign for the destruction of war supplies in neutral countries (Section III); and it was further denied that the campaign of sabotage in neutral countries was extended to the United States while the United States was at peace with Germany (Section IV).

In said Answers, the German Agent, on behalf of his government specifically denied that any order was issued by any department or agency authorizing sabotage in the United States (Par. 13 of Germany's Answers).

The Answers admitted that the message of January 26, 1915, authorizing sabotage against munition factories was genuine, but claimed that it was the " blunder " of a subordinate; that at any rate it remained in the files and no action was ever taken on it (Par. 14).

In German Exhibit CXXIII, affidavit of Hans Marguerre of " Sektion Politik ", it was admitted that, while the United States was neutral, men and material for sabotage were sent to the United States, and that Hilken and Herrmann were specifically supplied, the former with money, and the latter with incendiary devices, to be used for sabotage in the United States, but it was

claimed that, so long as the United States was neutral, they were only to get information as to establishments producing war material, but that they did not have orders to destroy such establishments so long as the country was neutral; but it was necessary " to make our preparations in America during neutrality so that in case of America's entering the war we would have agents and material on the other side ". (Testimony July 30, 1930, p. 15.)

A somewhat similar claim was made by Hinsch, namely, although he had been engaged in sabotage ever since he saw Rintelen personally, after Hilken returned from Berlin, where he met Nadolny and Marguerre in the spring of 1916, he (Hinsch) ceased his former activities, and did not further engage in sabotage (Ger. Ex. CXXVIII, pp. 88–93, 109).

The confessions of Hilken and Herrmann specifically contradicted Germany's Answers and Marguerre's affidavit.

Hilken's comment in his examination under subpoena with regard to Marguerre's statement that sabotage was not to begin until the United States entered the war is pertinent and deserves to be quoted. He said:

" Well, for obvious reasons, Mr. Sobeloff, [1] none of those instructions were in writing, but it is all bunk when he says that sabotage was not to take place until after America went into the War. And the very fact that all the men connected with sabotage left the minute America was in the war proves that.

" The whole sabotage work was against munition plants while they were manufacturing munitions for the Allies, and that was understood. It was understood between Marguerre, Nadolny, Herrmann, Dilger and myself, we all knew. Of course, it is their word against my word.

* * * * * * *

" Another thing that wholly disproves the contention is the fact that the entire inoculation of horses with anthrax germs was done long before I even met Nadolny and Marguerre. It was done immediately after Rintelen came over here, and Hinsch and Dilger were active in that long before I was taken ill, they were active in it and had their whole organization complete for the inoculation of horses, down at Norfolk and Newport News. Then the fact that when Rintelen came over here he established the ' cigar ' factory for making bombs at that time. It is so ridiculous on the face of it — the whole record proves that sabotage was going on during that whole period, before, not merely by us, but take the cases out on the Pacific Coast. Then there was Bode and Wolpert, the bunch that was working in Hoboken. They were all working at it. And the Consul at San Francisco, he had a gang working at that time. In fact, Fay, Rintelen & von der Goltz not only planned but executed their sabotage operations and were convicted and sentenced to Atlanta on that account long in advance of the entry of the United States into the War. Fay was actually convicted before we entered the war, and, as I recall, Rintelen's conviction may have been delayed, but it was on account of activities that long antedated our entry into the War.

* * * * * * *

" After I came back from Germany there were two men sent over, I might say three, although one arrived here a little before I did — that was Fred Herrmann: the other two were Arnold, who was to go to South America, and whom I financed, and Willie Woehst, who arrived here in November, 1916. Now Willie Woehst came directly from Nadolny and Marguerre in 1916, in November.

* * * * * * *

" He [Woehst] was to be added to the sabotage forces which were working under me." (Ex. 976, Ann. E, pp. 46-49.)

The correspondence between Arnold and Hilken (Ex. 906, Anns. T. *et seq.*) and the intercepted cables passing between Berlin and Buenos Aires specifically show the falsity of Germany's pleading, first, that Germany never authorized

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[1] Mr. Sobeloff, the United States Attorney at Baltimore, Maryland.

sabotage in neutral countries, and, second, that the instructions to Hilken and Herrmann were not to commit acts of sabotage in America until and unless America entered the war.

This correspondence and the intercepted cables show that Arnold was a German agent equipped with disease germs and incendiary devices to be used principally in the Argentine, which never declared war against Germany; that these sabotage instruments were so used by him; that he was paid by Hilken many thousands of dollars for his sabotage work in the Argentine. But these letters and cables also conclusively show that, while Arnold was carrying on sabotage work in the Argentine, Hilken through Hinsch, Herrmann and Woehst, was conducting a program of incendiary sabotage and of inoculating animals in America; and that this program was not interrupted by the U-boat enterprise, but was coincident with that scheme, and lasted until it was interrupted by the entry of the United States in the war, at which time all the German saboteurs, except Hilken, scurried away from America, like rats deserting a sinking ship.

It is clearly established that Arnold was an Agent of the Admiralty Staff, operating in the Argentine and other Latin-America countries in 1916, 1917 and 1918, and that he had been loaned to the General Staff (Ex. 320, Rec. pp. 866, 869, 900); and Arnold was most probably the Admiralty agent who came to the United States in 1915 with a Swiss passport under the name of Victor Thomsen (id. Rec. pp. 822, 874, 875).

Arnold, like Hilken, was working for " Sektion Politik " of the General Staff, and the expressions " our friends abroad " and " our principals " found in their correspondence can only refer to the " Sektion Politik " of the General Staff.

Attached to Exhibit 906, there are annexed communications passing between Hilken in Baltimore and Arnold in Havana and later in Buenos Aires, in which thinly veiled references are made to the sabotage activities of both of them. These communications began on August 3, 1916, just four days after the destruction of Black Tom and two days after the " U-Deutschland " sailed from Baltimore, and continued through February 24, 1917, and prove conclusively that Hilken and his agents, including Herrmann, were actively engaged in sabotage operations in the United States, the Argentine and other countries, coincident with Hilken's submarine activities; and thus discredit both Ahrendt and Hinsch, who testified that, after the submarine enterprise started, Hinsch was so busy, and was confined so closely to the submarine base, first, at Baltimore and later at New London, that it was impossible for him to engage in any other form of activity.

By this correspondence it is established that Arnold had, during a part of the time, two cover addresses, to-wit, Mr. John Herbert Schmidt, Casilla de correo 487 (Ex. 906, ann. CC), an admitted agent of the General Staff (Ex. 320, Rec. p. 869) and Senor F. O. H. Thomae, Casilla de correo 692, Buenos Aires (Ex. 906, Ann. EE), and that Hilken had three cover addresses, two in Baltimore and one in Ashtabula, Ohio (Ex. 906, Ann. BB 1). When Arnold needed money and could not get it through another German agent in the Argentine, John Herbert Schmidt, he would apply to Hilken asking him to remit the money to " Mr. Thomae, who keeps my money", and he " has an account in the Banco Aleman Transatlantico, here " (Ex. 906, Ann. FF). Arnold warned Hilken that:

" It would perhaps be better not to send letters in envellops of your Navigation Co., as certain people are very sharp in this country." (Ex. 906, Ann. GG.)

A few quotations from the correspondence between Arnold and Hilken and from the intercepted cables will show clearly that Arnold was the agent of the General Staff for sabotage in the Argentine just as Hilken was in the United

States, and that both of these agents continued their activity until the United States entered the war.

Under date of August 3, 1916, Arnold in Havana wrote Hilken suggesting that Hilken meet him in Colon and that they go together to South America, saying:

" * * * it is a shorter trip along the West Coast * * *. I have a few medicines with me." (Ex. 906, Ann. T.)

On August 7, 1916, Hilken cabled Arnold at Havana as follows:

" Have been trying arrange meeting with you Regret impossible leaving before September if you consider advisable will send *trustworthy representative* to meet you * * * ". (id. Ann. Y) (Emphasis supplied.)

This " trustworthy representative " was Herrmann. See Paul Hilken's letter of August 6, 1916 (typographical error 1917 to) his father:

" Hinsch and I had already thought over in reference to Cuba that it is at present impossible for me to get away, and we must therefore send Lewis [Herrmann] there." (Ex. 42 attached to Ex. 976, Anns. A-D.)

On August 21, 1916, Hilken wrote Arnold apologizing for not being able to meet him at Havana or Panama, as had been suggested by Arnold, and saying:

" Nothing would please me more, especially as I realize that you may need me there. Unfortunately, I am at present unable to say whether it will be possible for me to go to South America, especially, *because our friends abroad have been urging me to see them at the earliest possible moment.*" (Ex. 906, Ann. B B 1.) (Emphasis supplied.)

On October 14, 1916, Arnold in Buenos Aires wrote Hilken in reply to the letter of August 21, 1916, stating it was necessary for him to get out of the tropics and he has reached " this cool country after a short time (with my samples)", and then states:

" * * * I have also a great interest of seeing you, as I would want to speak to you *about some new articles for which there will be a good market here.*

" * * * I have so far *executed my first order*, but before you get this letter, I shall have executed many more orders, as I have booked several. There is a big market for my article — shaving brush — in this country; but with the same expenses for office, travelling, salaries and so on I may carry some more articles and make a great success. The Argentine is getting very important, indeed." (Ex. 906, Ann. CC.) (Emphasis supplied.)

In Exhibit 320, Rec. p. 869, there is an intercepted message of January 24, 1917, identifying John Herbert Schmidt as " agent for the General Staff ", and instructing him " to work in cooperation with reliable agent of the Navy ".

Under date of November 24, 1916, Arnold wrote Hilken indicating that things were not progressing smoothly and requesting funds, as follows:

" * * * then I shall need about five thousand dollars gold ". (Ex. 906, Ann. FF.)

Under date of December 12, 1916, Arnold wrote Hilken a letter, suggesting the desirability of Arnold's going north to meet Hilken, saying:

" I am sure you have been very busy all the time, as I have read so much about your work in the papers, and I congratulate you on account of your success! My business has been pretty good here and the prospects are far from being bad." (Ex. 906, Ann. GG.)

Under date of January 11, 1917, Hilken replied to Arnold's letter of December 12, as well as his earlier letters of October 14 and 18, and Nov. 16 and 24, saying:

"* * * I think your idea to come here a good one, especially as *our principals abroad*, realizing that my other interests require too much of my time and make it impossible for me to devote my energies to their interests, *have sent a young man*, who arrived here a month ago and whom I have since initiated into our American trade. He brought with him several *new samples* which may also find a market in Argentine.

* * * * * * *

" Only a few days ago I wrote my friend H. Arnold of the North German Lloyd at Buenos Aires to pay you on demand up to $1,000.— gold equal about 2000 pesos, but referring to your letter of November 24th, I have decided to remit an additional $1,000.— gold for account of Mr. F. O. H. Thomae. * * * This is all the money I can spare at present; but I have written to our principals abroad requesting them for additional funds, also asking for order from them to remit additional amounts to you." (Ex. 906, Ann. HH.) (Emphasis supplied.)

The " young man, who arrived here a month ago " and who was initiated by Hilken " into our American trade " is identified by Hilken as being Willie Woehst, who brought with him some new tubes (Ex. 976, Ann. E, pp. 49–51). Woehst arrived on the " Frederick VIII " on November 27, 1916 (Ex. 995, Ann. C).

In addition to the payments to J. A. Arnold, mentioned in Hilken's letter of January 11, 1917, the record discloses that, under date of April 6, 1917, Hilken wrote Crossman & Sielken asking that they remit $5,000 to Arnold in Buenos Aires (Ex. 906, Ann. QQ), and on August 17, 1917, Hilken sent $4,000 to Arnold, as evidenced by his check No. 238 (Ex. 909).

Under date of February 13, 1917, Arnold wrote Hilken acknowledging Hilken's letter of January 11th, 1917, expressing his intention to leave about the 23rd instant for New York and then he says:

" Many thanks for advising your friend to pay me the sum, you mention in your letter. I will call upon him one of these days, and as difficulties have arisen again, as I anticipated, I shall need the money, to keep my firm here supplied with money for about four months hence. But for the future I cannot be left without funds, and it was very good of you, to write to our friends, requesting them for additional funds." (Ex. 906, Ann. 00)

Under date of January 20, 1917, Arnold, in Buenos Aires, wrote Hilken complaining about the non-cooperation he was receiving in the Argentine and expressing his opinion that:

"* * * it will be most necessary to go to the States and talk over many things. I have wired for permission and I hope to get soon a telegram from you telling me that I shall leave. Business is alright, and my men are good fellows so that I may be away for some time." (Ex. 906, Ann. LL.)

Under the same date, January 20, 1917, Moller, in Buenos Aires, sent a message to Berlin:

" For Admiralty Staff of Navy in Berlin Arnold to General Staff Political.
" Request permission by telegram to make a journey to North America for the purpose of consulting a friend there.
" Affairs here will be carried on as usual during my absence." (Ex. 320, Rec. p. 869.)

That Arnold made his trip north and saw Hilken is evidenced by information contained in a letter dated July 6, 1917, from Arnold under the name of Thompsen quoted in a message dated July (?), 1917 from Madrid to Berlin, reading as follows:

" I have received a letter from B'aires dated July 6.
" The following is to be forwarded to the General Staff:

" With reference to my journey north, I have had a discussion with Paul concerning practical experiments with the dynamo report immediately how far other machines are * * * It was impossible to meet experts as the declaration of war had been dispatched and a sudden departure became necessary.

" I have received * * * for Department ' E ' and ' B ' from here in September and January each 10,000 paper pesos, from Paul in February 1,000 and in May 5,000 gold dollars; Funds will last until October 5th. Please remit before that date 2,000 pesos. The results from this department appear to be very satisfactory.

" Dynamo Department has drawn the Neiling credit of 100,000 marks. Thompsen." (Ex. 320, Rec. pp. 874-875.)

The above message is confirmed by another message of the same tenor sent July 23, 1917, reading as follows:

" From: B. A.
To. Berlin
" For General Staff No. 3
" Have spoken with Paul and learn that meeting of Dynamometer and other machine experts was impossible. Declaration of war made hurried return necessary.
" Have received at B'aires 20,000 pesos. Paul 5,000 dols. Funds will be exhausted by October. Request further 20,000 pesos.
" Dynamo section has drawn out the Neiling credit of 10,000 marks.
(signed) Thompson." (Ex. 320, Rec. p. 875.)

The fact that Arnold met Hilken in New York is evidenced by an entry in Hilken's diary for 1917 for Wednesday, March 28th, reading as follows:

" X to N. Y. 11 a. m. breakfast diner
See Arnold dine Biltmore Rice Fr. and Arnold —
Reisenweber's X " (Ex. 583, Ann. D, Rec. p. 2329.)

It is clearly established by contemporaneous intercepted messages that Arnold's sabotage activities in the Argentine continued throughout the year 1917. Some of these messages are set out below:

Under date of July 9, 1917, Luxburg, German Minister to the Argentine, radioed Germany as follows:

" Without showing any tendency to make concessions, postpone reply to Argentine * * * note until receipt of further reports. A change of Ministry is probable.

" As regards Argentine steamers, I recommend either compelling them to turn back, *sinking them without leaving any traces* or letting them through. They are all quite small." (Ex. 868, Ann. N.) (Emphasis supplied.)

Under date of December 14, 1917, Madrid cabled Berlin as follows:

" Arnold desires express instructions as to whether he should stop using dynamite against outgoing ships. He reports the departure of a new mule transport on November 30th for Mesopotamia." (Ex. 320, Rec. p. 882.)

Under date of December 18, 1917, Berlin sent the following in reply to the Arnold inquiry reported in the cable of December 14, 1917 (Ex. 320, Rec. p. 882), from Madrid to Berlin. This message reads as follows:

" Military No. 21656
For the Military Attaché
With ref. to Tel. 4592 Dec. 11th.
Please communicate the following to ' A ': —

" Irritation in the political world must be avoided. The use of *dynamite* in vessels engaged in the coasting trade is forbidden but it *is permitted* * * * *in the case of long voyages if its effect is delayed for a considerable period, so that it may be impossible to recognize its origin.* Spare neutral and Russian vessels.
" General Staff " (Ex. 320, Rec. p. 883.)

Luxburg's recommendation that Argentine steamers might be sunk " without a trace ", and the instructions from Berlin to the Military Attaché to be communicated to Arnold, namely, " Dynamite in vessels is permitted in case of long voyages, if its effect is delayed for a considerable period, so that it may be impossible to recognize its origin " would seem to indicate that the only immoral thing connected with sabotage in neutral countries is the sin of getting caught. Compare the instruction given to von Eckardt, the German Minister to Mexico, in connection with the proposed destruction of the Tampico Oil Fields by Herrmann:

Herrmann is correct. He has a commission to set fire to the Tampico oil Felds but don't openly support him.

(8) Financing the Saboteurs

In German Exhibit CXXIII, filed August 15, 1930, Marguerre described his task in " Sektion Politik ", first, in belligerent countries and, second, in neutral countries (id. Testimony July 30, 1930, pp. 4–7). He next described the activities of his agents in America and states that he provided them with instructions and material to stop the working of American establishments essential for war, but that " these instructions were to be followed out only in the event that America should enter the war and were to take effect only from that date on " (id. p. 8).

He related the incident when Captain Nadolny came to his office with Hilken, Jr., and Herrmann and a third gentleman. In a prior conference Nadolny had informed Marguerre that some gentlemen from America were in Berlin; among them was a German-American who had been selected as the head of the submarine boat service and he also spoke of Hilken as one who

" could assist us in the agents-service and that we could use his services in transmitting money and news." (Id. pp. 9, 10.)

At the interview which was held in the afternoon (of Tuesday, February 18, 1916) Nadolny made the introductions but " very soon left my room " and Marguerre stated that:

" I still have a picture in my mind of that discussion. Mr. Nadolny left the room very soon and was not present when I spoke to Hermann about the work assigned to him. I still picture Mr. Nadolny taking leave from us with a short bow before I proceeded to converse with Hermann." (Id. pp. 10, 11.)

He then testified as follows:

" Yes. As I said before, said discussion is still in my mind. I first spoke to Mr. Hilken about the question of transmitting money to our agents in America, since Captain Nadolny had told me at our conference in the forenoon that Mr. *Hilken could assist us in paying out money to the agents.* As far as I remember, I told him that it was to be *his task to pay out money placed at his disposal by us to agents named to him by us.* This was the only question we talked about since Mr. Hilken was to be employed only as intermediary for paying over money to our agents." (Id. p. 11.) (Emphasis supplied.)

He claimed, however, that, outside of the payment of money to the agents, he did " not recall having discussed with him matters of our intelligence service " (id. pp. 11,12). He also claimed that he was careful to take Herrmann aside and that he kept his back to Hilken and the other gentlemen, while he was giving Herrmann his instructions and describing to him the incendiary pencils (id. p. 12 et seq.); and he claimed that Hilken did not take part in the explanation of the incendiary pencils which he was careful to give to Herrmann; and

that, while he was doing this, he turned his back on Hilken, but it was easily possible that Hilken saw the pencils or that Herrmann showed them to him towards the end of the conference (id. p. 17).

Hilken, in describing the same meeting, said that Nadolny and Marguerre told him that he was to pay money to Herrmann whenever Herrmann needed it in America; and he said that the money which he paid to Herrmann was from funds made available to him by the General Staff (Ex. 583, Rec. pp. 2180, 2183, 2185). He further testified that he had credits in the Continental Bank, the Corn Exchange Bank, the Baltimore Trust Company, and the Guaranty Trust Company on which he drew for the purpose of these payments (id. p. 2185); and that from the time he got back from Germany in about April, 1916, until the time the United States entered the war in 1917, he paid Herrmann and Hinsch more than $50,000 (id. p. 2186).

The funds were made available to him probably within two or three months after he got back and were either kept in a special bank account, or he cashed them immediately, and kept them in a safe deposit box, where he always kept a lot of money, some in $1,000 bills, some $500's and some $100's (id. Rec. pp. 2187–2188). The moneys he sent to Mexico after April, 1917, for Hinsch, Dilger and Herrmann may have been over $100,000, and he gave Hinsch the sum of $23,361.75 which Hinsch took with him to Mexico in the latter part of May, 1917 (id. pp. 2189, 2209, 2252). On May 24th, 1917, Hilken paid Hinsch $1,500 (Ex. 976, Ann. E, p. 128; also check No. 218, dated May 24, 1917, for $1,500, Ex. 909, Ann. C).

In his deposition of August 26, 1930, Hilken testified that according to his recollection he paid Hinsch and Herrmann $60,000 not including the funds he had previously received from Rintelen, and that, in addition, he had remitted $50,000 " to an agent in Japan " (Ex. 829, Rec. pp. 6110, 6111). He had previously testified that he had received in the neighborhood of $10,000 from Rintelen and expended the same for sabotage purposes which he paid to Hinsch, mostly in $1,000 bills, and that Hinsch did not account to him for what use he made of these moneys (id. pp. 6099, 6100).

In his testimony under subpoena in September, 1933, Hilken explained the " A. C. D." account on the books of the Eastern Forwarding Company, aggregating $95,000, as representing the amounts credited on his books on which Anton Dilger drew after he got to Mexico (Ex. 976, Ann. E, pp. 44–46). He further testified that he did not remember the exact amounts he sent to Mexico.

> " but it was probably in the neighborhood of two or three hundred thousand [dollars] that eventually went to Mexico * * * to get them [the saboteurs] out of this country, and also to finance Herrmann, Dilger and Hinsch who had then gone to Mexico." (Id. pp. 45, 46.)

Some of this money went before and some after the United States had entered the war (id. p. 46).

We have already seen that after Hermann left the United States and went to Mexico, von Eckardt, the German Minister, on the 13th day of April, 1917, forwarded a telegram of Herrmann's " to Marguerre or Nadolny " of the General Staff reading as follows:

> " Where is Lieut. Wohst stationed? Has he sent about 25,000 dollars to Paul Hilken. He or somebody else it so [is to?] send me money." (Ex. 520, Rec. p. 1847.)

This is a clear indication that Hilken was expecting to receive an additional sum of $25,000 for sabotage purposes in Mexico.

That large sums of money were being made available by the General Staff to Hilken for sabotage purposes is conclusively established by the following cables from the General Staff, Berlin:

(1) Dated December 6, 1917, from Berlin to Madrid reading as follows:

" Financial assistance through the Argentine is impossible in view of the present political situation and the lack of communication. When $300,000 have been transmitted to the Minister by HILKEN, fresh funds for espionage are unnecessary.

(Signed) General Staff " (Ex. 868, Ann. O)

(2) Dated December 18, 1917, from Berlin to Madrid:

" Please ask Delmar [Dilger] whether the remittance of 300,000 by Hilken to the Minister at Mexico has taken place." (Ex. 868, Ann. P.)

In February, 1932, Hilken located his check stubs on his sabotage account in the Corn Exchange Bank in New York. From this account alone, he paid, during the period August, 1916, to August, 1917, to the German saboteurs — Herrmann, Hinsch, Woehst, Arnold, and Gerdts — the sum of $26,209.65 (Ex. 909). This was in addition to the sums of $23,361.75 and $1,500, given to Hinsch at the time Hinsch left for Mexico in the latter part of May, 1917. Therefore, during the twelve month period aforesaid, Hilken paid from his account in the Corn Exchange Bank the sum of $51,071.40. All of these payments are evidenced by undisputed, contemporaneous, documentary evidence, and prove conclusively that the German Government during that period expended, from one account, nearly $1,000 a week in financing the sabotage operations of Hilken and his group.

(9) Summary and Conclusion on the Question of Fraud

We have examined the pleadings and ascertained from the evidence, adduced to sustain the pleadings, that the pleadings filed by Germany were false in making the following allegations:

(1) Germany had never authorized sabotage in neutral countries;

(2) Sabotage in the United States had never been authorized during the period of its neutrality;

(3) Though men and material for sabotage were sent to the United States in 1916, definite instructions were given limiting and prohibiting the sabotage activity until the time when the United States should enter the war.

We have examined the evidence and shown that Germany authorized, and German agents committed, acts of sabotage in neutral countries, some of which remained neutral throughout the war; that Germany authorized, and German agents committed, acts of sabotage in the United States while the United States was neutral; and that Germany authorized, and German agents committed, acts of sabotage in Mexico and Argentine, both of which countries remained neutral during the war.

We have examined the evidence adduced by Germany and have ascertained that Wozniak, at whose bench the Kingsland fire started, was guilty of perjury and fraud permeating and destroying the whole of his testimony. We have shown that his testimony, in essential features, was false, and that it was purchased and paid for before his affidavits were filed; that, before his affidavits were filed, he demanded and received large sums of money, and that his demands for compensation began before his affidavits were filed and that they had not ceased when Germany repudiated him as a witness. We have shown that he wrote two letters to the Russians warning them of what he claimed to be deplorable conditions in the Kingsland factory, and that, two days before the fire, he wrote a postal card warning that a catastrophe was impending, but that he made

no disclosures of his information or fears, either to the authorities at the plant or to the police. We have further shown that, after he was repudiated as a witness by Germany, he contradicted all the important points of his former testimony.

We have shown that the Lyndhurst testimony, upon which the Commission based its decision at Hamburg with regard to the Kingsland fire, was false and purchased and known to have been false before the affidavits were filed by Germany, and that the three witnesses producing the same were promised additional compensation when the case should be closed.

It has been clearly established that Ahrendt, Woehst, and Hinsch, the three witnesses introduced by Germany to disprove the confessions of Herrmann and Hilken, were guilty of the grossest kind of fraud; and, although they claimed to be innocent and ignorant of any sabotage in the United States during neutrality, they were part and parcel of the band of saboteurs whose activities were responsible for the loss of millions of dollars worth of property and many lives.

After the record had clearly established the fact that Hinsch, under employment by Rintelen and Hilken, had been engaged in acts of incendiary sabotage and inoculating animals with disease, it was claimed by Germany that this form of sabotage ceased, after the return of Hilken and Herrmann from the conference with Nadolny and Marguerre in Berlin in February, 1916.

On the contrary, it has been clearly established that, as a result of that conference, Herrmann was sent to America, " with new devices ", and that Herrmann and Hinsch both continued the same forms of sabotage; that Hilken continued as sabotage paymaster, and that Ahrendt and Woehst aided and abetted them in their destructive mission.

We have shown that Hinsch, upon whose testimony Germany mainly relied to break down the confessions of Herrmann and of Hilken, as well as to destroy the Herrmann message, began his sabotage activities with Rintelen and continued them in the United States until he was forced to flee from this country to escape a Presidential warrant of arrest, and that, after he got to Mexico, his sabotage activities did not cease. In order to substantiate Germany's false pleadings, he made many false statements upon which the Commission relied in its several opinions.

In the course of the examination of the testimony given by Germany's witnesses, it has become more and more evident that their affidavits, which were carefully prepared to destroy the confessions of Hilken and Herrmann, have been built upon a mass of false pleadings and false premises. The destruction of these false pleadings and false premises has left the confessions of Hilken and Herrmann without the stigma produced by these false attacks, and these confessions must be reexamined in the light of the destruction of the perjured evidence directed against them.

The conclusion from an exhaustive examination of the record, is accordingly irresistible that the decision of October 16, 1930, reached at Hamburg, must be set aside, revoked and annulled; and the cases reinstated in the position they were before that decision was rendered.

Wozniak, the man at whose bench the Kingsland fire started, has admitted, since the Hamburg decision, that he consorted with German agents; that they instructed him in the methods of starting a fire; and that he received money from them.

We have concluded that Wozniak's failure to bring to the proper local authorities the information and fear disclosed in his letters and his postal card to the Russian authorities, coupled with his conduct at and since the fire, convict him of the complicity in the design and result.

Having found from an examination of the record, both before and after the Hamburg decision, that the Kingsland fire and explosion was the work of Ger-

man agents, it now becomes necessary to examine the question as to whether German agents were responsible for the destruction of Black Tom. This question, as in the case of the Kingsland destruction, must be reexamined in the light of all of the evidence including that tendered on the issue of fraud and collusion.

III. HERRMANN MESSAGE

What It Proves, If Genuine

In the decision at Washington, December 3, 1932, the Umpire, after examining the evidence relating to the Kingsland fire, expressed his conclusion as follows:

" I am of opinion the matters above discussed are insufficient, when taken with the proofs offered before the final hearing, to alter the finding that there is no credible evidence that Wozniak was a German agent, was connected and consorted with German agents, or that he was in Mexico in 1917." (Decs. and Ops., p. 1013) [m]

After expressing the above opinion, the Umpire then concluded his discussion of the Kingsland case as follows:

" If the so-called Herrmann message is authentic, that document alone would compel a finding contrary to that I have just stated so far as concerns Wozniak's being a German Agent." (Id. pp. 1013, 1014.) [n]

Later, in the same opinion in opening his discussion of the Herrmann message, the Umpire said:

" On July 1, 1931, there was filed with the Commission a Blue Book magazine of the January, 1917, issue, containing upon four printed pages lines of writing running crosswise of the print. This, we are told, is a code message forwarded by Fred Herrmann in Mexico to Paul Hilken in Baltimore in April, 1917; names being referred to by numbers in the script, the numbers referring to other pages of the magazine where the names were indicated by pin pricks through printed letters in the text. The writing fluid is said to be lemon-juice made visible by the application of heat." (Id. pp. 1015, 1016.) [o]

The coded and decoded form of the message follows:

" Have seen 1755 [Eckhardt] he is suspicious of me Can't convince him I come from 1915 [Marguerre] and 1794 [Nadolny] Have told him all reference 2584 [Hinsch] and I 2384 [Deutschland], 7595 [Jersey City Terminal], 3106 [Kingsland], 4526 [Savannah], and 8545 [Tonys Lab] he doubts me on account of my bum 7346 [German] Confirm to him thru your channels all OK and my mission here I have no funds 1755 [Eckhardt] claims he is short of money send by bearer U S 25000. — Have you heard from Willie Have wired 2336 [Hildegarde] but no answer Be careful of her and connections Where are 2584 [Hinsch] and 9107 [Carl Ahrendt] Tell 2584 [Hinsch] to come here I expect to go north but he can locate me thru 1755 [Eckhardt] I dont trust 9107 [Carl Ahrendt], 3994 [Kristoff], 1585 [Wolfgang] and that 4776 [Hoboken] bunch If cornered they might get us in Dutch with authorities See that 2584 [Hinsch] brings with him all who might implicate us. tell him 7386 [Siegel] is with me. Where is 6394 [Carl D] he worries me remember past experience Has 2584 [Hinsch] seen 1315 [Wozniak] Tell him to fix that up. If you have any difficulties see 8165 [Phil Wirth Nat Arts Club] Tell 2584 [Hinsch] his plan O.K. Am in close touch with major and influential Mexicans Can obtain old 3175 [cruiser] for 50000 West Coast What

[m] *Note by the Secretariat*, this volume, p. 113.
[n] *Note by the Secretariat*, this volume, pp. 113.
[o] *Note by the Secretariat*, this volume, pp. 114.

will you do now with America in the War Are you coming here or going to South America Advise you drop everything and leave the States regards to 2784 [Hoppenburg] Sei nicht dum mach doch wieder bumm bumm bumm. Most important send funds Bearer will relate experiences and details Greetings " (Ex. 904).

In his further discussion of the message, the Umpire after quoting the decoded form, said:

" A glance through this translation will indicate that, without reference to any other evidence, it is conclusive proof to any reasonable man that (a) Herrmann and Hilken knew the Kingsland fire and the Black Tom explosion were the work of German agents and (b) that Hinsch, Hilken, and Herrmann, undoubted agents, were privy thereto, and (in the light of the record before the Commission) (c) that Kristoff and Wozniak were active participants in these events. As the American Agent has well said, I may utterly disregard all the new evidence produced and still, if I deem this message genuine, hold Germany responsible in both of the cases." (Decs. and Ops., p. 1016.) [p]

The German Commissioner concurred in the whole opinion of the Umpire and therefore approved the above deductions.

In a note appended to his separate opinion, the Honorable Chandler P. Anderson, the American Commissioner, used the following language (Decs. and Ops., p. 1035): [q]

" The so-called Herrmann secret message, embodied in the Blue Book Magazine for January, 1917 (Exhibit No. 904), if accepted as authentic, would conclusively prove the liability of Germany in both the Kingsland and the Black Tom cases."

In this opinion we have already concluded that so far as the Kingsland disaster is concerned:

" Wozniak's failure to bring to the proper local authorities the information and fears disclosed in his letters and postal card to the Russian Embassy at Washington, coupled with his conduct at and since the fire, convict him of complicity in the design and result." (*Supra*, this Opinion, p. 53.) [r]

This conclusion has been reached independently of the Herrmann message.

It becomes necessary, therefore, to determine whether the explosion at Black Tom was the result of the activities of German agents. If the Herrmann message be a genuine document, then, under the Umpire's decision of December 3, 1932, concurred in by the German Commissioner, and under the note of the American Commissioner appended to his separate opinion, that document is conclusive proof that German agents were privy to, and active participants in, both the Kingsland and the Black Tom explosions.

In the study of the question as to whether the Herrmann message is a genuine instrument, this question must, in accordance with the decision of July 29, 1935, be " reexamined in the light of all of the evidence, including that tendered on the issue of fraud and collusion".

Before examining the record with reference to the evidence bearing on the question as to whether the Herrmann message is a genuine instrument or not, it is necessary to study the circumstances connected with the drafting, transmission, receipt, and production of the message.

There are four persons whose testimony must be studiedi n order to get a clear picture of these circumstances, namely:

Herrmann, who composed the message:

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[p] *Note by the Secretariat*, this volume, p. 115.
[q] *Note by the Secretariat*, this volume, p. 126.
[r] *Note by the Secretariat*, this volume, p. 276.

Siegel, who after Herrmann had composed it, dictated the message to Herrmann for transcription in invisible ink;

Gerdts, the messenger who transported the message from Herrmann in Mexico City to Hilken in Baltimore; and

Hilken, who received and developed the message in Baltimore and later produced the Blue Book message now in evidence.

1. Herrmann

Frederick L. Herrmann was born in Brooklyn, N. Y., September 10, 1895. His father was a German, born in Bederkesa, Germany, and came to this country when he was fourteen or fifteen years of age. The father was naturalized some time between 1885 and 1890 (Rec. pp. 4337, 5432). The mother was a natural born American of German descent (Rec. p. 5474). Herrmann was the second of four sons (Rec. p. 5433).

When the war broke out in 1914, Herrmann was working for W. R. Grace & Co., importers and exporters, but at the beginning of the war he was laid off with a number of other employees (Rec. p. 5432).

On or about January 14, 1915, a passport was issued to Herrmann in the name of Fred L. Herrmann to travel in Holland and Germany for the purpose of visiting his grandmother at Bederkesa, Germany (Rec. p. 2304).

On or about February 2, 1915, Herrmann sailed from New York on the Dutch steamer " Ryndam ". Going over on this ship he met William Kottkamp, a member of the German Secret Service and Kottkamp interested him in his activities (Rec. pp. 5425, 5433 et seq., 5475).

After Herrmann had arrived at his grandmother's home in Bederkesa, he received a wire from Kottkamp calling him to Berlin where Kottkamp introduced him to Captain Prieger of the German Admiralty Staff (Rec. pp. 5434, 5435). Herrmann accepted service with the German Admiralty Staff and was sent to England to watch the British fleet and report its movements for Military and Naval Intelligence (Rec. p. 5435).

In order to enter England, he obtained on or about March 4, 1915, an emergency passport from the American Legation at The Hague for the purpose of " visiting England for commercial business, and not to use Department passport which has been used in visiting Germany " (Rec. p. 5666).

In a letter to the Department of State, dated June 16, 1915, relating to his application of June 10, 1915, for another passport, he claimed to have been previously employed by " The European Textile Company " which had discontinued business (Rec. p. 5670.) (Fred Herrmann's brother Edwin Herrmann, afterwards claimed that the name " European Textile Company " was a blind for importing incendiary devices into the United States (Ex. 729, Rec. p. 4869)).

On his first trip to England, Herrmann remained for two or three months doing espionage work and returned to Berlin via Holland, reporting to Captain Prieger of the Admiralty Staff. He then came back to this country and on or about July 1, 1915, received a new passport for the purpose of visiting Holland on " commercial business " (Rec. pp. 2309, 5437). This passport was issued upon an application dated June 10, 1915 (Ex. 583, Ann. B., p. 2308).

With this passport Herrmann again entered England and matriculated at Edinburgh University in August or September, 1915, taking a course in forestry. While at Edinburgh he reported the movements of ships in the Firth of Forth where he was near the naval base. He remained at Edinburgh University until December, 1915, but his activities came under the suspicion of Scotland Yard and they put him aboard the " New Amsterdam " of the Holland Line for New York (Rec. pp. 5439, 5440).

In New York he stayed " a week or two " and then went back to Bergen in Norway, on the S. S. " Kristianafiord ". On this vessel he met Dr. Anton Dilger, alias, Delmar. After arriving in Bergen, Herrmann and Dilger went to Copenhagen where they met members of the German Admiralty Staff. They then went to Berlin, arriving in January, 1916, where Herrmann reported his arrival to Captain Prieger (Rec. pp. 5440–5442).

In Berlin Herrmann met Paul Hilken, of Baltimore, who had already been paymaster under Rintelen for German saboteurs in America and who was to become Herrmann's paymaster for the time of his employment in America.

When we were discussing the subject " Financing the Saboteurs " (*Supra*, this Opinion, pp. 151, et seq.),[8] we ascertained that Nadolny and Marguerre arranged for a conference in " Sektion Politik " which was attended by Hilken, Herrmann and a third gentleman who turned out to be Anton Dilger (Ger. Ex. CXXIII, pp. 9 *et seq.* Trans. of July 30, 1930). At this conference instructions were given relating to sabotage in America, and Herrmann was furnished with sabotage devices for that purpose, though it was claimed by Marguerre that " these instructions " to Herrmann " were to be followed out only in the event of America entering the war and they were to take effect only from that date on " (id. p. 8).

At this conference Marguerre instructed Hilken that " it was to be his task to pay out money at his disposal by us to agents named to him by us " (id. p. 11). Although Marguerre claimed that his instructions and the incendiary pencils to Herrmann were given while the others were not looking or within hearing, these facts were denied both by Hilken and Herrmann, who also denied that their instructions limited the sabotage activities until and unless America entered the war.

In describing the same meeting, Hilken said that Nadolny and Marguerre told him he was to pay money to Herrmann whenever Herrmann needed it in America, and he said that the money which he paid to Herrmann was from funds made available to him by the General Staff (Ex. 583, pp. 2180–2183, 2185); and that he had credits in the Continental Bank, the Corn Exchange Bank, Baltimore Trust Company, and the Guaranty Trust Company on which he drew for the purpose of these sabotage payments.

At this celebrated conference, as admitted by Marguerre, arrangements were made " that Herrmann should draw necessary funds from Hilken. Hilken was instructed to pay the funds demanded by Herrmann up to certain limit (I don't remember the amount) without requesting an accounting " (Ger. Ex. CXXIII, p. 13, Trans. 7/30–30, p. 10, Trans. 8/1–30; also Ex. 583, Rec. p. 2183).

Shortly after this conference, Herrmann and Hilken returned to America on different steamers. Anton Dilger remained in Germany and did not return to the United States until July 4, 1917. On his arrival in New York, Herrmann went to Baltimore where he got in touch with Hilken early in April, 1916. Hilken introduced him to Hinsch and the sabotage activities of Herrmann in this country began at that time.

How active Herrmann became in sabotage work may be realized by ascertaining Herrmann's aliases:

Anderson (p. 4340)	Marstrom (p. 5522)
Herman Hasrstrom (p. 2421)	Lewis (p. 2244)
Fred Herrmann (p. 2228)	F. Lewis (p. 6122)
Fritz Herman (p. 2225)	Herman Lewis (p. 2184)
Fritz Larssen Herman (p. 2225)	March (p. 2413)
Lewis Herman (p. 2228)	Frank Marsh (p. 2421)

[8] *Note by the Secretariat*, this volume, pp. 345 *et seq.*

Fred Leassen or Larssen (p. 2348)
Fred Harrson (p. 2222)
Larenson (p. 2225)
Fred Harstrom (Ex. 950, Ann. A)
Fred March (p. 6211)
Rasmussen (Ex. 900)
Rodriguez (p. 2241)
March (p. 4340)
Fritz Laissen Hermann (p. 2421)

The Eastern Forwarding Company was organized by Paul Hilken in Baltimore in the spring of 1916. It had the same officers as the partners in Schumacher and Company, which was the company representing the North German Lloyd in Baltimore. It was formed for the purpose of taking care of the American end of the shipping business in connection with the operation of commercial submarines between Germany and this country. While it has always been claimed by Hinsch that the operations of this company were distinct from sabotage, it is also true that with Paul Hilken, the Vice-President, and Hinsch, the General Manager, it was impossible to disassociate their activities as sabotage agents from their activities in connection with the company.

The submarine " Deutschland " arrived in Baltimore early in July, 1916. She was unloaded and loaded for her return voyage the latter part of July, 1916. Hinsch and Herrmann assisted in the work of the preparation for the reception and departure of the " Deutschland " on her voyage from Germany, but Hinsch, as we have seen, was away from Baltimore on several occasions during this period.

On the morning of July 30, 1916, the Black Tom explosion occurred. Shortly after that time, as has been clearly established, Hinsch received $2,000 from Hilken which Hilken claims was remuneration for the Black Tom explosion and Hilken says that:

" Hinsch told me at that time that he had hired the men that set fire to Black Tom." (Rec. p. 6112; also pp. 2198, 2199; Ex. 976, Ann. E, pp. 66-71.)

Six days after the explosion, to-wit, on August 5th, Hinsch, Herrmann, Hoppenberg, and Hilken were in the office of the Eastern Forwarding Company in the Whitehall Building with windows looking out over the Hudson River. Two or three windows were cracked by the Black Tom explosion, and, at this meeting, Hoppenberg facetiously pointed to the broken windows and said:

" Why, you fellows have broken my windows ".

Herrmann retorted to Hoppenberg by singing a little song of the war of 1870:

" Lieber Moltke, sei nicht dumm
Mach mal wieder bumm bumm bumm."

which being freely translated means:

" Dear Moltke, Don't be so dumb,
But go out rather and make bumm, bumm, bumm
[explosions]." (Ex. 976, Ann. E. p. 59.)

It has also been clearly shown in this opinion that Ahrendt, — though he claimed to have been innocent and ignorant of all sabotage by German agents,— one week after the fire at Kingsland, to-wit, January 19, 1917, wrote a postscript to a business letter addressed to Hilken in which he congratulated the " von Hindenberg of Roland Park " on " another victory " and informed him that Herrmann, " who is still at McAlpin ", asked Ahrendt " to advise his brother " that he was " in urgent need of another set of glasses " (incendiary tubes) (underscoring in original).

We have also seen that Herrmann was active in assisting Carl Dilger in operating germ laboratories, started by Anton Dilger, for the culture of germs to be used in inoculating animals intended for the Allies and that one of these

laboratories was located in Chevy Chase, D. C. During this time Herrmann lived for a while in Chevy Chase with Carl Dilger and his sister, and he, with Ahrendt, used to distribute to Hinsch and his crowd devices for inoculating animals.

The Kingsland fire and explosion occured on January 11, 1917.

Herrmann in his confession made in 1930 admitted that he, in cooperation with Hinsch, engineered this explosion, that he furnished two men, Wozniak and Rodriguez, who were immediately responsible therefor, with incendiary devices with which to start the fire, that he made them small weekly payments and promised to pay each man $500 in the event they were successful and that he did pay Rodriguez $500 two or three days following the explosion. He did not pay Wozniak for the reason that Wozniak failed to show up at the appointed rendezvous.

We have also studied Herrmann's connection with Willie Woehst, another sabotage agent, who left this country on February 14, 1917, sailing on the same boat with Germany's diplomatic and consular representatives on their return to Germany.

Herrmann on February 24, 1917, under the name of Fred Larssen, together with a Colombian national named Raoul Gerdts Pochet, sailed from New York for Havana, Cuba, on the S. S. " Pastores " en route to Mexico City. They spent about a month in Havana, where they were under the surveillance of the Department of Justice Agents.

Late in March or early in April Herrmann and Gerdts sailed from Havana to Vera Cruz. On the steamer they met Siegel (Ex. 908). From Vera Cruz they went to Mexico City where they met Major Schwierz of the Mexican Army at whose advice they went to Hotel Juarez belonging to Otto Paglasch (Ex. 908).

The next day after their arrival, Herrmann and Gerdts went to see von Eckardt, the German Minister, and Herrmann apprised the Minister of his connections with Nadolny and Marguerre, his activities in the United States, and of the fact that he had been authorized by " Sektion Politik "to destroy the Tampico oil fields.

We have had occasion to discuss this matter before, and it will be recalled that the Minister was suspicious of Herrmann, but forwarded a wire, sent by Herrmann to the General Staff, inquiring about the whereabouts of Willie Woehst and informing the General Staff that Woehst was to send him $25,000. The General Staff confirmed Herrmann's claim that he had been authorized a year before that to set fire to the Tampico oil fields, a commission which had been renewed by Hilken in January. The Minister indicated that a member of his Staff believed that Herrmann and Gerdts were English or American spies and requested an immediate answer (Rec. pp. 1847–1848).

It will be recalled that the " Sektion Politik " confirmed Herrmann's statements as correct, stated that they knew nothing about Gerdts, but that Woehst had been retired. " Sektion Politik " left to the Minister the decision as to whether the Tampico oil fields should be destroyed and cautioned the Minister to do nothing which would endanger Germany's relations with Mexico " or if the question arises, give Herrmann any open support " (Ex. 320, Rec. p. 874). As Herrmann received no answer to his telegram and could not get the $25,000 as a result of his cables to Hildegarde Jacobsen, Herrmann and Siegel " decided to send Raoul Pochet [Gerdts] to Baltimore to obtain funds " (Ex. 908, Ann. C).

In Ex. 904(4), Herrmann identified the original Blue Book Magazine for January, 1917, in which the message was written, as being the magazine which he sent to Hilken by Raoul Gerdts in April, 1917, shortly after America came into the war. He recognized the message as being in his handwriting and stated that he told Gerdts to call upon Hoppenberg in New York to find out from him

the whereabouts of Hilken. He also said that, as he remembered the circumstances, Gerdts returned to Mexico with only about $800.00 and told Herrmann that Hinsch was bringing down the balance of $25,000 which he requested.

Herrmann is confirmed by Siegel's first statement, as follows:

" Raoul Pochet [Gerdts] returned from the U.S.A. about the middle of May, but brought with him much less money than Herrmann expected, or had asked for. He reported that Captain Hinsch would shortly thereafter come himself and bring along the needed funds." (Ex. 908, Ann. C.)

In Siegel's second statement, designed to raise some question as to the first statement, he still recalled that Gerdts was sent to the United States to procure money, and

" Furthermore, I still know that Gerdts stayed away a long time and, to Herrmann's disappointment, then brought with him only a comparatively small amount " (Ger. Ann. 69).

In Herrmann's examination of April 3, 1930, after telling of taking Gerdts with him to Havana and from there to Mexico City, he said:

" Yes; he went with me to Mexico City, and he was there I imagine about a month or five weeks or something like that. I sent him up to Paul Hilken with a couple of letters.

" Q. What were these letters about? A. Asking about Captain Hinsch, asking if any new instructions had come, and so forth." (Rec. p. 5461.)

In Exhibit 986, Ann. A, p. 139, being examination under subpoena in October, 1933, Herrmann, referring to his telegram forwarded by Eckardt to Berlin, said:

" I didn't believe that Von Eckhardt had cabled Berlin. So I sent Raoul Gerdts up to the States. I conferred with Siegel and we thought we better send Raoul Gerdts up to Paul.

" Q. Why?

" A. To get money, to see that Hinsch and different ones got out of there.

" Q. Why did you want Hinsch and the others to get out?

" A. Because I was afraid he would get caught up there. We needed funds."

In the same examination Herrmann's testimony of April 3rd, 1930, quoted above was read to him and he was asked whether it was true or not. He replied:

" A. I knew at that time that I had sent Raoul up with a message. Exactly what it was I did not remember until I saw the Blue Book Magazine when it was produced by Paul Hilken.

" Q. In your April, 1930 testimony, you spoke of a couple of letters being sent to Hilken.

" A. That is all I remembered of it.

" Q. In January, 1929, more than a year before you testified, Gerdts testified you had sent him up with a couple of messages written in a book, and in lemon juice. Were you not aware of that when you testified in 1930?

" A. I never saw any testimony of Gerdts.

" Q. So that you did not have Gerdts' testimony to refresh your recollection in 1930?

" A. No, sir. I did not see the testimony of Gerdts until — after the hearing I returned to Chile, brought my wife and children up and got settled — it must have been at least the month of July, 1930, the first time I ever saw or heard anything about Gerdts' testimony, or later even, for that matter. That is the first time I knew of it.

" Q. Didn't you remember what you had written in the message?

" A. No, sir, I did not, * * * " (Ex. 986, Ann. A, pp. 140, 141).

He was shown the original Exhibit 904 and he stated as follows:

" That is the book and the message which I sent with Raoul Gerdts to Paul Hilken, from Mexico.

" Q. Does that contain one message or two messages?

" A. Well, I notice the back page is missing; the last page of the last story, page 719, that is missing. Perhaps I wrote something on that. What I wrote on it I don't know.

" Q. Might it have been some code to the other message which begins on page 700?

" A. It might have been. I don't exactly remember. * * *

" Q. This does contain a code, does it not?

" A. Yes. The message is partly in code. The numbers in there refer to pin-pricks on the pages.

"Q. You mean the numbers refer to other pages in the magazine?

"A. Yes, containing pin-pricks.

" Q. Containing pin-pricks which prick out the letters of the names referred to in the message?

" A. Yes.

" Q. Referred to in the code number?

" A. Yes, sir.

" Q. This message, on page 700, says, ' Have seen 1755. He is suspicious of me.' How would Hilken know, first of all, on what page of the magazine the message was, and then, having discovered on what page it was, and having heated that page, how would he find out where to look for the pin-pricks that spelled out the name of the person intended by 1755?

"A. I don't remember how he was to find the pages containing the message, nor how I indicated to him the code which I had used. Possibly the missing last page is the missing link.

"Q. Had you arranged such a code with Hilken before your departure from the United States?

"A. That I don't remember.

"Q. Did you ever use a code like this in which a number was interpreted by referring to the pin-pricks on another page of the book?

"A. It is quite possible.

"Q. Do you recall sending the message in the magazine?

"A. I certainly do.

"Q. Do you recall where you got the magazine?

"A. No, I don't recall where I got the magazine; I might have bought it in Havana, perhaps I bought it in Mexico City, at one of the book stores there. I don't remember where I bought it." (id. pp. 141, 142, 143, 144)

In Exhibit 583, Annexes P, Q and R, Special Agent Berliner made to the Department of Justice reports, dated repectively March 1st, 2nd and 11th, 1917, on Raul Pichot (Pochet, Gerdts) and Ferd Larssen (Herrmann) dated at Havana, Cuba (Rec. pp. 2373 – 2392). The Agent traced the activities of Gerdts and Herrmann in Havana and on page 2391, made the following report of what happened at and after dinner at the Hotel Florida on March 10, 1917:

" While eating in came both Larssen [Herrmann] and Pichot [Gerdts], they looked about as if hunting for some one, then went out. Agent then picked em up again at the Plaza, bought em a cigar smoked and talked with them for a while, *then Larssen [Herrmann] bought two of the latest American Magazines* and said he was going to his room." (Emphasis supplied.)

Here we have a report on March 10, 1917, that Herrmann, about a month before leaving Havana for Mexico, purchased two late American magazines.

In reply to the question whether he recalled the actual circumstances surrounding the preparation of the message, Herrmann said (Ex. 986, Ann. A, p. 145):

" I only remembered that it was written while we stopped at Paglasch's Hotel, which was called the Juarez, and that Siegel and Raoul were with me, but as to the

exact details of the circumstances my memory had through the years become rather vague until it was refreshed at the time of the talk I had with Siegel in Tallinn in 1932; then all the circumstances were brought back to my mind.

" Q. What were the circumstances under which the message was prepared?

" A. We sat in our room on the balcony in the back of Paglasch's Hotel. We pulled the table or the wash stand out in front of the window. Siegel and I first prepared the message on paper with a lead pencil, figuring out the code numbers and everything. I then took the magazine and Siegel dictated the message to me and I wrote it in the magazine in lemon juice. Raoul was standing around the room. The message, I recall, was written in the afternoon. The following morning early Raoul left for the States by train."

He testified that Raoul was away about three weeks and they were worried, as they expected him back at the most in ten days or two weeks, so he sent a second wire to Hildegarde, the substance of which was

" Just asking if he had arrived, if she had seen him, or something similar." (id. p. 146)

He then identified the telegram from Ex. 587, Rec. p. 2478, dated May 6, 1917, reading:

" Have you seen Raoul? Answer immediately
Hotel Juarez Greetings "

signed " F. March ", as the telegram which was sent by him.

In his affidavit of November 15, 1932 (Ex. 950, filed November 15, 1932), Herrmann again testified in regard to the circumstances connected with the Blue Book message which had been already filed as Ex. 904. In explaining the circumstances connected with the identification of the message he said:

" When I identified the message in May, 1931, I did not have an opportunity to closely examine the magazine, which I had not seen from the time I handed it to Gerdts in April, 1917, until Hilken showed it to the claimants.

" Hinsch's testimony confirmed the recollection which I had when testifying in Washington in April, 1930, that there were two messages. I spoke of them as 'a couple of letters ', and my best recollection was that there were two messages though I could not remember exactly what I had written. In fact, I recalled the details of the one which is in evidence only because I recognized the magazine and my writing therein.

" The last page of the last story in the magazine, I observe, is now missing. It is my recollection that this page contained a short note in lemon juice, including an explanation of the code.

" In so far as Hinsch now states that the message was written in a book on a plain page and not in this Blue Book Magazine, his statement is entirely false, as is also his description of the contents of the message. Hilken was already acquainted with Gerdts when I first met the latter through Woehst."

2. Siegel

Adam Siegel, who after the message had been composed and written by Herrmann, dictated it to Herrmann for transcription in secret form, traveled with Herrmann and Gerdts in March or April, 1917, on the steamer en route from Havana to Vera Cruz.

Siegel was an electrical engineer who served the German Government in Russia. The first mention of him in the record is found in a voluntary statement given by Lothar Witzke on September 18, 1919, to Captain Thomas J. Tunney, Special Investigator, United States Military Intelligence Division (Ex. 24, Rec. pp. 55, 92–95). In this statement Witzke described two secret agents of the German Government, one named Siegel and the other named Rodriguez (Herr-

mann). The description of Siegel is in some particulars incorrect, and the description of Rodriguez (Herrmann) is evidently the description of Herrmann. Witzke reported that both of these men operated in New York in the early part of the year 1916 under the supervision of the captain of the North German Lloyd Steamship Company (Hinsch), who " was in charge of the tug-boat that took in the submarine Deutchland in Baltimore on the first trip." The statement then has the following information:

" After the declaration of war by the United States against Germany, both of these men worked under the same captain in Mexico City. Siegel was sent as a Russian to the Panama Canal around June 1917. Rodriguez worked during the early part of the European war in England. Both of these men may be connected with or have some information regarding who was responsible for the Black Tom Explosion. Both of them left the United States to Cuba and thence to Mexico about April 4, 1917. I met both of these men in Mexico City." (id. p. 93)

Later Witzke supplied the name of the captain who was in charge of Siegel and Rodriguez as " Captain Frederick Hintsh or Hintch." He related as follows:

" Siegel's first name is Adam; he lived at the Hotel Juarez in Mexico City; was an electrical engineer by profession; spoke Russian fluently; was a Reserve German Cavalry Officer; of South German birth; interned in Russia where he was at the outbreak of the ear; escaped from Siberia and landed in San Francisco. Siegel was in New York in 1916 at the time of the Black Tom Explosion. He was very intelligent and a real patriotic German." (id. pp. 94, 95)

Gerdts met Siegel on a steamer in the port of Havana while he and Herrmann were en route to Vera Cruz (Ex. 626–a, Rec. pp. 2768–2774).

While in Mexico, Siegel was associated with Herrmann, Gerdts and Major R. Schwierz, a major in the Mexican Army, who was reported to have come from the German garrison at Tsingtau (Ex. 626–a, Rec. p. 2768, Ex. 583, Rec. p. 2422).

In a report dated September 16, 1917, Frederick Simpich, American Consul at Guaymas, Mexico, informed the Secretary of State that Siegel and Fred March (Herrmann) had been cooperating with Rademacher, German Consular Agent at Guaymas, and with Major Schwierz of the Mexican Army, and they had been very active in Sonora and lower California, within the preceding two weeks. March's false passport had been obtained from the Mexican Consul General in Cuba, was dated March 5, 1917, bore March's photograph and had on it this legend:

" Gesehen, v. Eckardt, 21 Mai. 17 ". (id. Rec. p. 2422)

In Cuba Siegel was reported to have participated in a negro uprising and he represented himself to the Russian mission in Cuba as a Russian revolutionary, studying labor conditions in Mexico and the United States; and he was also represented to have been in communication with an I. W. W. leader at Bisbee, Arizona (id. Rec. p. 2422).

After arriving in Guaymas, Siegel and March (Herrmann) made an extensive trip into lower California and worked their way north and emerged at Los Angeles Bay (Mexico), where a small wireless had been in commission in June last. They returned to Santa Ana, Sonora, and from that place they went to Guaymas. While at Santa Ana, March received telegrams from Rademacher and Schwierz. On July 16th Major Schwierz telegraphed in German to Siegel ordering him to proceed to Mexico City (id. Rec. p. 2423).

In an affidavit of A. E. W. Mason dated February 15, 1929 (Ex. 625, Rec. p. 2756 *et seq.*), Mason, a British subject, and a captain in the British Army, and formerly a member of the British Parliament, who was transferred to the

British Naval Intelligence Service under Sir Reginald Hall, says that: In November, 1917, he was sent on duty to Mexico, and there became familiar with the activities of German agents in Mexico, both before and after his arrival. From information gained by him, Mason was convinced that von Eckardt, the German Minister, was personally familiar with the operations of the German agents in Mexico, amongst whom were Jahnke, Witzke, Bode, Siegel, Hinsch, and Paglasch, the proprietor of the Juarez Hotel, which was a rendezvous for German agents. Mason was the employer of the negro, William Gleaves (Rec. pp. 2756–2759).

During the time he was in Mexico, Witzke crossed the border several times, but was finally arrested by the American police with the aid of Gleaves, and they discovered a letter in the lining of his jacket which was from Eckardt, recommending Witzke as a man who could be relied upon for any dangerous work (Ex. 625, Rec. p. 2761).

In the report to the State Department of Guyant, American Consul at Barranquilla, Colombia, dated August 24, 1917, Gerdts had stated that, following his arrival in Mexico City, he met two Germans, Siegel and Schwierz, a major in the Mexican Army, en route from Havana to Mexico (Ex. 583, Ann. H, Rec. p. 2351).

When Hilken was first examined the description of Siegel as given by Witzke was read to him but he said:

" I don't remember him at all." (Ex. 583, Rec. pp. 2239, 2242)

Siegel has made two principal statements showing his connection with the drafting of the Herrmann message, the one found in Exhibit 908, filed May 27, 1932, which was written entirely in Siegel's own handwriting; the other, found in German Annex 69, verified on the 15th day of July, 1932, and filed August 27, 1932.

In his first statement, Siegel relates that he met Herrmann and Gerdts in March or April, 1917, on a steamer en route from Havana to Vera Cruz. From Vera Cruz they went to Mexico City by rail and stopped at Hotel Cosmos. They met Major Schwierz of the Mexican Army, at whose advice they moved to the Hotel Juarez, belonging to a certain Otto Paglasch. He related to Herrmann (1) his escape from Russian internment; (2) his lack of money; and (3) his desire to do something in the interests of Germany. On the day after their arrival Herrmann and Gerdts (Pochet) went to see the German Minister, von Eckardt, and a few days later Siegel accepted employment by Herrmann, and Herrmann enlightened Siegel " about his activities, and it was decided to send Raoul Pochet to Baltimore to obtain funds."

An analysis of the description of the message by Siegel is as follows:

(1) It was written in an American magazine;
(2) Crosswise to the print;
(3) In lemon juice;
(4) On several pages of the magazine;
(5) Partly in normal writing, partly in code;
(6) The code words in cipher were to be deciphered in a certain way by means of perforations with a needle;
(7) The report was first drawn up on a sheet of paper;
(8) It was dictated by Siegel to Herrmann;
(9) Herrmann wrote it in the already-mentioned magazine.

Siegel related the events following Gerdts' departure as follows:

Raoul Pochet (Gerdts) " returned from the U.S.A. about the middle of May " with much less money than Herrmann expected or had asked for. He reported that Hinsch would shortly come and bring along the needed funds.

Siegel identified a magazine shown to him by Herrmann as similar to the one used to send to Baltimore; and he likewise identified " the photographs of the printed pages on which the report to Baltimore was written in lemon juice at that time." These photographs were each signed by Siegel.

Siegel's second statement (Ger. Ann. 69), may be analyzed as follows:

On March 14, 1932, Herrmann, to his surprise, came to Siegel's office. Herrmann did not mention his purpose until next day.

Herrmann represented:

(1) The Governments were engaged in clearing the sabotage matter and it was necessary to learn something concerning a secret message once sent to the United States.

(2) Herrmann had undertaken the trip from Chile upon the advice and at the expense of the German Government;

(3) He came from Berlin under order of the German Government and had been instructed to deliver his material in Berlin.

Siegel assumed:

(1) That Herrmann's material " would form the subject of diplomatic negotiations "; and

(2) " That Herrmann wanted to place his own activities in the right light before the German authorities."

His first statement was given in order to assist Herrmann and the German Government.

He went to Herrmann's hotel and they discussed for about an hour the text of the statement.

He decided to write the statement holographically.

He decided to have the signature attested at the German Consulate, because he " considered it unwise to state in a protocol before an Estonian notary matters of the wartime."

The next day Siegel took the necessary steps at the German Consulate and Herrmann departed that evening, leaving his address in Berlin.

To that address Siegel was to send three photographs brought by Herrmann to Siegel, of which Siegel had copies made.

Later the photographs were sent but came back as undeliverable.

Herrmann failed to tell Siegel:

(1) That he was traveling with an American attorney;

(2) That he had called at the American Consulate;

(3) Anything of the German-American Mixed Claims Commission, or of its composition;

(4) That Siegel's statement was to be submitted to that Commission (Siegel's assumption being that his statement was to be used by Germany as " the subject of diplomatic negotiations ");

(5) That Herrmann had testified before the Commission;

(6) That Siegel's statement was to be used to support Herrmann's statement.

Comparisons:

" Had I had any idea that my statement was to be used in a litigation before an international tribunal, I would have *acted* differently." (Emphasis supplied.)

(He probably means that he would have refused to testify.)

As regards his first statement of March 16, 1932, he states as follows: Being *under oath to-day* he can now state only what he can actually answer for according to his recollection of matters dating so far back, whereas in *the statement of March*

16th he relied on what Herrmann told him. Most of the items Herrmann called to his memory and they *jointly reconstructed* the things. The statements on page 1 are, on the whole, correct.

He still remembers with certainty:

(1) That Herrmann needed money;
(2) That Gerdts was sent to the United States to procure money;
(3) That Gerdts was given a secret message;
(4) That its substance was to give money to the bearer to take back with him;
(5) The urgent request for money was what he had in mind when he used the words " necessary communications ".

He remembers and confirms:

(1) That Gerdts stayed a long time;
(2) That Gerdts brought with him only a comparatively small amount of money;
(3) That Herrmann was disappointed;
(4) Herrmann's drafting the message without Siegel's participation;
(5) Herrmann asked Siegel to dictate it;
(6) The message was written in a printed volume;
(7) That the message was " longer than one sentence otherwise I would not have had to dictate it."

He is not certain:

(1) Whether a magazine or a book was used.
(2) Whether the printed volume was smaller than the sheets shown by Herrmann.

From a comparison of these statements certain clear deductions may be made. Siegel was not in a position to deny, and did not deny, the truth of his first statement, but endeavored to throw doubt upon some of the statements therein by arguments rather than by denials. If it be admitted that Herrmann's representations to Siegel were false, were those representations and Siegel's assumptions of such a character as to cast doubt upon the first statement or to induce Siegel to make false statements with regard to the message? Were the matters alleged to have been suppressed by Herrmann the cause of any error or misstatement by Siegel?

The object of Siegel's second statement was not directly to contradict the first statement, but to cast some doubt upon the verity of his first statement, first, because Herrmann allegedly made false representations; second, because of the assumptions made by Siegel and, third, because Herrmann suppressed certain information which he ought to have disclosed.

Herrmann's allegedly false representations were based upon the idea that the German Government was anxious to clear up the sabotage cases and, therefore, had secured Herrmann's services for that purpose. These allegedly false representations and Siegel's assumptions that the material furnished Herrmann would form the subject of diplomatic negotiations and that Herrmann wanted to place his own activities in the right light before the German authorities, offered Siegel no excuse for making a false record or deviating from the truth.

It is self-evident that the matters which Herrmann failed to bring to Siegel's attention could not have affected the verity of his statement, however much these matters might have affected his action in making the statement. The fact that Herrmann was traveling with an American attorney; had called at the American Consulate and that there was such a tribunal as the German-American Mixed Claims Commission before whom Siegel's statement would be submitted; that Herrmann's testimony had been presented to the Commission and

that Siegel's statement would be used to support Herrmann's testimony, might have been used by Siegel as a reason for refusing to make any statement, but even if all these facts had been brought to him and, after a knowledge of them, he had made his statement, they would have been additional reasons for a careful and truthful statement but not for a statement which departed from the truth.

In Exhibit 950, verified and filed November 15, 1932, referring to Siegel's second statement, Herrmann testified as follows:

" In regard to Siegel's testimony I told him that the question of the responsibility for destruction work that had been done in the United States before it got into the war, was now before an international commission composed of Americans and Germans, and that the German officials had said that they wanted to get at the truth. I did not tell Siegel as to whether I wanted his statement for one side rather than the other, but did say that the Commission was supposed to be neutral. I am sure that Siegel understood this completely and fully when he wrote out in his own handwriting the statement which he gave me. He certainly examined carefully the language of the message and there was never a shadow of doubt exhibited by him in our entire interview indicating that he did not fully remember the circumstances and the document as the one which he helped me to prepare in Mexico. Siegel asked me about the names represented by numbers, and I told him all that I could remember, which was practically all of them."

This statement is in accord with a letter written by Herrmann to Mr. H. H. Martin on April 4, 1932, the original of which was filed as Exhibit 1005, Ann. K, on April 26, 1938. See also Herrmann's testimony under subpoena in October, 1933 (Ex. 986, Ann, A, pp. 146, 193, 194).

Whether we accept Siegel's account in his second statement or Herrmann's testimony as to what took place between them before Siegel wrote out his first statement, the differences are not of a sufficient character to destroy the verity of Siegel's first statement.

Siegel's attempt to distinguish between his obligation in making a statement under oath, and his obligation in making a statement where his signature was witnessed before the German Consulate, is a mere quibble. Therefore, all the reasons which Siegel in his second statement adduced in order to becloud the efficacy of his first statement seem to indicate that, while Siegel was not willing to depose that his first statement contained falsehoods, he was perfectly willing for the Commission to make this inference. Under the circumstances, his first statement must be accepted as more in accord with the actual truth than his labored effort to becloud the same.

In Hinsch's attack on the Herrmann message (Ger. Ann. 71) (to be thoroughly studied hereafter), Hinsch claimed that the secret message which Gerdts brought to Baltimore contained only three elements: first, an identification of Gerdts with an assurance that he could be trusted; second, a request for $20,000 or $25,000 to be transmitted by Gerdts; and, third, advice that Gerdts would report verbally about all other matters. It was also claimed that the message was on only one page.

If Siegel's first statement be true, then Hinsch's claim is false.

In his second statement in describing how the message was drafted, Siegel used the following language (Ger. Ann. 69, p. 3):

" The secret message came about in the following way: Herrmann had drafted it without my having anything to do with it and asked me—since it is difficult to write with invisible ink — to dictate it to him. This I did. * * * Nor do I longer recall today, whether the message took up one or more pages * * * It must certainly have been longer than one sentence otherwise I would not have had to dictate it."

In his first statement, Siegel stated that the message was written partly in normal writing, partly in code, and that the code words consisted of a cipher and were to be deciphered in a certain way by means of perforations with a needle (Ex. 908, Ann. C, p. 2). In his second statement Siegel uses the following language (Ger. Ann. 69, p. 5):

" Finally, as regards my statements about a ' code ' and decoding ' mittels Durchstechung mit einer Nadel ' (by means of pricking with a needle), these are based on the following:

" *I recall that Herrmann had a code which consisted of a sheet on which there were, in squares, letters or names and figures,* which could be folded so that two or more sheets were laid on top of each other and could be adjusted in a certain order. If a message with words coded in figures had arrived the recipient, who had the same code, on his part had to adjust this code according to a certain order agreed upon and then found the clear text by pushing or pricking through the figures on the sheet of his code lying on top, with a pointed object, as a pencil or needle, and then assembling on the sheet lying underneath the corresponding words. I cannot say whether this procedure was used in the instant case since I did not personally frame the message and also was not present when it was received. I was, however, present when the writing was done and the printed volume was handed to Gerdts and know positively that during that time single sheets of the printed volume were not pricked with a needle under certain letters. I hear for the first time of such a system as can not very well be called decoding in the proper sense, but simply a reading from pricked letters. Nor do I recall that Herrmann told me anything about this." (Emphasis supplied.)

An examination of the explanation in the second statement will show that, whatever else Siegel had in mind, he did not deny, but he actually affirmed, that Herrmann in preparing the secret message used a code.

An examination of the coded and decoded message (Ex. 904 (3)) will show that the coded words are in all cases proper names with one exception, namely, the word " cruiser ". An examination of the message as described by Hinsch will show that such a message would not require to be coded, and, as Siegel says in his second statement, would not require to be dictated.

Therefore, a careful analysis of Siegel's second statement absolutely disproves the claims made by Hinsch with reference to the message, and, in the last analysis throws no doubt upon Siegel's first statement, but rather tends to show that Siegel's second statement was a labored effort on the part of Germany's representatives by many words to raise a cloud of doubt rather than directly to attack Siegel's first statement on the ground that Siegel lied when he made his first statement.

3. Gerdts

Gerdts' History Before He Brought the Herrmann Message

As we have already seen, Gerdts was the messenger who brought the message from Herrmann to New York on April 21, 1917, the day after Hoppenberg's death. He then took the message to Hilken at Baltimore.

Gerdts' father was a German and his mother was a Colombian and, according to his own statement, he came to the United States in March, 1916, and remained until February, 1917.

He was mentioned in Kaba's report to the Department of Justice dated May 19,1917, Annex X to Ex. 583 (Rec. pp. 2406 *et seq.*). The information in that report came from a Miss McPherson, who was a friend of Gerdts' mother and also of Hildegarde Jacobsen, Woehst's cousin. Through her Miss McPherson met Woehst, under the name of Hauten; Herrmann, under the name of March, and Gerdts. When Woehst left on the steamship " Frederick VIII ",

on which Count Bernstorff departed, Miss McPherson, Gerdts, Herrmann, and Miss Jacobsen saw him off (Rec. p. 2408).

In a statement to the Department of Justice made by A. G. Adams on February 21, 1917, relating to William Woeh(r)st (Ex. 583, Ann. K, Rec. pp. 2359 *et seq.*) it is related that a Spaniard, whose first name was Raoul, used to call frequently at the apartment at 600 West 115th Street, New York City, used by March (Herrmann) and Hauten (Woehst), and that after Woehst's departure Gerdts lived at the apartment. The succeeding reports (Anns. L, M, N, O, P, Q, R, X, and Y, Rec. pp. 2363–2410), trace the activities of Herrmann, Woehst and Gerdts until Woehst sailed for Germany and Gerdts and Herrmann arrived in Mexico and, when taken into consideration with other portions of the record, show clearly that Gerdts, Herrmann and Woehst were all engaged in sabotage in this country while the United States was neutral.

Herrmann testified that he met Gerdts in an apartment on 116th Street; that he was introduced to him by Willie Woehst, and that Woehst secured a job for Gerdts though Hilken, who sent him to some brewery to work, but he got fired the next day (Rec. p. 5461).

Herrmann further testified that when he left the United States he took Gerdts with him to Havana because Gerdts could speak Spanish and Herrmann could not (Rec. p. 5461). This testimony of Herrmann is fully confirmed by the reports to the Department of Justice referred to above.

Gerdts Brings the Herrmann Message to Hilken in Baltimore

As we have seen above, Ahrendt's affidavit, German Annex 73, was introduced for the specific purpose of showing that Gerdts never brought a written message from Herrmann to Hilken.

In the examination of Herrmann at Washington, April 3, 1930 (Rec. pp. 5431 *et seq.*), Herrmann told of his introduction to Gerdts by Woehst. Gerdts lived in his apartment and got his meals there, and when Herrmann left the country and went to Havana he took Gerdts with him. Herrmann states:

" Yes; he went with me to Mexico City, and he was there I imagine about a month or five weeks or something like that. I sent him up to Paul Hilken with a couple of letters.

" Q. What were those letters about? A. Asking about Captain Hinsch, asking if any new instructions had come, and so forth." (Rec. p. 5461).

The first time that Gerdts ever made a record or report on the subject matter of his trip from Mexico to Baltimore was on July 29, 1917, when he made a report to S. LeRoy Layton, American Vice Consul at Barranquilla, Colombia (Ann. G to Ex. 583, Rec. p. 2346). Mr. Layton was transferred from Colombia to Hamilton, Canada, as the American Vice Consul; and under date of August 1, 1917, he made a report to the Secretary of State on the subject " Plot to blow up the oil wells at Tampico, Mexico by a German-American. "

In his report to Layton, Gerdts claimed to be anxious to give his information to the United States and willing to go to Washington and explain everything more fully, if the Government would provide transportation and a position for him (Rec. p. 2348).

Layton's report to the Secretary of State relates the

" sensational story as told to the writer by Mr. Raul W. Gerdts Pochet of Barranquilla, Colombia, on July 29, 1917, prior to my departure for my new post at Hamilton, Canada."

According to this report, Gerdts met a German-American (Herrmann) in February, 1917, in New York City, who offered him a position as traveling

secretary. Gerdts accepted and sailed on the S.S. " Factories " in February for Havana. Gerdts and the German-American left Havana in March for Vera Cruz and they went thence to Mexico City. His employer sent him to New York by train with *some letters which he delivered*, and, upon his return to Mexico City, his employer offered him a weekly salary of $200.00, expenses and a bonus of $5000.00, if Gerdts would accompany him to Tampico and assist in blowing up the oil wells, which Gerdts refused to do. His employer showed him several small tubes about the size of a cigarette and about five inches long and told him that the tubes contained chemicals, and, when placed in a certain position, the chemicals ran down the tubes and at a given time caused combustion with dynamite by a time fuse, and he was told that these tubes were used to destroy munitions plants in the United States. Gerdts refused and asked his employer to pay his transportation to New York, which the employer refused, and a fight followed. He was given enough money to pay for his passage to Havana and by telegraphing to his relatives got funds with which to return home. His employer resided in a little town near Elizabeth, N. J., but he was afraid to give the name of his employer.

Layton reported that he had ascertained that R. G. Pochet sailed on the S. S. " Pastories " (not" Factories ") on February 24, 1917, to Havana, occupying stateroom 48 with Fred Larssen (Herrmann).

Layton's report was, on August 14, 1917, referred by the Department of State to Claude E. Guyant, American Consul at Barranquilla, Colombia, and under date of August 24, 1917, he made a report to the Secretary of State on the subject "Raoul Pochet, employee of German Agent Herrmann " (Ann. H to Ex. 583, Rec. pp. 2349 *et seq.*). Consul Guyant reported as follows:

Gerdts, while in New York, sought work unsuccessfully and finally obtained a position as chauffeur for Herrmann. Gerdts drove his car and acted as personal servant to Herrmann. Herrmann made one short trip to Savannah, for what purpose Gerdts was not aware.

In February or March Herrmann sailed for Cuba, taking Gerdts with him. In packing up Herrmann's effects, Gerdts noticed a number of small tubes, and when asked what they were for, Herrmann told him " It was none of his business ". Upon arriving at Havana, Herrmann placed these tubes in Gerdts' baggage, but Gerdts took them out and replaced them in Herrmann's effects.

Gerdts remained with Herrmann in Havana about a month, during which time Herrmann told him that the tubes contained two acids, which, when mixed, would start a fierce combustion, and that he intended to use them for setting fire to munitions factories. From Havana they went to Vera Cruz, and thence to Mexico City, where they met two other Germans, Adam Siegel and Major Schwierz of the Mexican Army. After being in Mexico City about two weeks, doing nothing

" He was ordered by Hermann to proceed to New York by rail *with a verbal order for $25,000.00* to be received from one Hoppenberg having offices in the Whitehall Building, New York City. Gerdts states that he proceeded to New York on these orders and went to the offices of this Hoppenberg who, he states, was agent for the German submarine ' Deutchland'. Hoppenberg he reports, died suddenly the day previous to his arrival in New York City and he was not able to obtain the $25,000.00. He returned to Mexico City overland and states that Hermann and his associates offered to pay him $25,000.00 if he would proceed to Tampico and blow up some of the oil tanks or wells at that place. He states that he refused to do this and that shortly afterward the Germans * * * * finally told him they had no further use for him."

Vice Consul Layton, a week before his departure from Barranquilla, after he had learned from Raoul and his brother, Hans, the clerk in the American

Consulate of Barranquilla, details of Gerdts' transactions with Herrmann, urged Gerdts not to say anything to Mr. Guyant about the matter, and promised that he, Layton, would do all possible to confirm the report upon reaching New York, and would take the matter up in Washington with a view to getting a large reward for obtaining the information, which reward was to be divided between him and Gerdts. Guyant reported that on account of Layton's promise of a large reward, Gerdts' mind was poisoned, and he refused to give a written statement.

According to the report of Layton, Gerdts was sent by Herrmann to New York by train *with some letters* which he delivered. According to the report of Guyant, Gerdts was ordered by Herrmann to proceed to New York by rail with a *verbal order* for $25,000 to be received from one Hoppenberg.

How Gerdts' Affidavit was Secured, Payment Therefor

Before any controversy arose as to the character of the message brought by Gerdts to Hilken and before Hilken ever produced the Blue Book message, the American Agent was anxious to, and did finally, secure the testimony of Gerdts. How this testimony was secured is related in a letter from L. A. Peto and Amos J. Peaslee to the American Agent transmitting Gerdts' affidavit, dated January 18, 1929 (See Ex. 626 (b), Rec. pp. 2794 *et seq.*).

From this letter it appears that Mr. Peto and Mr. Peaslee went to Barranquilla for the purpose of endeavoring to examine Gerdts, but he refused until he was compensated for his information and demanded $100,000 before he would make any statement. The only thing which Gerdts was willing to tell these gentlemen orally was

> " that he had information, obtained while he was associated with Fred Hermann, which he believed had quite a direct bearing upon both the destruction of the Black Tom Terminal and the Kingsland Plant. Mr. Gerdts finally stated that the minimum reward which he was prepared to consider was $10,000. He declined either to discuss what the nature of his information was or to discuss the cases further unless it was agreed that such a reward would be paid."

Mr. Peto finally informed Gerdts that his company was prepared to pay the reward unless there was objection from the American Agent's office. The gentlemen had prepared a series of interrogatories to be submitted to Gerdts and left these interrogatories with him, together with the attached exhibits, and advised Gerdts that, if he would go through the papers during their absence and prepare his answers and deliver the questions and answers to them upon their return, the reward would be paid, unless the American Agent indicated any objection to that procedure. They received word from the office of the American Agent to proceed in whatever way seemed best under the circumstances, so Gerdts delivered to them his statement (Ex. 626 (a), Rec. p. 2765) and the reward was paid.

Gerdts' First Affidavit

In his affidavit Gerdts was shown, and confirmed, the reports of Vice Consul Layton and of Consul Guyant, as " absolutely correct ", and he also expressed his willingness to declare everything he knew about the matter pending before the Mined Claims Commission. He confirms the report of the trip of Herrmann and himself from the United States via Havana, to Vera Cruz, and Vera Cruz to Mexico City, where he stayed twelve days.

In answer to the question where he first met Captain Hinsch and the nature of his acquaintance with him, he replied as follows (Rec. p. 2772):

" I was ordered by Herrmann to go from Mexico to New York with an order to collect $25,000 from Hoppenberg and to bring the money back personally to him (Hermann) in Mexico City. I remember that the *order and instructions* given to me by Hermann *were written in lemon juice on a page in a book of poetry*. The lemon juice made the writing invisible and for that reason I did not know the exact contents of the order. The address of Hoppenberg which Hermann gave me was ' Pearl Street, New York '. When I arrived there I was told that Hoppenberg had died the previous day. *In the same book of poetry there was another order, also written in lemon juice*, to the effect that in the event that I should not find Hoppenberg in New York I was to deliver the order to Paul Hilken, in Baltimore, where I went that day. I remember that when I arrived at Mr. Hilken's home and asked for him, a woman, probably thinking that I had some business of interest to Mr. Hilken, told me to leave the house immediately and come back in about a half hour because at that time special investigators were inspecting the house. I returned some time later and found Mr. Hilken to whom *I gave the page from the book of poetry*. He went to the cellar of the house to decipher the order and then told me that he did not have that amount of money, but that I should stay at his home while he went to New York to procure the money. Three days later he returned and told me that he was going to send the money, but that another friend of his who he expected in a few months was going to take the money to Mexico. Shortly afterwards a man was introduced to me as Captain Hinsch. He told me that he was a Captain of the North German Lloyd that towed the steamer ' Deutchland ' to the harbor at Baltimore. He told me to go back to Mexico, and gave me a $1,000. The balance of $24,000 he told me he was going to take himself. He asked me to tell Hermann that he (Hinsch) was busily engaged in getting guns of 7.05 millimeters across the border into Mexico which were to be used to equip a destroyer in Mazatlan, intercepting ships carrying cargoes from San Francisco. He told me to tell Hermann to enlist the two hundred men that were required to man the destroyer, which Hinsch himself was to command. This was how I met Captain Hinsch and this was the nature of my relationship with him. I have not seen him since." (Emphasis supplied.)

He met Siegel on the S.S. " Monterrey " (" Monserrat "), of the Ward Line, in the harbor of Havana, when Siegel came aboard and sailed with Herrmann and Gerdts to Mexico, and he learned that Siegel was an engineer who had been a prisoner of war in Siberia and escaped from prison, going first to China and then to the United States by way of San Francisco (Rec. p. 2774).

He confirmed the report of Consul Layton that Herrmann in Mexico had offered him a " bonus of $5,000.00 " if Gerdts " would accompany him to Tampico to assist him to blow up the oil wells." He also confirmed the report of Consul Layton that Herrmann and his associates offered to pay him $25,000 if he would proceed to Tampico and blow up some of the oil tanks or wells at that place, and when he refused, Herrmann discharged him (Rec. p. 2774). His relations with Herrmann at the end were very disagreeable (Rec. p. 2775). Herrmann's associates were Siegel, Schwierz and Paglasch (Rec. p. 2776).

Gerdts' Second Affidavit

In Exhibit 979, Ann. A, verified July 17, 1933, Gerdts testified again about some of the circumstances connected with the Herrmann message. He testified first, that he had met Paul Hilken four or five times in New York and also in Baltimore with Hinsch; second, he knew that lemon juice was used by Herrmann

" Because I bought the lemon myself and brought the lemon to Hermann to the Hotel Paglach, Avenida Juarez, Mexico City, where we were living and I saw him writing the message myself ";

third, that he was with Herrmann when he was writing the message; fourth, that he told Hilken how to make the writing appear with a hot iron, and Hilken

went down to the cellar, and, after half an hour, he came up again to the room and said that everything was all right. He didn't see the message after it was deciphered. However,

" I saw the message before it was brought out by the use of a hot iron because it was possible to read it by holding the pages on which it was written up to the light."

He was shown photostatic pages from the original Blue Book containing the developed message, and said:

" I recognize it is a copy of the message I carried to Baltimore."

and he signed each page.

There are some differences in the various statements in the record made by Gerdts with reference to the Herrmann message. In the report of Vice Consul Layton, made on August 1, 1917 (Ex. 583, Ann. G, p. 2347), Gerdts stated:

" He [Herrmann] sent me to New York by train *with some letters, which I delivered.*" (Emphasis supplied.)

In the report of Guyant, American Consul at Barranquilla (Ex. 583, Ann. H, Rec. p. 2350), made twenty-three days later on August 24, 1917, Guyant reported to the State Department as follows:

" He * * * was ordered by Hermann to proceed to New York by rail *with a verbal order* for $25,000.00 to be received from one Hoppenberg having offices in the Whitehall Building, New York City." (Emphasis supplied.)

In Exhibit 626 (a), verified January 11, 1929, Gerdts confirmed as correct the reports of Vice Consul Layton and Consul Guyant (Rec. p. 2767), but he recalled that the order and instructions were written in lemon juice on a page in a book of poetry, and he states that in the same book of poetry there was *another order, also written in lemon juice* in event he did not find Hoppenberg in New York he was to deliver the order to Paul Hilken in Baltimore (Rec. p. 2772). He went to Baltimore and finding that Hilken was not at home he returned later

" And found Mr. Hilken to whom I gave the page from the book of poetry." (Rec. p. 2773)

On page 2789 the following queries and answers occur:

" Q57. The report of Consul Guyant (annex D) states that after you reached Mexico City in 1917, Hermann ordered you to proceed to New York by rail ' with a verbal order for $25,000.00 to be received from one Hoppenberg, having offices in the Whitehall Building, New York City '. Is this statement correct?

A. This statement is correct, as I have already stated.

" Q58. Consul Layton's report (annex C) also states that you went to New York pursuant to that order of Hermann's and found that Hoppenberg had died. Is this statement correct?

A. Absolutely correct."

His affidavit on January 11, 1929, was given nearly two years before Hilken claims to have found the Blue Book in his attic in Baltimore, and of course the reports of Layton and Guyant, being made in 1917, could not have had any relation or reference to the subsequent controversy as to the message being contained in the Blue Book.

It would seem that, on this point, Gerdts' apparent contradictions are due to the defects of an inaccurate memory and not to an intention to deceive. When he was making his statements to Layton and Guyant his main idea was to be rewarded by securing a " position " from the Government of the United States;

and if his testimony was hurtful to Herrmann, he was no longer under obligations to his former employer.

When he made his affidavit of January 11, 1929, he was not in any way trying to verify any controversial point as to the character of the message transported by him, for at that time the Herrmann message had not been produced and it was not until June 28, 1932, almost 3 1/2 years later, that the controversy was finally raised by Hinsch (Ger. Ann. 71). [1] Gerdts was endeavoring to connect Herrmann and Hinsch with sabotage activities, particularly with the Kingsland and Black Tom disasters. His description of the message which he brought from Mexico to New York was only an incident in that effort. Instead of speaking of a *verbal order* he now tells of two orders *written in a book of poetry*, and he claims to have given a page from the book of poetry to Hilken, but he still verifies his report to Guyant that it was only a verbal order for $25,000, and his report to Layton that he carried some letters and delivered them.

There was one other difference in his statements which should be mentioned. In his affidavit of January 11, 1929, he says

" The lemon juice made the writing invisible and for that reason I did not know the exact contents of the order." (Ex. 626 (a), Rec. p. 2772.)

In his affidavit of July 17, 1933, he said:

" I didn't see the message after it was deciphered. However I saw the message before it was brought out by the use of a hot iron because it was possible to read it by holding the pages on which it was written up to the light." (Ex. 979, Ann. A.)

That this may have been possible seems to be confirmed by the testimony of Hilken in Exhibit 976, Ann. E, p. 116, taken September 7th to 16th, 1933. In that deposition, Hilken testified that he took the magazine down into the cellar and used a hot iron to bring out the lemon juice. He remembered saying to Gerdts, " Why, that is almost yellow enough to read without ironing."

Although each of Gerdts' reports varies from the others, taken as a whole they confirm Herrmann's and Hilken's testimony in regard to the Blue Book message in three essential particulars;

First, it contained a request for money;

Second, the message indicated that the bearer would relate verbally the particulars; and

Third, the message was written in lemon juice.

It is significant that in attacking the Blue Book message Hinsch stated that the text of the message contained:

" an identification of Gerdts, the request for $20,000 or $25,000 to be transmitted by Gerdts, and the advice that Gerdts would report verbally about all other matters. That was all." (Ger. Ann. 71, p. 3.)

It will be recalled in this connection that the Blue Book message concludes as follows:

" Most important send funds. Bearer will relate experiences and details. Greetings."

4. Hilken

(1) Hilken's receipt and development of the message

Hilken in Exhibit 904 (3) in describing the rediscovery of the message, uses the following language:

[1] Following Gerdts' affidavit of January 11, 1929, Hinsch had testified four times prior to his testimony in Ger. Ann. 71, and never questioned Gerdts' statements.

" I am submitting herewith a photograph of four (4) pages of a document which I found in a box of books and papers in the attic of my old house in Baltimore, during the recent search, and which document is an issue of the Blue Book Magazine for the month of January 1917 and which was sent to me in April 1917 by Fred Herrmann. This original magazine has been delivered by me to the Claimants, in support of my previous testimony."

In describing the original reception of the message, Hilken uses the following language:

" Raoul Gerdts brought this magazine from Mexico to me in Baltimore. My 1917 diary shows the date of his arrival as April 29, 1917. Gerdts told me that this magazine contained a message in invisible writing and also told me the page on which the message commenced. The attached photograph shows that the page number on which the message commences is page 700 and the message continues consecutively on pages 698, 696, and 694 on which page the message concludes. Gerdts remained with me while I raised the message by means of a hot iron. The message was written by Fred Herrmann whose handwriting I recognized."

A careful examination of the record disloses that Hilken was mistaken in saying that his diary showed that Gerdts' arrival was April 29, 1917. As a matter of fact, his diary shows that on April 27th he paid Gerdts $175 and on April 29th Gerdts and Hinsch dined with him in his home at Roland Park.

In Exhibit 976, Annex E, p. 115, Hilken testified that in April, 1917, Raoul Gerdts Pochet, brought him the Blue Book of January, 1917, containing the secret message. Hilken took the magazine down into the cellar and ironed it out, that is to say, he used a hot iron to bring out the lemon juice. He remembered saying to Gerdts:

" Why, that is almost yellow enough to read without ironing."

He does not remember whether Gerdts was present when he heated the pages of the magazine, but Gerdts was certainly in the house. Gerdts did not know what was in the message, otherwise it would not have been necessary for Herrmann to write out a message in lemon juice. All Gerdts knew was that he was to bring back $25,000 (id. p. 116). Gerdts did not speak English fluently, but did speak German and Spanish, and had great difficulty in making himself understood by Mrs. Hilken (id. p. 117).

(2) Hilken already knew Gerdts and no introduction was necessary

If the procuring of $25,000 was the sole purpose of sending Gerdts, there would have been no necessity for a secret message (id. p. 117).

Hilken knew Gerdts in New York before Gerdts and Herrmann left for Cuba. Hilken related that Gerdts had frequently carried money from Hoppenberg to Herrmann, and stated that, if Gerdts had come to him and said Herrmann needed $25,000, Hilken would have accepted that as a fact. He might not have given him the whole $25,000, but he would have accepted it as a fact, and an introduction to Gerdts was not necessary as he had frequently met him in New York (id. p. 117). [1]

Hilken related an incident about Gerdts and Hoppenberg occurring in December, 1916. Herrmann told him that Hinsch was being hounded for money; that

[1] The claim of Hilken that he knew Gerdts before he left New York and that no introduction was necessary, was confirmed by the Hilken-Hoppenberg-Lowenstein correspondence (see this opinion, p. 120); and also by Gerdts (Ex. 979 Ann. A, *supra*, this opinion, p. 183). (*Note by the Secretariat*, this volume, p. 323, and also p. 367.)

Hinsch had asked him, Herrmann, to pay off Kristoff. Herrmann sent Gerdts down to Hoppenberg for money, and Hilken wrote out a check, and Hoppenberg pinned the money in an inside pocket of Gerdts' coat. The thing that impressed him at the time was this huge Hoppenberg, who weighed about three hundred pounds, with " hands as big as bears ' paws, trying with a small safety pin to pin the money into Gerdts' coat pocket." Gerdts weighed about a hundred and ten pounds. This incident occurred sometime in December of 1916 (id. p. 118).

On account of his recollection of this incident which was quite fresh in his mind, there was no necessity whatever for Herrmann to give Gerdts a message introducing Gerdts to him and Herrmann knew that Hilken knew Gerdts (id. p. 120).

Hoppenberg died Friday, April the 20th, 1917. He fixed this date by referring to his diary (id. p. 118). Hoppenberg died before Gerdts' arrival with the message in the magazine (id. p. 119).

(3) Hilken goes to New London and brings Hinsch back to Baltimore

After receiving the message and developing it, he made a transcript, and took the copy to New London for the purpose of discussing the message with Hinsch (id. pp. 116, 120). Gerdts did not accompany him. Hinsch and Hilken returned to Baltimore in order to consider the message with Gerdts, personally, and to talk about his crossing the border into Mexico (id. p. 120). He, however, did not remember this trip until he saw it stated in his diary for April 27th and 28th (id. p. 121).

(4) Hilken and Hinsch's interview with Gerdts, Sunday April 29, 1917

Hinsch and Hilken saw Gerdts in Baltimore on Sunday, April 29th, at Hilken's house in Roland Park as shown by his diary. [1] The reason why Gerdts was spoken of in the diary as " cousin Raoul " was because they had distant cousins in Venezuela, and in order that the children, who were of an age to begin to take notice, would not be suspicious, they introduced him to them as " cousin Raoul " and the children called him " cousin Raoul " (id. p. 121).

(5) Hinsch criticizes Herrmann's code in the message

Hilken showed the message to Hinsch after they got to Baltimore, and Hinsch criticized Herrmann for using simply one number before the main number instead of adding a superfluous number at the end (id. pp. 121, 122).

He identified the Blue Book, Exhibit 904, as " the Blue Book with the famous message which Raoul Gerdts brought to me in Baltimore in April, 1917 " and as the magazine which he showed Hinsch (id. p. 122).

(6) Hilken's sabotage payments to Hinsch, May 1917

In Hilken's diary for May 1917, above the item for Thursday the 24th of May, occurs the figure " $1,500 " and below the item for Saturday the 26th, occurs the figure " 23,361.75 " (Ex. 583, Ann. D). In the check stub book (Ex. 909, Ann. C) the item for May 24, 1917, is as follows: " No. 218 Pay to KNK for H $1500 ".

There is no corresponding item, however, for the sum of $23,361.75. Hilken explained that both of these items were for money given to Hinsch, the $1,500

[1] This is confirmed by Hinsch (Ger. Ann. 71; *supra*, this opinion, p. 119). (*Note by the Secretariat*, this volume, p. 322.)

payment being on the 24th and the payment of $23,361.75 was on the 24th, 25th or 26th. He thinks that it was on the 24th (Ex. 976, Ann. E, pp. 126–129).

The payment to Hinsch of the sum of $23,361.75 was not related in any way to the affairs of the Eastern Forwarding Company [1] (id. pp. 129, 130). The cash book shows that the sum of $23,361.75 was drawn on the German-American Bank (id. p. 130).

(7) Hilken and Hinsch send Gerdts back to Mexico with $1,000

Hinsch and Hilken sent Gerdts down to Mexico with $1,000. [2] Hilken confirms Gerdts' statement as to the message which Hinsch sent by him to Herrmann in Mexico with reference to getting guns across the border to be used in equipping a destroyer and enlisting two hundred men (id. p. 137).

(8) Hilken knew Siegel

He testified that he knew Siegel and knew what the reference in the message meant in saying " Tell him Siegel is with me " (id. p. 138). [3]

(9) Hilken stores the message in the attic of his home in Baltimore

When he had talked over the message with Hinsch, he probably put it with other papers in his desk. Later on he stored it with a number of papers relating to his wartime activities in the attic of his house in Baltimore (Ex. 904 (3); Ex. 949, p. 3; Ex. 976, Ann. E, pp. 139–141).

(10) Hilken's house was not being watched, when Gerdts came nor was it ever searched

When Gerdts came with the message, his house was not being watched, as had been testified to by Gerdts; but Gerdts may have had in mind an incident, when some hoodlums in Roland Park had painted a sign, " To Hell with the Kaiser ", on the concrete walk leading from the street to his house and Mrs. Hilken had complained to the police, and it was possible that when Gerdts arrived, a policeman may have been there (Ex. 976, Ann. E, p. 139).

Hilken's house was never searched, but in August, 1918, Parr, an investigator of the Department of Justice, went to Baltimore with Hilken to search for some papers desired by the Alien Property Custodian (id. p. 140).

(11) Hilken discovers other papers with the message

At the time he discovered the Herrmann message, he discovered also the Arnold letters and other correspondence which he had packed in a small box after he had taken them out from the eaves of his attic (Ex. 906). Additional correspondence was later found in the eaves of the attic. This was given to Mr. Martin, counsel for the American Agent (Ex. 976, Ann. E, p. 141).

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[1] This is confirmed by the testimony of Hilken, Sr. (Ex. 976, Anns. A–D, pp. 115–120).

[2] This is confirmed by Hinsch (Ger. Ann. 71); Gerdts (Ex. 629, p. 2773); Herrmann (Ex. 904 (4), also Ex. 986, Ann. A, p. 152); and Siegel (Ex. 908).

[3] In his examination of December 8, 1928, Hilken denied that he knew Siegel (Ex. 583, Rec. pp. 2239, 2242).

(12) Hilken and Herrmann and the Liberty articles

In October, 1930, Herrmann found that Sidney Sutherland was working on his magazine articles in Peaslee's office and Herrmann " raised particular hell about it." Herrmann telegraphed Hilken to meet him in town and told Hilken all about the articles which were to appear in Liberty. He does not know exactly how the matter came to Herrmann's attention, but at any rate Herrmann immediately got in touch with Hilken. Hilken and Herrmann sought Mr. Peto and charged him with bad faith because, when Peto and Peaslee solicited Hilken's testimony in 1928, they promised Hilken the utmost protection against publicity, and Hilken never would have testified, if he had not had a definite promise of no publicity. This was on account of his family (id. pp. 142, 143). Hilken and Herrmann therefore cabled Peaslee in Paris, demanding that permission granted to Sutherland be withdrawn. They assumed that Sutherland had been authorized by the office of Peaslee and thought that he was paying the firm for the privilege (id. p. 143).

Hilken met the American Agent at the pier on his return from The Hague and explained the whole matter to him, and Bonynge said he knew nothing about it, and agreed with Hilken that it was a breach of good faith, and promised him to call a meeting to see what could be done about stopping the Liberty articles. He is not now charging Peaslee with breaking faith, but he was certainly under the impression at the time (id. pp. 143, 144).

Bonynge knew that Hilken's testimony had been given under a promise of protection from publicity and not for the purpose of having it exploited for the benefit of magazine writers (id. p. 144).

After Peaslee returned from Europe, Hilken learned how access to the records had been obtained by Coudert Brothers while Peaslee was abroad. Hilken called Doing, of Coudert Brothers, who was a friend of Sutherland, and endeavored to have him arrange an appointment for Hilken to see Sutherland. Everybody promised to use their influence to repress the magazine publication (id. p. 144).

Sutherland refused to meet Hilken and stated he would only take orders from Patterson, President of the Liberty Magazine. Hilken made several efforts to see Patterson and had two or three conferences with his secretary but was unsuccessful; finally he caught Sutherland in his reception room and had a stormy interview in which he called Sutherland a " grave digger " (id. p. 145).

When asked " What has all this to do with the discovery of the message in the magazine? " Hilken replied (p. 145):

" A. It has a great deal to do with my not producing it. After some of the articles had been published, but before my name had been mentioned, I again went to Liberty, and was waiting in the reception room for Mr. Patterson's secretary, when the receptionist at the desk said to a man who had entered, ' Oh, Mr. Sutherland, I have a letter for you ', and handed him a letter. I immediately confronted him, said, ' Are you Mr. Sutherland? ' He said, ' Yes '. I introduced myself as Mr. Hilken and I told him everything I could think of. I said to him, ' You think you are an author, but your friends and colleagues consider you nothing more than a grave digger.' He was furious, almost livid, and took out his spite on the poor receptionist who had mentioned his name, and disappeared in an inner office. That is all the satisfaction I ever got out of it."

These conferences for the purpose of suppressing the magazine articles took place between the end of October, 1930, and February or March, 1931 (id. p. 146). He saw Mr. Bonynge during that period, but Mr. Bonynge did practically nothing to help him.

Hilken got his sister interested and she was a friend of Mrs. Patterson. He introduced as evidence his sister's letter, *id.* Paul Hilken Exhibit No. 4, p. 147, and a second letter from his sister as *id.* Paul Hilken Exhibit No. 5, p. 148.

(13) Hilken's family and publicity

These letters, the first undated, and the second dated March 20, 1931, show the anxiety of Hilken's family over the publicity resulting from the Sutherland articles.

In the first, his sister, Nina, after expressing her opinion that the attempt to reopen the case would fail, said:

" Anyway don't you *ever again* let them persuade or frighten you into talking. They promised you no publicity — then took no steps to prevent the Germans and Belgians from letting in the mob * * *. That [conduct of the firm of lawyers] is contrary to the ethics of the profession. You can and must defy any attempt to make you a witness. * * * you lay low and say nothing." (Ex. 976, Ann. E, Paul Hilken Ex. No. 4.) (Emphasis in original.)

In the second letter she uses this language:

" Thanks for your last letter — with ' Liberty ' enclosure. I have bought every issue since — and notice with grief that your name appeared in the last number — and I 'm afraid the next numbers will have more. It 's too bad. The only course to take now is to act as though you and we never read Liberty — and had no connection with that particular Paul H.! — Or, with those people who know too much, that you were acting according to instructions from the North G. Lloyd — and did not know what you were contracting for. * * * It 's too bad for Henry and the girls — because they will worry. If worst comes to worst, they 'll just have to move away from Baltimore. In a strange city no one would remember the name." (Ex. 976, Ann. E, Paul Hilken Ex. No. 5.)

(14) Hilken rediscovers the message Christmas, 1930, and delivers same to Mr. Peto April 27, 1931

Hilken claimed to have rediscovered the Blue Book message in his attic Christmas, 1930, and he brought the message to Mr. Peto on April 27, 1931 (Ex. 976, Ann. E, p. 151; Ex. 904(3), executed May 8th, 1931).

(15) Hilken's claim of rediscovery substantiated by his wife and daughter

Hilken's claim that he rediscovered the Blue Book in his attic Christmas, 1930, is substantiated by the affidavits of his estranged wife and of his daughter.

In her affidavit of November 15, 1932 (Ex. 972), Mrs. Hilken referred to the visit paid to her home by Mr. Harold H. Martin, counsel of the American Agent, on December 15, 1931, said visit having been described by Mr. Martin in Exhibit 911, dated May 26, 1932, filed May 27, 1932. The object of this visit was to secure Hilken's 1916 diary. In Exhibit 911 Mr. Martin recited a visit paid by himself and Mr. Hilken to the home of Hilken's estranged wife on December 9, 1931, for the purpose of locating the diary. Following this visit, Mrs. Hilken made a search in the attic and finally on Saturday, December 12th, found the diary in a doll's trunk; and, on the succeeding visit of Mr. Martin on December 15th, she turned the diary over to him.

In Exhibit 972 Mrs. Hilken relates the details of Mr. Martin's visit. She states that Exhibit 911 conformed to her recollection of what passed between them and then she states:

" I remember the lad Raoul, who was an unwelcome guest at my home for two or three days. He spoke practically no English; smoked cigarettes incessantly, and amused himself with our pianoplayer.

" I am aware of the fact that my husband, Paul G. L. Hilken, has delivered to representatives of the United States, the Blue Book Magazine which this lad Raoul brought from Mexico in 1917. I know that my husband discovered this

magazine and other papers in the attic of my home at Christmas, 1930. Although my husband did not tell me personally what this magazine contained, he did tell my daughter, Theodora, that it contained a message written in lemon juice, and that names were pin-pricked out in the printed matter on various pages in the magazine.

" This statement is made at the request of the Agent of the United States, in confirmation of similar statements made verbally to Mr. Leonard A. Peto by my daughter Theodora and by me, a year or so ago."

Appended to Mrs. Hilken's affidavit is the affidavit of her daughter, Theodora St. Vincent Hilken, which reads as follows:

" I have read the above statement by my mother, and hereby confirm that my father, Paul G. L. Hilken, found a magazine containing a message, written partly in lemon juice and partly by pin pricks, at our home in Baltimore on Christmas Day, 1930."

(16) Hilken substantiated by Carr and Cooney

In Exhibit 976, Ann. L, dated April 22, 1933, filed September 15, 1933, Frank Carr, an employee of the Thiel Service Company, testified that on Monday, April 20, 1931, he was assigned by T. J. Cooney to locate a certain man named Maubach, living at 40 West 89th Street, New York City, and was accompanied by Fred Herrmann. After abandoning the work for the day, he went with Herrmann to 135 West 183rd Street where Hilken resided, and they talked with Hilken about Herrmann's visit to Mexico. Hilken produced a demi-john of home-made wine and before they left the apartment it had been practically all consumed. During the evening Hilken and Herrmann discussed the sabotage cases and various people concerned therewith, and Herrmann boasted that they could have proven the case for the Lehigh Valley railroad, but they would not do anything for Arnold and Peaslee. Then the affidavit goes on as follows:

" Herrmann said to Hilken, ' You can produce your 1916 diary, and Hilken said, ' Yes, I can.' He also said, ' I have go[t] something better than that, which would clear up both the Canadian Car & Foundry case and Black Tom.' Herrmann said, ' What's that? ' and Hilken replied, ' I still have that book you sent me, in which there were messages written.' Herrmann became excited and they conversed in German, which I do not understand."

He stated that both Hilken and Herrmann were incensed with Mr. Peaslee over the Liberty articles and with Mr. Arnold about some remark he had made about putting pressure on Herrmann to make him reveal more about Black Tom.

In Exhibit 976, Annex M, Cooney, after reading the statement of Carr, testified as follows:

" The next day after Carr and Herrmann's visit to Hilken's apartment, Herrmann called at my office at 50 Church Street and I asked him what the book was he and Hilken had been discussing in the presence of Carr the previous evening as Mr. Carr had reported it to me. Herrmann stated this book was a magazine he had sent back by messenger from Mexico to Hilken; that there was a message written in invisible ink in this magazine, in which he asked Hilken to send him some money and also to advise some German officials in Mexico that he was one of their agents. He stated he also mentioned Wozniak in the message and that the messages in this magazine would undoubtedly show the connection of the German agents with both Black Tom and Kingsland. Herrmann stated that Hilken had said that the magazine had remained hidden away some place in Baltimore and he had found it on his last visit to Baltimore.

" I reported this to Mr. Peto immediately and took occasion to urge Herrmann personally to endeavor to persuade Hilken to deliver this document to the Claimants. Herrmann said that he would do so, but that Hilken was scared about Black Tom."

(17) Hilken substantiated by Mrs. Elizabeth Braun

In Exhibit 974, Elizabeth Braun, a resident of New York City, testified under date of November 12, 1932, that she had known Mr. Hilken and the members of his family for a number of years; that on the first Sunday following Christmas, 1930, Hilken was a guest at her home for dinner, and, while discussing the visit of Hilken to Baltimore on Christmas Day:

" Mr. Hilken told me about having located in the attic of his old home in Roland Park a number of old papers concerning his activities during the period of the late war, and mentioned one particular document, which he said was of great importance, consisting of a magazine which Fred Herrmann had sent to him from Mexico in 1917, and which contained a secret meassge written therein by Mr. Herrmann in lemon juice, and which writing had been made visible by Mr. Hilken through the application to it of a hot iron.

" Mr. Hilken explained that the names in the message were pin-pricked on various pages in the magazine.

" In making this statement as to the time when Mr. Hilken told me as to this document, I am repeating exactly what I told to Mr. Leonard A. Peto and others about a year and a half ago shortly after Mr. Hilken turned over that particular document as evidence to be submitted to the Mixed Claims Commission."

(18) Hilken's efforts to show the message to the Umpire

Hilken's explanation of the delay in the production of the magazine from Christmas, 1930, until April 27, 1931, was the publicity given by the Liberty Magazine articles, his interviews with Rintelen, and the attitude of his family. It was also explained by him, however, that in the latter part of February, 1931, he took the Blue Book to Umpire Boyden's office. He was afraid that Mr. Bonynge, the American Agent, would get in touch with the claimants and the attorneys and there would be more publicity and, therefore, he made a personal effort to see Mr. Boyden and present the magazine to him in Boston (Ex. 976, Ann. E, p. 152). Before doing this, he telephoned to a friend of his, a Miss Phillips, and asked her to communicate with Boyden's office and find out when he would be in town. He received a telegram from Miss Phillips that Boyden would be in New Hampshire the early part of the week and would be in his office on Friday, February the 27th. He therefore went to Boston by boat the night of the 26th and called at Mr. Boyden's office on the 27th, where his secretary, Miss Smyth, informed Hilken that Boyden had unexpectedly been called to New York and gave Hilken his address as 44 Broad Street, *c/o* Mr. Searle. He explained to Miss Smyth exactly what he had with him and told her to explain to Boyden the reason for his visit. Hilken then called on his friend, Charles Curry, who knew the President of the First National Bank of which Umpire Boyden was a director, and Curry offered to arrange a meeting with Boyden if Hilken was unsuccessful in seeing him in New York (id. p. 154).

(19) Hilken's efforts to see Boyden confirmed

The fact that Hilken did endeavor to see Boyden is further confirmed by the affidavit of J. Henry Phillips (Ex. 976, Ann. K). From this affidavit it appears that Hilken was a friend of the Phillips family while he was a student at the Massachusetts Institute of Technology where he had the nickname of " Bismarck ". Phillips was the brother of Adelaide Phillips, who wrote the letter filed with Ex. 976, Ann. E, as Ex. 6, and who died on April 27, 1932. By a reference to his sister's diary, he found that Paul Hilken was in Boston on February 27, 1931, and he testified that his sister, Adelaide, had received a letter

from Hilken asking her to inquire from the office of the Umpire when he would be in his office, and his sister told him that Mr. Boyden was expected on February 27, 1931, and she either telegraphed or telephoned that information to Hilken in New York.

(20) Hilken's effort to see Boyden confirmed by Miss Phillips

Hilken's effort to see the Umpire is also confirmed by letter from Miss Adelaide Phillips, dated February 28, 1931 (Paul Hilken Ex. 6, to Ex. 976, Ann. E). In this letter Miss Phillips uses the following language:

" I have been thinking of you all the morning and wondering if you were with Mr. Boyden. I *do* hope that you saw him and accomplished all that you hoped to. If he sees you I feel you will be successful. * * * Please let me know how the Boyden incident ended. I hope you saw him and had a successful interview." (Emphasis in original.)

(21) Hilken's effort to see Boyden by Curry

Hilken's attempt to get in touch with Boyden is further corroborated by the affidavit of Charles H. Curry, the co-partner of Curry Brothers Oil Company, who had known Hilken intimately for about twelve years. He testified that Hilken called on him at his Boston office in the early part of the year 1931 to seek his assistance in obtaining an interview with the late Roland Boyden. Hilken related to him in a general way his testimony before the Mixed Claims Commission, and was incensed that he should have been disbelieved and ignored and classified as a liar, and also on account of the distress caused to his family by the undesirable publicity. Hilken asked Curry to arrange a meeting with Mr. Boyden in order that he might prove with letters and documents which he had with him that his testimony was true and Curry consented to do this as he had confidence in Hilken's integrity (Ex. 976, Ann. J).

(22) Hilken's visit to the Umpire's office is confirmed by the Umpire's Secretary

Hilken's visit to Boyden's office is further confirmed by the affidavit of Grace K. Smyth, Boyden's secretary, who testified that " during the early part of 1931, the exact date I am now unable to recall, Mr. Paul G. L. Hilken called and inquired for Mr. Boyden ". Hilken explained to her that he had been called as a witness before the Mixed Claims Commission and was incensed at having been called a liar in the decision rendered by the Commission, and he was seeking an opportunity " to prove to Mr. Boyden by exhibiting corroborative documents, that his testimony was true". She gave Hilken Boyden's address in New York where she thought Boyden could be reached (Ex. 976, Ann. I).

5. The Internal Evidence

A careful analysis of the Herrmann message discloses that it had at least seven purposes:

(1) To enlist Hilken's aid in convincing von Eckardt, the German Minister to Mexico, of Herrmann's *bona fides*, and his mission in Mexico.

(2) To persuade Hilken to send Herrmann $25,000.

(3) To persuade Hinsch and Hilken to leave the States and come to Mexico, or, in the case of Hilken, to go to South America.

(4) In connection with Hinsch to promote the destruction of enemy commerce on the West Coast.

(5) To warn Hilken where he might expect trouble from co-saboteurs and their friends.

(6) To awaken memories of past sabotage acts.

(7) " Bearer will relate experiences and details."

An effort will be made to study the record to ascertain, if possible, whether the purposes above set out were the normal reaction of Herrmann at the time when he sent the message by Gerdts to Hilken, or whether these purposes, clearly disclosed in the Blue Book message, were a part of a clever scheme to use the facts already in the record to convince the Commission by a forged instrument that the confessions of Herrmann and Hilken were genuine. We will now take up each of the aforesaid purposes in their order.

(1) To enlist Hilken's aid in convincing von Eckardt, the German Minister to Mexico, of Herrmann's bona fides, *and his mission in Mexico*

The sentences in the message used for this purpose are as follows:

> " Have seen Eckardt
> he is suspicious of me
> Can't convince him I come from Marguerre
> and Nadolny
> Have told him all reference Hinsch and I
> Deutschland, Jersey City Terminal, Kings-
> land, Savannah, and Tonys Lab
> he doubts me on account of my bum German
> Confirm to him thru your channels all OK
> and my mission here ".

The prevailing thought and purpose in the sentences quoted above is to remove from Eckardt's mind the suspicions which he entertained in regard to Herrmann.

Several times in this opinion we have had occasion to refer to two telegrams that passed between von Eckardt in Mexico and Marguerre and Nadolny, in charge of " Sektion Politik ", just after America entered the war (Ex. 520, Rec. p. 1847; Ex. 320, Rec. p. 874 — See *supra*, this Opinion, p. 34). [t]

The first telegram is dated April 13, 1917, and contains a message, dated April 12, 1917, which was sent by Herrmann to Captain Marguerre or Nadolny, General Staff. The first telegram, containing Herrmann's telegram, reads as follows in the translation furnished by the German Agent (Ann. 21 to Report. of Ger. Agent of 8/1/29):

Marguerre

" 17 April 12 [For Captain ~~Magea~~ or Nadolny, General Staff:

' Mexico, April 12. Where is Lieutenant Whost? Has he remitted about $25,000 to Paul Hilken? Either he or somebody else should send me money Fritz Quarts en Hermann.'

" Referring to preceding paragraph. Hermann (slender, fair, German with American accent) claims to have received a year ago order from General Staff and again last January from Hilken to set fire to Tampico oil fields and wants to put plan into execution now. He asks me if he should do it; am I not to answer that I have no contact with Berlin? Mr. von Verdy suspects him and his companion Raoul Gerds to be America-English spies. I request telegraphic answer, rush.]

* * * * * * *

von Eckardt.
LUCIUS "

[t] *Note by the Secretariat*, this volume, pp. 262-263.

The reply to von Eckardt's telegram was sent on May 13, 1917, and reads as follows:

" Hermann's statements are correct. Nothing is known of Gerds. Wohst has been retired.

" The firing of Tampico would be valuable from a military point of view, but the General Staff leaves it to you to decide.

" Please do not sanction anything which would endanger our relations with Mexico or if the question arises, give Hermann any open support.

* * * * * * * "

(Ex. 320, Rec. p. 874).

A careful analysis of these two telegrams shows clearly that on April 12, 1917, six days after America entered the war, Herrmann, the next day after his arrival in Mexico City, called on the German Minister in Mexico, von Eckardt, asking for money, and that he also informed the Minister that he had received from the General Staff a year ago an order, which had been renewed in January by Hilken, to set fire to the Tampico oil fields and now proposed to carry it out and wanted the Minister to sanction his plan.

The minister was not certain whether Herrmann and Gerdts, his companion, were German agents and could be trusted, and recited to Marguerre and Nadolny of the General Staff that Verdy believed them to be American or English spies; and he suggested to the General Staff that it might be well for him (Eckardt) to deny that he was in touch with Berlin.

The General Staff's answer of the 13th of May confirmed in every respect Herrmann's statement, particularly as to his commission to set fire to the Tampico oil fields, but the matter of firing the Tampico oil fields was left to the German Minister to decide; but the Minister was warned not *openly* to support Herrmann.

The first telegram which had been sent by von Eckardt a few days before Gerdts left Mexico for Baltimore, confirms in every respect the recitals in the message set out above. As no reply was forwarded from Berlin to von Eckardt's query until the 13th day of May, it is clear that von Eckardt's suspicions had not been removed when the Herrmann message was written and forwarded to Baltimore.

We know from the intercepted messages that, when Hinsch finally arrived in Mexico, a contest immediately started between Jahnke on the one side and Hinsch on the other, and later participated in by Dilger, as to whether Hinsch or Jahnke should be the recognized leader of saboteurs in Mexico. We also know that von Eckardt was inclined to continue the commission [1] in Jahnke's hands and at one time asked leave of Berlin to dismiss Dilger and Hinsch. Therefore, the difficulties which Herrmann encountered in his first interview with von Eckardt were reflected in the difficulties encountered by Hinsch upon his arrival in Mexico (See, *supra*, this Opinion, pp. 111 *et seq.*). [u]

The importance to Herrmann of securing the confidence of von Eckardt and of removing from von Eckardt's mind the suspicions which he entertained towards Herrmann cannot be overestimated: for, if Herrmann was to continue his sabotage activities in Mexico, it was necessary for him to secure von Eckardt's approval, as is shown by the telegram which the General Staff forwarded to von Eckardt, giving him the power of veto over Herrmann's activities in Mexico, including the firing of the Tampico oil fields.

[1] This commission had been given by Wunnenberg, the dynamiter, and the " son Charles " of the cables of November 12, 1917 (Ex. 320, p. 879) and of April 3, 1918 (id. p. 906). Wunnenberg in turn received his commission from Wilhelm of the German Admiralty Staff of Antwerp (Ger. Ex. IV, pp. 7 *et seq.*, and Ger. Ex. XXIX, pp. 3 *et seq.*).

[u] *Note by the Secretariat*, this volume, pp. 317 *et seq.*

Von Eckardt seems to have occupied a more important position with reference to sabotage in Mexico than Hilken occupied in the United States. Von Eckardt was both paymaster and director of the saboteurs, with power to veto their activities. It was not only necessary for Herrmann to secure von Eckardt's approval, but it would probably be impossible for Herrmann to finance his schemes unless he could secure, through von Eckardt, the necessary funds.

Herrmann realized that, with the United States at war, it would be difficult for him to continue to receive funds from Hilken in the United States, and, therefore, his first aim, naturally, was to establish cordial relations between himself and the German Minister, and his appeal to Hilken for aid was the natural and normal thing to do.

" Have told him all reference Hinsch and I Deutschland, Jersey City Terminal, Kingsland, Savannah and Tonys Lab [and yet] He doubts me on account of my bum German ".

From Herrmann's point of view, here are enumerated sufficient references to Herrmann's connections with sabotage to have given von Eckardt confidence in him. Herrmann and Hinsch were the acknowledged leaders of sabotage in the United States. Of all the numerous plants destroyed, the devastating catastrophes at Jersey City Terminal (Black Tom) and Kingsland had received most notoriety; Savannah was fresh in Herrmann's mind and it was natural for him to link it with the others. Tony's Lab referred, of course, to the fact that Anton Dilger had established in Chevy Chase, D.C., a laboratory for culture of disease germs to be used in inoculating with disease animals in the United States. Herrmann and Carl Dilger and Ahrendt had been used by Hinsch to distribute these germs to his force of men, who frequented, for this ignoble form of sabotage, the grounds used for assembling the animals — in Norfolk, Newport News, Baltimore, New York, and St. Louis.

The fact that Herrmann used the term " Jersey City Terminal ", which was not in the record in 1931, instead of "Black Tom ", which was scattered all through the record, is certainly an argument in favor of the proposition that the Blue Book message was composed in 1917, rather than in 1931; for if the purpose of the composer of the message had been to make the message conform to the record as it was in 1931, he would certainly have selected " Black Tom " rather than " Jersey City Terminal ".

So, also, instead of referring to " Tony's Lab ", he would have selected " Dilger's laboratory ", or " Delmar's Germs ", to make his message conform to the record as it stood in 1931.

" he doubts me on account of my bum German ".

In von Eckardt's telegram he described Herrmann as " slender fair, German with American accent "; and he also recites that " Mr. von Verdy suspects him and his companion, Raoul Gerdts to be America-English spies."

(2) To persuade Hilken to send Herrmann $25,000

The sentences in the message used for this purpose are as follows:

" I have no funds
Eckhardt claims he is short of money
Send by bearer U. S. 25000.—
Have you heard from Willie
Have wired Hildegard but no answer

* * * * * * *

Most important send funds."

These sentences indicate, first, that Herrmann had no funds; second, that he had applied to von Eckardt for money, but that von Eckardt had refused and claimed that he was short of money; third, that Herrmann's expectation of receiving $25,000 from Willie Woehst had not been realized and that his wire from Havana to Willie Woehst's cousin, Hildegarde Jacobsen, had not been productive of results and he had received no answer from her.

Von Eckardt evidently did not convince Herrmann that he was dealing frankly; for in the message, Herrman tells Hilken: "Eckhardt claims he is short of money"; so that their suspicions were mutual. That Herrmann had good ground to be distrustful of von Eckardt is borne out by the latter's suggestion in his telegram to the General Staff:

"* * * am I not to answer [Herrmann] that I have no contact with Berlin?"

From Kaba's contemporaneous report (Ann. Y to Ex. 583, Rec. p. 2410 *et seq.*), it appears that Wilhelm Woehst in May, 1917, a little over a month after America entered the war, had been the subject of investigation by the Department of Justice. During this investigation, his cousin, Mary Hildegarde Jacobsen, was examined. It was ascertained from her that Herrmann was at the time of the investigation in Mexico, that she received a cable from Herrmann about a month ago (end of March or early in April, 1917) from Cuba reading

"Have you heard from Willie?";

and about two weeks prior to the report that she had a telegram from Herrmann sent, according to the report of her statement, from *Havana* reading

"Have you seen Raoul".

As to this latter telegram, we know that either Miss Jacobsen or the examiner made a mistake; for the actual telegram was sent from *Mexico* dated May 6, 1917, and read as follows:

"Have you seen Raoul. Answer immediately
Hotel Juarez greetings
F. March"

(Ex. 587, Rec. p. 2478).

In Kaba's report (Rec. p. 2414) Raoul (Gerdts) is represented as having been told by Herrmann that Miss Jacobsen was to receive $250,000, and that, in answer to the telegram of May 6, 1917, she had replied as follows:

"I have seen Raoul. He left. No money."

Evidently the sum $250,000, contained in Kaba's report was a mistake and should have read $25,000. This reply telegram instead of being sent to Hotel Juarez, Mexico City, was sent to the town of Juarez in Mexico and, therefore, was probably never received by Herrmann (Ex. 583, Ann. Y, Rec. p. 2414; Ex. 587, Rec. p. 2478).

In the Kaba report referred to above (Ann. Y to Ex. 583, Rec. p. 2410 *et seq.*) Hildegarde Jacobsen reported that, on the day that Woehst returned to Germany, Herrmann told her she would receive a large sum of money from Willie Woehst, which she should deposit in bank until called for by him or Gerdts, and she was to explain the receipt of this money by stating that it had been left to her by a deceased relative in Germany (Rec. p. 2413). This report, made within two months after the United States entered the war, confirms the telegram sent by von Eckardt for Herrmann and also the message, in showing that Herrmann was expecting to receive money from Woehst.

We have already seen that in his testimony under subpoena in September, 1933, Hilken explained the "A.C.D." account on the books of the Eastern

Forwarding Company, aggregating $95,000, as representing amounts transferred to Anton Dilger after he got to Mexico (Ex. 976, Ann. E, pp. 44-46). Hilken further testified that he did not remember the exact amounts he sent to Mexico,

" but it was probably in the neighborhood of two or three hundred thousand that eventually went to Mexico * * * to get them [the saboteurs] out of this country, and also to finance Herrmann, Dilger and Hinsch, who had then gone to Mexico ". (id. pp. 45, 46)

Some of this money was sent before and some after the United States had entered the war (id. p. 46) (See *supra*, this Opinion, p. 153). [v]

Thus, a careful study of the record in regard to the money which Herrmann expected to receive reveals the fact that the message was a product of what he knew in 1917, and had a right to expect at that time.

(3) To persuade Hinsch and Hilken to leave the States and come to Mexico, or, in the case of Hilken, to go to South America

The sentences in the message used for this purpose are as follows:

" Where are Hinsch and Carl Ahrendt
Tell Hinsch to come here
I expect to go north but he can
locate me thru Eckhardt
What will you do now with America
in the war
Are you coming here or going to South
America
Advise you drop everything and and leave
the States "

Hinsch and Herrmann had been so closely associated in their sabotage work that it was natural for Herrmann to desire the continuance of their relations. The desire to have Hinsch come to Mexico was also coupled with his scheme to promote the destruction of enemy commerce on the West Coast by the use of an old cruiser. As Hinsch had acted as Captain of the " Neckar " and had been likewise connected with the " U-Deutschland " activities, it was natural and normal for Herrmann to think that Mexico would offer a good field for Hinsch's experience.

Herrmann's advice to Hilken to " drop everything and leave the States " showed Herrmann's natural anxiety to have his associates in sabotage cooperate with him in Mexico. At the time the message was despatched none of these associates had come to Mexico. Hinsch had not yet arrived. Anton Dilger was in Europe and did not reach Mexico until late July or early in August, 1917. After his return from Europe in 1916, Carl Dilger never left the United States but ceased sabotage work before America entered the war. [1]

Witzke in September, 1919, is reported by Tunney of Military Intelligence as saying that " in the early part of 1917 (Feb.) * * *, I left the United States for Mexico * * *" and was in Tampico " the latter part of May 1917 " investigating " a case that was reported to us of American and English Secret Service men trying to blow up an oil property or conspiring to blow up oil property in Tampico for the purpose of blaming the matter on German

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[v] *Note by the Secretariat*, this volume, p. 346.

[1] Herrmann was also anxious to get his co-saboteurs out of the United States, because he was not sure of their discretion or their loyalty, as indicated by this sentence: " See that Hinsch brings with him all who might implicate us."

agents " (Ex. 24, Rec. pp. 68, 69). In his affidavit of July 19, 1927, Witzke, however, claims that " on March 23, 1917, * * * I signed on in San Francisco as a sailor on the steamer ' San Pedro ', on which I reached Manzinillo in April 1917 ". He then claims to have gone to Mexico City, where he " received a few commissions for observing movements of ships and the export of oil from Tampico and Vera Cruz " (Ger. Ex. Q, p. 4). Jahnke claims to have gone to Mexico " in May 1917 " (Ger. Ex. P, p. 4). Schulenburg did not get to Mexico until the middle of August (Ex. 986, Ann. A, pp. 185, 186).

We have already had occasion to examine the Arnold correspondence (*supra*, this Opinion, pp. 143 *et seq.*).[w] In the course of that correspondence Arnold, in Havana, wrote Hilken suggesting that they go together to South America. Hilken on August 7, 1916, cabled Arnold expressing his regret at not being able to meet him and stating that he would send a trustworthy representative (Herrmann) if Arnold thought it advisable (Ex. 906, Anns. V, W, X, Y, Z, AA, BB, 1; Ex. 42 attached to Ex. 976, Anns. A–D).

Doubtless Herrmann was thoroughly familiar with these plans and, therefore, in urging Hilken and Hinsch to leave the States, he must have known that, in case Hilken did leave, he would consider going either to Mexico or to South America to join Arnold.

(4) In connection with Hinsch to promote the destruction of enemy commerce on the West Coast

The sentences in the message used for this purpose are as follows:

" tell him [Hinsch] Siegel is with me
Tell Hinsch his plan OK
Am in close touch with Major [Schwierz?]
and influential Mexicans
Can obtain old cruiser for 50000 West
Coast."

Although Siegel denied that he ever met Hilken or Hinsch in the United States (Ger. Ann. 134, Ger. Ann. 169), it is a remarkable fact that on September 18, 1919, more than two years before the Treaty of Berlin was ratified and nearly three years before the Mixed Claims Commission was brought into existence by the Agreement of August 10, 1922, Captain Thomas J. Tunney, Special Investigator, United States Military Intelligence Division, reported that Witzke, a secret German agent in Mexico (who had been convicted of espionage), had voluntarily made a statement to him, from which it appeared that Siegel operated in the early part of the year 1916 in the City of New York under the supervision of a Captain of the North German-Lloyd Steamship Company, who " was in charge of the tug-boat that took in the Submarine Deutschland in Baltimore on the first trip " (Ex. 24, Rec. p. 93). He afterwards stated that the Captain referred to was Hinsch (id. p. 94). If Witzke's report to Tunney be correct, namely, that Siegel was operating under Hinsch in New York in 1916, it was natural for Herrmann, in Mexico, to inform Hilken that Siegel was with him.

When Hilken was under examination by Mr. Sobeloff, the United States District Attorney at Baltimore, taken in accordance with Act of June 7, 1933 (48 Stat. 117), the following questions and answers occurred (Ex. 976, Ann. E, p. 138):

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[w] *Note by the Secretariat*, this volume, pp. 339 *et seq.*

" Q. Mr. Hilken, the message says, ' Tell him (that is Hinsch) Siegel is with me.' And yet both Siegel and Hinsch testified in this case that they did not know each other at that time.

" A. There is nothing inconsistent in that because I had met Siegel at the McAlpin, and Fritz was simply letting me know that Siegel was down there, so as to indicate to Hinsch that he could count on additional help.

" Q. Do you know whether Hinsch had ever met Siegel?

" A. No, I do not. But I knew Siegel. I knew he had come from China or Russia, and had appeared to me as a most efficient and capable man."

The fact that Siegel stayed at Hotel McAlpin is confirmed by his affidavit of November 12, 1937 (Ger. Ann. 134), where he said that, when he arrived at New York on his trip from China, he stayed for a few days at the Hotel McAlpin.

The insertion of Siegel's name in the message was probably due to the fact that Siegel was present when the message was being composed, and Herrmann wanted to incorporate his name for that reason. Certainly from the standpoint of a person who was fabricating the message in 1931, the insertion of Siegel's name would not have added any strength to his fabrication, for it is clear that Hilken himself had forgotten that he ever met Siegel (Ex. 583, Rec. pp. 2239–2242).

The mention of Siegel's name in the message added no verity to the message, and, like the mention of Wolfgang and Phil Wirth, is one of the circumstances tending to show that the message was not concocted as a clever scheme to deceive the Commission by conforming with the record.

In Gerdts' first affidavit (Ex. 626 (a) Rec. p. 2773) he told of going to Hilken's home in Roland Park and finding Hilken, to whom he gave the page from the book of poetry. Hilken then went to the cellar to decipher the order and told Gerdts he did not have that amount of money ($25,000)

" but I should stay at his home while he went to New York to procure the money."

Gerdts remained in his home three days, during which time Hilken went to New London and brought Hinsch back with him, and Hilken told Gerdts that he was going to send the money by another friend. Shortly after that Captain Hinsch was introduced to Gerdts, and Hinsch told him to go back to Mexico and gave him $1,000, and also told him that he was going to bring the balance of $24,000 himself. Thereupon Gerdts said:

" He asked me to tell Hermann that he (Hinsch) was busily engaged in getting guns of 7.05 millimeters across the border into Mexico which were to be used to equip a destroyer in Mazatlan, intercepting ships carrying cargoes from San Francisco. He told me to tell Hermann to enlist the two hundred men that were required to man the destroyer, which Hinsch himself was to command."

In Hinsch's affidavit of June 28, 1932, relating the same incidents (Ger. Ann. 71), Hinsch first tells the circumstances under which he went on Sunday to dinner at Hilken's home in Roland Park, describes the message as a very short one consisting of an identification of Gerdts, a request for money and advice that Gerdts would report verbally about all other matters; and, in his affidavit as finally executed, he also stated that to up that time Gerdts was unknown to both him and Hilken; and he states the circumstances under which he formed the conclusion

" that Gerdts had really come from Herrmann and was not, by any chance, an agent of the American Intelligence Service who had taken this book away from a messenger of Herrmann at the border." (p. 4)

He then repeated Gerdts' oral statement as follows (p.5):

" He mentioned first that Herrmann, down in Mexico, was very short of money and that he (Herrmann) had given him (Gerdts) half of his remaining funds so that he could make the trip to Baltimore. He then told us that Herrmann could not obtain any funds from Mr. von Eckardt, the German Minister in Mexico, since Mr. von Eckardt distrusted Herrmann. Herrmann, he said, had told Mr. von Eckardt of the U-DEUTSCHLAND expeditions and had mentioned Hilken's and my names to identify himself to Mr. von Eckardt. Mr. von Eckardt, however, he said, did not want to have anything to do with him. Gerdts told us, furthermore, that Herrmann was in Sonora and that he had become friends with one Major Schwieritz. Herrmann had found out, he said, that some German sailing vessels were lying in the harbor of Sonora and that he could hire a large enough crew to man an auxiliary cruiser; guns and ammunition could also be procured. I should, therefore, come down to Mexico to take command of the auxiliary cruiser. We could then, with the aid of this auxiliary cruiser, capture enemy merchant vessels. Furthermore, Gerdts told us that Herrmann had instructed him to tell us that he had found out that there was a possibility of setting fire to oil wells near Tampico. Herrmann, he said, had made a suggestion to that effect to the German Minister. The latter, however, had forbidden Herrmann to undertake any such thing; consequently, Mr. von Eckardt did not want to have anything at all to do with Herrmann. At the end of his report Gerdts mentioned that Herrmann could be reached through the German Legation in Mexico and the German Consul in Sonora, Rademacher, whom he would inform of his whereabouts."

It is remarkable how many of the statements attributed by Hinsch to Gerdts as oral information are found in the Blue Book message. Some of these will be examined below (*infra*, this Opinion, pp. 220, 221). [x]

If the Herrmann message had been produced after Hinsch's affidavit, there would have been good grounds for suspecting that the draughtsman of the message had copied many statements *verbatim* therefrom.

On January 11, 1929, when Gerdts made his statement in Ex. 626 (a) Rec. p. 2773, there was, of course, no Blue Book message in the record and Gerdts was relating from memory incidents that had occurred twelve years before that time.

An analysis and comparison of Gerdts' original affidavit (Ex. 626 (a), Rec. p. 2773), Hinsch's report on the oral message delivered by Gerdts (Ger. Ann., 71, p. 5) and the contents of the message as found in the Blue Book of January 1917, disclose the fact that there are many points of similarity but also some striking differences. An examination of the record will disclose clearly that where Hinsch in his report of the oral message from Herrmann varied or changed the terms of the message as contained in the Blue Book or departed from Gerdts' original statement of January 11, 1929, it was Hinsch who was guilty of fabrication and not Gerdts or Herrmann.

Hinsch represents Gerdts as saying that Herrmann was in Sonora and had found out that some German sailing vessels were lying in the harbor of Sonora and that he could hire a large enough crew to man an auxiliary cruiser. Gerdts says in his statement of January 11, 1929, that he was directed by Hinsch to return to Mexico and tell Herrmann that Hinsch was busy making preparations for equipping a destroyer and that Herrmann should enlist two hundred men for that enterprise.

We now know that Herrmann was not in Sonora and that he did not reach Sonora until some time in June (see report of Frederick Simpich, American Consul at Guaymas, Mexico, dated September 16, 1917, Ex. 583, Ann. AA, Rec. p. 2421 *et seq.*). From this paper it appears that Herrmann, with a false

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[x] *Note by the Secretariat*, this volume, pp. 394, 395.

passport dated March 5, 1917, arrived in Sonora some time in June, 1917, that this passport was marked

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and with him were Siegel and Schwierz, a German who had become a major in the Mexican Army.

In Ex. 986, Ann. A, p. 151, Herrmann was shown this passport and testified that the endorsement was placed thereon at the Embassy in Mexico City and from this he states that he could not have been in Sonora even on the 21st of May. He further testified that he went to Sonora about the beginning of June, after Gerdts got back to Mexico with about $700, and he gave him enough money for his return to his home in Colombia (id. pp. 152, 153), so that before Herrmann went to Sonora Gerdts was on his way to Colombia.

In Ex. 904 (4), affidavit of Herrmann, dated the 9th day of May, 1931, in speaking of Gerdts' return to Mexico he said:

" As I remember the circumstances Gerdts returned to Mexico with only about $800 and told me that Hinsch was coming down and would bring the balance of the $25,000 which I requested. Hinsch finally arrived in Mexico City while I was on the North West Coast, and Rademacher told me that a wire had arrived from von Eckardt for me to return to Mexico City immediately."

In Ex. 986, Ann. A, p. 153 *et seq.*, Herrmann testified that it was improbable for Gerdts to have told Hinsch in Baltimore that he, Herrmann, was in Sonora. He said:

" It would have been impossible for me to have been in Sonora, as the records all prove that I was in Mexico City the whole time, and did not leave Mexico City until after I had sent Gerdts back to Colombia."

When Hinsch's testimony, quoting Gerdts as saying that Herrmann was in Sonora at the time when Gerdts was with Hinsch and Hilken in Baltimore, was read to him, Herrmann said (id. p. 154):

" It must be clear to you from the records that you yourself have that Hinsch is deliberately trying to put me in Sonora at a time when I was actually in Mexico City so as to discredit my testimony about sending the message — either that or he is trying to discredit Gerdts."

Then he asks the examiner this question:

" Mr. Sobeloff, what does Gerdts say about that?

" Q. He testified in January, 1929, that you were in Mexico City in April, 1917, and that Hinsch sent him back to you to tell you to go to Sonora to recruit the men for the cruiser.

" A. That is exactly true and what actually happened.

" Q. When Gerdts returned what information did he bring to you from Hinsch?

" A. That Hinsch was coming down with some money and for me to go to Sonora, that he would get in touch with me there through Von Eckardt.

" Q. Did not you say that Gerdts brought you some money?

" A. Only a little, somewhere around seven hundred dollars.

" Q. How much were you awaiting?

" A. I was expecting about $25,000. Gerdts only brought about $700. Hinsch told him he would bring the balance of the money with him.

" Q. Did you go to the West Coast with the money which Gerdts brought you?

" A. That was not quite sufficient, after giving Raoul money to go back to Colombia, so I secured more money, I think two or three thousand pesos, from Von Eckardt.

" Q. Did Von Eckardt receive an answer from Berlin to his cable before giving you the money?

" A. He told me he had and that everything was O. K., for me to report to Rademacher and keep in touch with him so he would always know where to get in touch with me.

" Q. The record shows that Von Eckhardt did not receive the cable from Berlin, in answer to his inquiry about you, until about the middle of May.

" A. It was after that that he gave me the money and that I left for Sonora.

* * * * * * *

" Q. About when did you get this notification that Hinsch was in Mexico City?

" A. Somewhere towards the end of July, and I arrived in Mexico City early in August."

And again on p. 157:

" Q. Was it after this date, July 17th, that you returned to Mexico City?

" A. I returned shortly after that date. I have already stated that I arrived in Mexico City about the beginning of August."

On p. 158, he was asked this question:

" Q. What was the result of your trip to Sonora in connection with the cruiser?

" A. When I returned to Mexico City and reported to Hinsch, Hinsch got cold feet and we dropped the entire matter."

Therefore, when Hinsch represented in his affidavit (Ger. Ann. 71) that Gerdts said " that Herrmann was in Sonora " and that Herrmann " could hire a large enough crew to man an auxiliary cruiser ", it is not reasonable to believe that Gerdts made such a statement on April 30, 1917, because Gerdts had been with Herrmann ever since Herrmann arrived in Mexico and he knew that Herrmann had not been in Sonora. Herrmann did not reach Sonora for about two months thereafter; and when Hinsch claims to have directed Gerdts " to tell Herrmann to remain in Sonora until he should hear from me and that until then he should not undertake anything in these matters ", Hinsch was guilty of pure invention and fabrication, by taking the data in Gerdts' affidavit and varying the same for the purpose of contradicting the message.

The object of Herrmann's trip to Sonora and of his activities there, as reported by Simpich, was clearly to carry out the instructions Gerdts said he brought from Hinsch in regard to manning the destroyer.

Likewise, Hinsch's grounds for vetoing the scheme of the auxiliary cruiser as impracticable, because they would need the requisition by a battleship commander, was just as fanciful. It was probably the fear of the navies of the United States and Great Britain, and not the lack of requisition of a battleship commander, that put the veto on this scheme. This is confirmed by Herrmann who in giving the results of his trip to Sonora in connection with the cruiser, said that when he returned to Mexico City and reported to Hinsch, " Hinsch got cold feet " and the entire matter was dropped (Ex. 986, Ann. A, p. 158).

Hilken testified that the reference in the message to engaging a cruiser referred to a discussion between Hinsch, Herrmann and himself before Herrmann left the United States and he stated:

" Hinsch had the idea that he would start out from Mexico soon after his arrival there as a commerce raider. His thought was he would be a second Count Luchner." (Ex. 976, Ann. E, p. 137.)

(5) To warn Hilken where he might expect trouble from co-saboteurs and their friends

The sentences in the message used for this purpose are as follows:

" Be careful of her [Hildegarde Jacobsen]
and connections

I dont trust Carl Ahrendt, Kristoff,
Wolfgang, and that Hoboken bunch
If cornered they might get us in Dutch
with authorities
See that Hinsch brings with him all
who might implicate us
Where is Carl D[ilger]
he worries me
remember past experience
Has Hinsch seen Wozniak
Tell him to fix that up
If you have any difficulties see Phil
Wirth Nat Arts Club."

The reason for Herrmann's distrust of Hildegarde Jacobsen, Willie Woehst's first cousin, is not disclosed in the record; but as a matter of fact we know that in May, 1917, she did disclose to the Department of Justice many facts which raised suspicions as to the activities of Woehst, Herrmann and Hilken. The haste with which Woehst and Herrmann left their apartment in New York, with compromising papers therein, was probably because they became aware that the Department of Justice was on their trail, and it may be that Herrmann had reason to suspect Hildegarde Jacobsen of being responsible.

Just why Herrmann distrusted " Carl Ahrendt, Kristoff, Wolfgang, and that Hoboken bunch " is not clear from the record. It is clear from the record, however, that Ahrendt did not hesitate to fabricate evidence. Wolfgang is unknown, and " that Hoboken bunch " evidently refers to the German interned sailors who were used by Rintelen and Hinsch in their worst forms of incendiary sabotage and inoculating animals.

" Where is Carl D[ilger]
he worries me
remember past experience "

The anxiety which Herrmann here expresses as to Carl Dilger is thoroughly reflected in the record and has been carefully studied and analyzed in this Opinion (*supra*, pp. 95 *et seq.*).[y] The story was first told by Herrmann on April 3rd, 1930 (Rec. pp. 5431, 5489), and was subsequently confirmed by Hinsch in German Exhibit CXXVIII, p. 108, and was also confirmed by the production of Hilken's contemporary correspondence with Captain W. Bartling, German Commercial Attaché at Copenhagen (Ex. 906, Anns. A and D) and with Mr. Haguested (Ex. 906, Anns. O and P). It was also confirmed by Carl Dilger (Ex. 764, Rec. p. 5649) who gave his affidavit on April 18, 1930, about eight months before the message was rediscovered by Hilken in his attic and one year before it was produced.

" Has Hinsch seen Wozniak
Tell him to fix that up "

In Herrmann's confession of April 3, 1930 (Rec. p. 5431 *et seq.*), Herrmann told about his employment of Wozniak and Rodriguez and of giving them incendiary pencils in December, 1916, or January, 1917 (id. pp. 5433 – 5455, 5503 – 5505). He showed them how to work the pencils, and, two days after the fire, he met Rodriguez and gave him $500 and two or three days afterwards he saw Hinsch at New London (id. pp. 5455, 5503 – 5505). But he never saw Wozniak after that (p. 5456). In the same deposition, on re-examination by the American Agent, he again tells of giving the tubes to Wozniak and Rodriguez several days before the Kingsland fire and paying them $40 a week for

[y] *Note by the Secretariat*, this volume, pp. 306 *et seq.*

three or four weeks and after the fire he paid Rodriguez $500 but he never saw Wozniak again (id. p. 5588).

That Herrmann had almost an instinctive dislike and distrust of Wozniak is clearly established by the record. Thus, before the production of the message, Herrmann, under an examination by the German Agent, repeated a conversation he had with Hinsch about Wozniak, as follows:

" I don't like the looks of this fellow [Wozniak]. He looks as if he is half crazy. I don't know whether to believe him, * * * or if he can do anything or not." (Rec. p. 5502.)

And then, again, when he was informed that Wozniak was in Mexico, he said:

" Of course I did not want to see him, because he was half cuckoo. I thought perhaps he was sore because he did not get his money, and I thought maybe he would take a shot out of me." (Id. p. 5460.)

And, again, under examination by the German Agent, Herrmann testified as follows (id. p. 5528):

" You were not inclined to give him anything? A. Who, Wozniak?
" Q. Yes. A. No.
" Q. Why not? A. I was sort of scared of that guy.
" Q. Were you willing to pay him? A. If I had met him shortly after the fire I would have paid him.
" Q. But afterward you did not think it necessary? A. Afterwards I didn't want to. He did the job, and that was enough for me.
" Q. He did what? A. After he did the job that was enough for me. I didn't want to see him again. Why? If I was to have got going with him I would have had him hanging on my neck for the next couple of years, and if I didn't take care of him more and more he would threaten to squeal on me."

" If you have any difficulties see Phil Wirth Nat Arts Club "

The name of Phil Wirth had not appeared in the record before the message was produced. After the message was produced Hilken was asked the question as to the significance of the above sentence and replied:

" I don't know. I had never known Mr. Wirth. I believe he was a friend of Herrmann and that Herrmann wanted to give me his name and address so that I would have some one who could be of assistance to me in case of necessity. But that is only a surmise on my part." (Ex. 976, Ann. E, p. 138.)

Herrmann, when asked the question: " Why did you make the reference in the message to Phil Wirth of the National Arts Club? " stated that he had met Wirth on board the steamer " New Amsterdam " after he had been put out of England in January, 1916; that he became better acquainted with him in New York and Wirth offered to help him in any way he possibly could, especially if Herrmann was to get into trouble, and told Herrmann to communicate with him and he would be only too glad to help him. When asked why he mentioned his name in the message, he said:

" Because I thought most likely Paul would be in trouble at that time and that he did not know for sure whom he could trust. Wirth had also arranged cover addresses for me in Holland and Denmark, and I knew that Hilken could trust him." (Ex. 986, Ann. A, p. 184.)

(6) To awaken memories of sabotage acts

The sentences in the message used for this purpose are as follows:

" Regards to Hoppenburg
Sei nicht dum
mach doch wieder
bumm bumm bumm."

The explosion at Black Tom was in the early morning of July 30th, 1916. Six days after that explosion, to-wit, on August 5th, Hinsch, Herrmann, Hoppenberg, and Hilken were in the office of the Eastern Forwarding Company in the Whitehall Building with windows looking out over the Hudson River. Two or three windows had been cracked by the force of the explosion at Black Tom and at this meeting Hoppenberg facetiously pointed to the broken windows and said:

" Why, you fellows have broken my windows."

Herrmann retorted to Hoppenberg by singing a song of the war of 1870:

" Lieber Moltke sei nicht dumm. Mach mal wieder, bumm, bumm, bumm"

which being freely translated means:

" Dear Moltke, don't be so dumb
Go out rather and make bumm, bumm, bumm " (Ex. 976, Ann. E, p. 59.).

(7) " *Bearer will relate experiences and details. Greetings.*"

The statement that " bearer will relate experiences and details " was a natural closing sentence for the message, having no specific relation to any other portion of the message or the record; but this sentence was evidently the portion of the message which suggested to Hinsch that his description should include an oral message, much longer and much more in detail than the written message described by him.

As to the last word " greetings ", this was the same salutation which was used by Herrmann in his telegram to Hildegarde Jacobsen dated May 6, 1917 (Ex. 587, Rec. p. 2478).

It has been clearly established that Hinsch's attack on the Herrmann message failed (1) in claiming that, since Gerdts was unknown to Hilken (and Hinsch), its purpose was to identify Gerdts; (2) in claiming that, since lemon juice was an outmoded form of secret writing in 1916 and 1917, Herrmann would not have used lemon juice in a message to Hilken in early 1917; (3) in claiming that the border when Gerdts crossed it was being closely watched.

It has been clearly established on the contrary (1) that Gerdts was well known to Hilken before he brought the Herrmann message; (2) that secret messages written in lemon juice were still being employed by German agents at the time the Herrmann message was drafted and Herrmann was expecting such messages when he left hurriedly for Cuba, en route to Mexico; (3) that Hinsch, himself, knew from personal experience that the border in April, 1917, was not being closely watched.

In the examination of the internal evidence we have found other examples of an effort by Hinsch to fabricate evidence in order to detract from the verity of the message. If the message as produced by Hilken had been concocted for the purpose of convincing the Commission by fabricated evidence that German agents were responsible for the destruction of Black Tom and Kingsland, is it not strange that no anachronisms have been discovered and that no departures from facts established in the record have been brought forward?

Attacks on the Herrmann Message

1. By Ahrendt

The first attack on the Herrmann message came from Ahrendt.

We have already examined some of Ahrendt's affidavits, filed for the purpose of confirming Hinsch and destroying the confessions of Herrmann and Hilken, and we have found that Ahrendt's affidavits were false:

(a) In his attempt to confirm Hinsch's alibis, that is to say, Hinsch was so closely confined at Baltimore and New London, respectively, while engaged in the U-boat activity, that it was impossible for him to have been engaged in sabotage;

(b) In claiming that, after Hinsch arrived in Mexico, he did not hear from Hinsch and did not know in what form of activity he was engaged;

(c) In asserting that he never heard of any explosive tubes, incendiary pencils or glass tubes used by Hinsch or anybody else, or of the existence of any such devices, and that he was ignorant of any sabotage activities of Herrmann, Hilken or Hinsch.

After filing of the Herrmann message on July 1, 1931, and its identification by Hilken (Ex. 904(3)), and its identification by Herrmann (Ex. 904 (4)), filed on the same date, the German Agent, Dr. Tannenberg, secured from Ahrendt an affidavit made February 10th, 1932, and filed as German Annex 73 on August 15, 1932, the object and purpose of which was to show that no message written by Herrmann had been received by Hilken in April, 1917, and, therefore, that the message contained in the Blue Book Magazine for the month of January, 1917, which Hilken swore he received the latter part of April, 1917, was a forgery. This was the first attack.

In this affidavit (Ger. Ann. 73), Ahrendt relates that he met the German Agent, Dr Tannenberg, at the offices of the North German Lloyd in New York. The German Agent explained to him the supplemental petition for rehearing and showed him the affidavit of Paul G. L. Hilken filing the Blue Book message (Ex. 904(3)) and the affidavit of Fred L. Herrmann verifying the Blue Book message (Ex. 904 (4)).

According to his statement under oath, Ahrendt carefully examined these affidavits and also the photostatic copies of the message, and carefully noted what Hilken and Herrmann had said in their respective affidavits in regard to the January, 1917, Blue Book message. Ahrendt made comprehensive denials, under oath, of ever having seen a message in the Blue Book of January, 1917, or any other magazine; that he had ever heard of any such message or that he had ever received any message from Herrmann during his stay in Mexico; or that he had ever heard of any such message. He denied that he ever heard from Hilken that he had ever received this message. He also denied that he had any knowledge of statements made by Hilken and Herrmann with reference to raising the message by means of a hot iron.

He made oath that he stayed continuously in New London with Captain Hinsch from April 6, 1917, until May 25, 1917, when he left New London with Captain Hinsch en route to New Orleans, and that he arrived in Baltimore May 26th and left Baltimore May 27th.

Taken in connection with his other affidavits, which we have already examined, the object and purpose of Ahrendt's affidavit, as drafted by Dr. Tannenberg, was to show that, on account of the close relationship between himself, on the one side, and Hinsch and Hilken, on the other (which had been shown in other affidavits), Ahrendt would have been in a position to know whether there had been any written message from Herrmann to Hilken, and, though the statement is not directly made, the inference to be drawn from the affidavit (and its only purpose) was that, since he had never heard of such a written message, therefore, no such written message was ever received by Hilken. The mention of the fact that Ahrendt was continuously in New London on or about the time when Hilken alleged that the message was brought to him in Baltimore and that he did not see Hilken in New London during that time, was part of the circumstances upon which he and the German Agent relied to show that no written message had come from Mexico to Hilken.

It has been already shown, in another connection, that, when Hilken received the Herrmann message from Gerdts, he left Gerdts in his home in Roland Park, and on April 27, 1917, went to New London to have an interview with Hinsch in regard to the message. On April 28th Hinsch and Hilken left New London and went back through New York and thence to Baltimore. This is borne out by the entry in Hilken's diary for Saturday, April 28th, which reads as follows:

> " Saturday 28
> 4 a m with Capt. H. Leave 11 a m
> train and Congressional for Baltimore." (Ex. 583, Ann. D.)

As we have seen before, Captain Hinsch and Gerdts dined with Hilken in his Roland Park home on Sunday the 29th, and on Monday Gerdts says that Hinsch gave him $1,000 and told him to go back to Mexico (Ex. 626 (a), Rec. p. 2773); but Hinsch and Hilken both went back to New York on that date, as shown by the diary entries for the 29th and 30th of April. Therefore, the statement in Ahrendt's affidavit (Ger. Ann. 73) that he had not seen Hilken in New London between April 6, 1917, and May 25, 1917, while evidently made for the purpose of proving that no written message was received by Hilken, failed dismally, and, taken in connection with Siegel's statements showing that there was a written message carried by Gerdts to Hilken, this affidavit convicts Ahrendt of fabrication, just as his famous postscript in his letter to Hilken did.

In Siegel's first statement, witnessed by the German Consul on the 16th of March, 1932, and filed on the 27th of May, 1932, Siegel stated that it was decided by himself and Herrmann to send Gerdts to Baltimore to obtain funds; that Gerdts was given an American magazine to take along; that the necessary communications were written cross-wise to the print in lemon juice on several pages of the magazine; that the information was written down partly in normal writing and partly in code; that, after the report had first been drawn up on a sheet of paper he dictated the same to Herrmann who wrote it in the American magazine; and that Gerdts had returned after about the middle of May and brought with him much less money than Herrmann expected (Ex. 908, Ann C).

After this statement was filed, it was no longer possible for the representatives of Germany to carry out their first line of attack and the efficiency of Ahrendt's affidavit was completely destroyed. It was no longer possible to claim that no written message had been sent by Herrmann to Hilken and, therefore, the tactics were changed.

It was then admitted that Herrmann had sent a written message to Hilken, but it was claimed that the Blue Book message was a forgery, and for this purpose there were filed on August 27, 1932, Hinsch's affidavit (Ger. Ann. 71, verified on June 28, 1932), and Siegel's second statement (Ger. Ann. 69, verified July 15, 1932).

2. By Hinsch

Siegel's first statement (Ex. 908) showing that a written message to Hilken had been put into Gerdts' hands and that he had been sent by Herrmann to Hoppenberg and Hilken, destroyed Ahrendt's attack on the message, and it then became necessary to change the line of attack. Therefore, Siegel's second statement (Ger. Ann. 69) and the affidavit of Hinsch (Ger. Ann. 71) were brought forward for that purpose. It was no longer possible to claim that there was no written message, and, therefore, in Hinsch's affidavit, it was admitted that a written message had been brought by Gerdts to Hilken but it was claimed that the Blue Book message was a forgery. To establish this proposition, it was claimed by Hinsch, first, that the message which Gerdts brought to Hilken consisted of one page, not four; second, that it contained an identification of

Gerdts, with an assurance that he could be trusted and a request for $20,000 or $25,000; and, third, that it contained a statement that Gerdts would report verbally about all other matters.

It was further claimed that Gerdts was unknown to both Hilken and to Hinsch and, therefore, needed identification. To substantiate the assertion that he was unknown to Hilken and to Hinsch, it was alleged that Hinsch and Hilken discussed whether they could trust Gerdts or not, but that since Gerdts stated to Hilken certain particulars in regard to the submarine enterprise known only to Herrmann, Hinsch was of opinion that Gerdts had come from Herrmann and was not, by any chance, an agent of the American Intelligence Service who had taken " the book " away from Herrmann's messenger at the border.

There are some minor allegations necessary to be examined:

(1) Gerdts reported being closely watched at the border and that he came a roundabout journey to Hilken's home.

(2) Hilken was disturbed about the possibility that Herrmann's message might be found in his possession and, therefore, Hilken and Hinsch determined to destroy it without delay.

(3) The message brought by Gerdts was written in invisible ink (which did not require heat for development) and not in lemon juice (which did require heat for development); and to substantiate this claim it was asserted that lemon juice was a primitive medium for writing secret messages, outmoded at the time the Herrmann message was composed, and not used at all in 1916 and 1917 for invisible writing, and that the unprinted sheet of paper which Hilken had removed from the book contained the secret message and had purple discolorations.

It was further claimed that the message was contained not in a magazine but was contained in a book with a stiff cover, and that it was written on one white page not on four printed pages.

Some of the attacks made by Hinsch depend merely upon the veracity of witnesses affirming or denying; for example, that it was written on a single white page, not on four printed pages.

As to these contentions, we do not make any progress by simply saying that we believe Hinsch, or by saying that Hinsch is a liar; neither does Hinsch's statement gain any weight by a mere recital of facts contradicting the message in the Blue Book.

Before proceeding to analyze the attacks made by Hinsch on the message, it is proper to study the message as described by Hinsch.

The message described by Hinsch conforms with the Blue Book message in two particulars, first, it was a request for money, and, second, it represented that the bearer would make a verbal report.

It differed from the Blue Book message in two particulars, first, it was short and written on one white page, whereas the Blue Book message was lengthy and written on four printed pages; and, second, the message as described by Hinsch called the name of the bearer, Raoul Gerdts, and assured Hilken the bearer could be trusted, whereas the Blue Book message did not call the name of the bearer and made no such assurance.

Surely, if Gerdts had been unknown to Hilken when he brought the Herrmann message to Baltimore, the insertion of his name and the assurance that he could be trusted with $25,000 would not have been any inducement to Hilken to entrust him with so large a sum, and, as is admitted, Hilken only gave him $1,000 and sent the balance by Hinsch.

It is interesting to note that Hinsch's account of Gerdts' verbal report conforms in almost every respect to the Herrmann message as contained in the Blue Book, to-wit,

(1) Herrmann was short of money;
(2) Herrmann could not obtain money from von Eckardt, the German Minister;
(3) Von Eckardt distrusted Herrmann;
(4) Herrmann had told von Eckardt of the " U-Deutschland " expedition and mentioned Hilken's and Hinsch's names to no effect;
(5) Herrmann was in Sonora; (The message says " I expect to go north but he (Hinsch) can locate me thru Eckhardt ".)
(6) Hinsch refers to the fact that Herrmann wanted him to come down to Mexico to take command of an auxiliary cruiser. The message says:

" Am in close touch with major [Schwierz?] and influential Mexicans Can obtain old cruiser for 50000 West Coast."

(7) Hinsch refers to Herrmann's request that he come down to Mexico. The message says:

" Tell Hinsch to come here."

Thus, nearly every statement which Hinsch claims to have gotten orally from Gerdts is actually contained in the Blue Book message.

In addition, Hinsch's statement confirms the record as to the authority which Herrmann had received more than a year before to set fire to the Tampico Oil Fields and the doubt which the German Minister had expressed to him when this story was repeated to him.

In order to analyze and study the attack made by Hinsch, it is necessary to make a careful study of the record to determine whether Hinsch's various attacks may be substantiated. We will endeavor to make this study under the following heads:

(1) Was the border being closely watched when Gerdts came to Baltimore?
(2) Was the Herrmann message destroyed?
(3) Was the Herrmann message written in lemon juice or invisible ink?
(4) Was Gerdts unknown to both Hilken and Hinsch when he brought the Herrmann message to Baltimore?
(5) Was the message written in a magazine or a book with a stiff cover?

Hinsch's Attack

(1) Was the Border Being Closely Watched When Gerdts came to Baltimore?

In his affidavit of June 28, 1932 (Ger. Ann. 71, filed Aug. 15, 1932), Hinsch stated as follows (p. 6):

" Gerdts also told us, in the course of the conversation, that he had been closely watched at the border and that Herrmann had told him that he should go out to Roland Park only when he felt sure he was not watched. As a matter of fact, he had come to Hilken's home only after a long, roundabout journey."

This language is practically repeated by the Umpire in the decision of December 3, 1932, where the Umpire said:

" * * * the border was being watched for secret correspondence; the situation was so tense that Hilken was under actual surveillance and his home was being searched." (Decs. and Ops., p. 1022.) [z]

In making this statement the Umpire was justified, not only by the testimony of Hinsch but also by the argument of the German Agent (Washington Argument, November 23, 1932, p. 197), in which he represents that Gerdts was sent

[z] *Note by the Secretariat*, this volume, p. 118.

" across the border at a time when the border was most carefully watched ", almost the exact language attributed to Gerdts in Hinsch's affidavit.

When Hinsch left Baltimore for Mexico on May 27, 1917, after the United States had entered the war, Ahrendt accompanied him to El Paso, Texas (Ger. Ex. CII, pp. 84, 85, filed July 2, 1930). Their movements after they got to El Paso are described by Ahrendt in his examination by Dr. Tannenberg as follows (id. p. 85):

" We left the train at El Paso, Texas, and I went across the border to see whether it was difficult or not to go across the border, and discovered that it was quite an easy feat to cross the border and came back, and Hinsch and I got into an automobile for a sight-seeing trip around El Paso. The guide asked whether we would like to see Mexico and we said, ' Why, surely, if we could,' and he drove us across the border, and I left Hinsch in Juarez."

In the course of his examination the following ensued (id. p. 89):

" Q. How was it possible for you to cross the border?
" A. Why, that is what Captain Hinsch commented on; that in the case of war that a country was so lax at its border. They had sight-seeing cars that were transporting people around El Paso, and anyone that expressed the desire could stay in this car and ride across the border and see Juarez. When you reached the international border there were some American officials there who looked in the car to see whether you had any munitions, or guns, or revolvers. They simply asked us; they didn't lift a seat and look; a man said, ' Have you any ammunition or firearms? ' And we said, ' No ' He said, ' Go ahead.'
" Q. Was it necessary to have a passport?
" A. Not at all.
" Q. Did these officials examine any papers you had?
" A. Not a thing.
" Q. Is it right that anybody who crossed the border in a sight-seeing bus could do that without any difficulty?
" A. No difficulty at all at that time."

Again (id. p. 91):

" Q. And when you crossed the international border, what kind of an examination was there by the American officials?
" A. None at all; simply that they asked whether we had any ammunition or firearms in the car. We were asked for no papers, and it was a very easy affair.
" Q. Did the American officials ask you about your nationality?
" A. No."

On August 11, 1932 (Ger. Ann. 74, filed August 15, 1932), Ahrendt made another affidavit in behalf of Germany in which he introduced his Pullman stubs for his trip with Hinsch from New York to New Orleans en route to the border, from which it appears that Hinsch and Ahrendt left New London on Friday, May 25, 1917, and went from New Orleans to El Paso on May 29th. The affidavit proceeds (p. 3):

" There we got off the train. At El Paso, Hinsch and I crossed the border after we had found out that this could be accomplished without difficulty, as I have previously testified in my affidavit of April 11th, 1930."

It will be recalled that, before Hinsch left the country, a presidential warrant for his arrest had been issued (Ord. Ex. 343, Rec. p. 4258).

On August 15, 1932 (translation filed August 27, 1932), the German Agent filed Hinsch's affidavit of June 28, 1932 (Ger. Ann. 71). This affidavit as originally drafted by Dr. Tannenberg (Ger. Ann. 132) and as finally executed by Hinsch, contained the following language:

" Gerdts also told us, in the course of the conversation, *that he had been closely watched at the border* and that Herrmann had told him that he should go out to Roland Park only when he felt sure he was not watched." (Emphasis supplied.)

On the same day, August 15, 1932, that he filed Hinsch's affidavit, the German Agent filed Ahrendt's affidavit of August 11, 1932 (Ger. Ann. 74). In this latter affidavit, Ahrendt, after filing his Pullman receipts and showing that he and Hinsch had arrived at El Paso on May 29, 1917, repeated his statement in his former affidavit (Ger. Ex. CII) as follows:

" At El Paso, Hinsch and I crossed the border after we had found out that *this could be accomplished without difficulty, as I have previously testified* in my affidavit of April 11th, 1930." (Emphasis supplied.)

It thus appeared that Hinsch crossed the border going to Mexico about one month after Gerdts had already crossed the border carrying the message to Hilken in Baltimore and only a very short time after Gerdts had recrossed the border on his return to Mexico, and Hinsch had commented to Ahrendt on how lax the United States, a country at war, was in watching its border (Ger. Ex. CII, p. 89). Therefore, at the time when Hinsch made his affidavit of June 28, 1932, he could not have been unmindful of the ease with which he and Ahrendt had crossed the border on May 29, 1917, just about a month after Gerdts had gone to Baltimore.

Thus, on the same day that he filed Ahrendt's affidavit, the German Agent filed Hinsch's affidavit directly contradicting Ahrendt; and in the Washington argument in November, 1932, the German Agent used Hinsch's affidavit on this point without referring to the fact that he had already filed two affidavits of Ahrendt which directly contradicted Gerdts' statement as reported by Hinsch.

On October 17, 1933, Ahrendt testified again about his trip with Hinsch to El Paso (Ex. 975, Ann. C, pp. 103–105). He said that they had no difficulty at the border, and it was all right for you to carry anything in your pockets without interference from any guards; that there was no search made; that the only question asked was whether you had firearms, guns or ammunition; that he did not agree with the opinion of the Commission that the border was carefully watched.

Ahrendt in the same examination testified that not long after Hinsch left, he accompanied, in the early part of August, 1917, the lady who subsequently became Hinsch's wife to Laredo, Texas, and that she had no difficulty in getting across the border in a cab with her baggage (id. pp. 236–240). Ahrendt went across first and bought her a ticket and had no difficulty going or coming across the border (id. p. 239).

We know that Anton Dilger arrived in this country from Berlin on July 4, 1917 (Ex. 943), that he followed Hinsch to Mexico carrying secret ink which he had received from the German General Staff (Ger. Ann. 75).

Witzke crossed and recrossed the border at least twice in the summer of 1917 on missions for Jahnke (Ger. Ex. Q, p. 5).

Jahnke apparently had no difficulty in crossing the border into Mexico in May, 1917 (Ger. Ex. P, p. 4; Ger. Ex. Q, p. 4).

James J. Larkin, the well-known Irish labor agitator, in his affidavit of January 2, 1934, tells about a trip he made from New York to Mexico City in the latter part of August, 1917, to confer with Eckardt (Ex. 990, Ann. A. p. 17). That Larkin came from the United States to see von Eckardt in Mexico City in the summer of 1917 is confirmed by von Eckardt in his affidavit of April 16, 1934 (Ger. Ann. 95).

It would seem clear that the sole foundation for Hinsch's claim that the border

was being watched is found in Gerdts' affidavit (Ex. 626), where he said (Rec. p. 2772):

" I remember that when I arrived at Mr. Hilken's home and asked for him, a woman, probably thinking that I had some business of interest to Mr. Hilken, told me to leave the house immediately and come back in about a half hour because at that time special investigators were inspecting the house."

As we have already seen, Hilken denied that when Gerdts came to his houses, it was being watched; but, according to Hilken, Gerdts may have had in mind an incident, when some hoodlums in Roland Park had painted a sign, " To Hell with the Kaiser", on the concrete walk leading from the street to his house and Mrs. Hilken had complained to the police, and it was possible that when Gerdts arrived, a policeman may have been there (Ex. 976, Ann. E, p. 139).

In Ex. 921-M-3, filed June 1, 1932, there is a photostatic copy of a report dated November 1, 1917, written by R. M. Campbell, Captain, U. S. A., Military Attaché, from the city of Mexico to the Chief, Military Intelligence Section, War College Division, Washington, D.C. The report deals with the activities of a certain female messenger carrying secret messages in the soles of an extra pair of shoes carried by her, having a little compartment in the sole for the reception of the letters. In the course of the report he uses the following language (paragraph 6):

" The woman who was to have carried these letters has made frequent trips from here north, and there is strong evidence to believe that all these trips have been made for the purpose of carrying letters for the propaganda committee, or the German Legation. I am informed, and believe the information is trustworthy, that on none of these trips has she entered the United States, but that she has gone sometimes to Nuevo Laredo, sometimes to Piedras Negras, and sometimes to Matamoras. *This reveals the fact that German agents in the three Mexican towns have means of getting documents across the frontier without the knowledge of our authorities.*" (Emphasis supplied.)

Thus as late as November 1, 1917, the Military Attaché reports to the War Department that German agents in the three Mexican border towns had the means of getting their documents across the frontier without the knowledge of the authorities of the United States.

(2) Was the Herrmann Message Destroyed?

It is claimed by Hinsch that Hilken was disturbed about the possibility that the Herrmann message might be found in his possession and, therefore, that he and Hilken determined to destroy the message without delay. If the message simply consisted of an identification of Gerdts, with a request for funds and no more, such a message was not dangerous and would not have disturbed Hilken, and there would have been no necessity for its destruction. Indeed, such a message need not have been secret or written in invisible ink.

(3) Was the Herrmann Message Written in Lemon Juice or Invisible Ink?

In order to prove that the message contained in the Blue Book was not a genuine instrument, Hinsch claimed that the message which Gerdts brought to Hilken in Baltimore

" had been written with a secret ink which could not be developed by heat and, consequently, not by means of a hot iron " (Ger. Ann. 71, p. 6.);

and he further claimed that

" Invisible writing fluids which could be made visible by heat would not have been used at all in the years 1916/1917, for such important communications, since it would have been too easy to make messages produced with such fluids visible " (id. p. 6).

It was claimed that since letters written in lemon juice could be developed by heat, this method was primitive, and offered no guaranty of secrecy; that Hilken and Herrmann, upon returning from Germany had brought secret inks in powdered form; and therefore Herrmann could never have counted on Hilken, of all people, to accept such a message (id. pp. 6, 7).

He claimed that the unprinted paper upon which Hilken developed the message showed that the secret writing had been made visible in the way typical of developing invisible inks, and that the whole sheet had slightly purple discolorations typical of the secret ink (id. p. 7).

In his affidavit of January 11, 1929, Gerdts recited that he was ordered by Herrmann to go from Mexico to New York to collect $25,000, and that the order and instructions given by Herrmann were written in lemon juice on a page in a book of poetry, and stated that in the same book of poetry there was written another order, also written in lemon juice (Ex. 626(A), Rec. pp. 2772, 2773).

This affidavit was executed nearly two years before Hilken claims to have rediscovered the Blue Book in his attic (Christmas 1930).

At the time Gerdts executed the affidavit (January 11, 1929), the only references in the record to his carrying a message from Herrmann are found in Layton's despatch of August 1, 1917, where Gerdts is reported as saying that Herrmann " sent me to New York by train with some letters, which I delivered " (Ex. 583, Ann. G, Rec. p. 2347); and in Guyant's report of August 24, 1917, where Gerdts is reported as saying that " he was ordered by Herrmann to proceed to New York by rail with a verbal order for $25,000.00 to be received from one Hoppenberg "(id. Ann. H, Rec. p. 2351), and there was no controversy as to invisible messages, whether in lemon juice or not. Gerdts had no reason or inducement to tell a falsehood as to the medium used by Herrmann for transcribing his message. There is, therefore, not the slightest reason to doubt the truth of Gerdts' statement, made before any controversy arose, that lemon juice was the medium used by Herrmann for transcribing his message.

In his second affidavit of July 17, 1933 (Ex. 979, Ann. A), Gerdts was asked how he knew that the Herrmann message was written in lemon juice and he stated:

" Because I bought the lemon myself and brought the lemon to Hermann to the Hotel Paglach, Avenida Juarez, Mexico City, where we were living and I saw him writing the message myself."

He also testified that he was with Herrmann when he was writing the message.

The fact that the message which was written by Herrmann and transported by Gerdts to Hilken in Baltimore was written in lemon juice and not in the so-called invisible ink, is substantiated by the affidavit of Mrs. Hattie Shannon. Mrs. Shannon wrote to the Umpire on April 9, 1934, offering to testify. Her letter was referred to each Agent, and as a result her affidavit was secured (See motion of American Agent, August 16, 1935, p. 5). In her affidavit she testified as follows:

She was a passenger on a steamship sailing from Buenos Aires July 14, 1932. The steamer was boarded at Rio de Janeiro by Gerdts on July 30, 1932, and they were fellow passengers for three weeks and in each other's company a great deal (Ex. 999-A, p. 1).

During their conversations Gerdts informed her of his association with a number of German spies in the United States, one of whom was Fred Herrmann. He told Mrs. Shannon about a Blue Book Magazine of 1917 which concerned the Black Tom blast, and which book he said involved both Herrmann and himself. The affidavit continues:

" He said the magazine contained a message written in lemon juice and then explained to me that to develop lemon juice writing, a medium hot iron must be used in order to prevent the paper from scorching. He went into a great deal of detail about this magazine but as I was not interested, I paid little attention to what he said. He also told me that he did not know the contents of the messages he carried, that he simply followed the orders of those higher up " (id. p. 2).

Gerdts told Mrs. Shannon an incident about the inoculation of horses being loaded for shipment to Europe, and that a short time after they left port they all died (id. p. 2).

In Exhibit 999, Ann. B, Mrs. Shannon relates that shortly prior to Gerdts' leaving the ship at Puerto Colombia, he promised to write her a letter in the manner similar to the one written in the Blue Book and gave her instructions how to develop it. He sent such a letter, which was written in the ordinary form, but by application of heat another letter written with lemon juice was made visible, and she filed with her affidavit a letter, dated September 8, 1932, containing both the visible and invisible letter.

At the time when Mrs. Shannon met Gerdts, to-wit, July 30, 1932, Hinsch's affidavit attacking the Herrmann message and claiming that the original message was written in invisible ink had not been filed. Indeed, when Gerdts wrote his letter to Mrs. Shannon September 8, 1932, and superimposed on it a letter in lemon juice, he could not have known anything about Hinsch's affidavit, which was filed on August 15, 1932.

As we have already seen, Siegel, in his first statement (Ex. 908, Ann. C), written in his own handwriting, unequivocally testified, on March 16, 1932, that the Herrmann message was written in lemon juice.

As we know, Siegel's second statement, verified July 15, 1932, was filed on August 15, 1932, the same date that Hinsch's affidavit attacking the message was filed.

In his second statement (Ger. Ann. 69, p. 4) Siegel testified as follows:

" That the message is supposed to have been written by Herrmann with lemon juice, he himself told me. This also seemed to me believable since I recalled a fluid which was not ink. It is, however, quite possible that Herrmann used a secret ink. I myself received, later on, from Hinsch whose acquaintance I made in Mexico, a powder for making secret ink for my own communications, and the developer belonging thereto, which made the secret writing appear in a blue color while the paper itself became slightly discolored. I still recall, for instance, that I could hardly make out one message which I myself received, because the writing, in developing it in the fluid, had run so badly. Furthermore, when Herrmann and Hinsch jointly sent secret messages from Mexico they used secret ink of like appearance."

In this instance, as in other details of the message, referred to in his second statement, Siegel was unwilling to denominate his first statement as false, but related matters outside of the message and not relevant to the point at issue for the apparent purpose of convincing the Commission that the message might not have been written in lemon juice.

In order to confirm Hinsch's claim that the Herrmann message was not written in lemon juice but in invisible ink, the German Agent again brought forward Woehst as one of Hinsch's principal backers.

In Woehst's affidavit of July 8, 1932 (Ger. Ann. 76, filed August 15, 1932), Woehst described the method of developing secret inks and the appearance of the paper after the secret message had been developed. He then related that when he, Woehst, left the United States, in the middle of February, 1917, Herrmann took him to the boat and he gave Herrmann his entire supply of powder for making secret ink. Then he states (p. 7):

" As I mentioned in my deposition of July 24, 1930, Herrmann did not understand very well, in the time during which we were together, how to write with invisible ink. Since the writing becomes invisible as soon as the ink dries, a certain skill is required for writing the lines evenly and leaving proper space between the lines. I cannot say from personal knowledge whether and when Herrmann acquired sufficient skill in that respect."

In his affidavit of July 24, 1930 (Ger. Ex. CXXIV, filed August 18, 1930), referred to by Woehst in the quotation above, Woehst recited his and Herrmann's joint activities after, as he claimed, he could not get a visa for a passport to Italy. He stated that he and Herrmann, always working together, were engaged in investigating the movement of munitions over railroads and terminals to transatlantic steamers (id. p. 41). As he had been specially trained in the Intelligence Service, he made the reports to the Admiralty Staff, written with invisible ink, and, since Herrmann did not then know how to use the ink, the reports were written by him (Woehst) *alone* (id. p. 46). Here again, was an evident attempt on the part of Woehst to bolster one of Hinsch's false affidavits.

The fact that German secret service agents in the United States were using lemon juice for secret writing is clearly established by the report of A. G. Adams of the Department of Justice, under date of February 26, 1917 (Ex. 583, Ann. N, Rec. pp. 2367 *et seq.*). This report shows that the agent, on February 24, 1917, went to 600 West 115th Street, the apartment which had been occupied by Hauten (Woehst) and March (Herrmann). The agent found there a letter reading in part as follows:

" Dear Hauten:

" If letters come for me from Perth Amboy, open them and heat them. If there is any news, you can forward it to the right party.

* * * * * * *

" (Signed) ~~FM~~ "

It is clearly established from the record that this letter was written by Herrmann to Hauten (Ex. 976, Ann. E, pp. 96–98; Ex. 986, Ann. A, pp. 95 *et seq.*).

The letter also shows that Herrmann was expecting from Perth Amboy letters written in an invisible fluid that required heat to develop, as he directs Woehst to " open them and *heat* them." The only purpose of heating these letters, of course, would be to develop the invisible writing, and this letter has the effect of discrediting Woehst, not only in his attempt to confirm Hinsch's statement with regard to invisible ink, but also shows clearly that Woehst was thoroughly acquainted with the sabotage activities of Herrmann.

(4) Was Gerdts Unknown to Both Hilken and Hinsch When he Brought the Herrmann Message to Baltimore?

The main theme towards which Hinsch's affidavit was directed, namely, that Gerdts was not known to Hilken or to Hinsch, and, therefore the sole purpose of the message was to identify Gerdts to Hilken has already, in another connection, been proven to be false. (See, *supra* this Opinion, p. 118).[aa] It will be recalled that the German Agent, in German Annex 132, set out the original draft of Hinsch's affidavit; and in that original draft, it was asserted that, up until the meeting in Hilken's home on Sunday, April 29, 1917, Gerdts was " unknown to me [Hinsch] ". It will likewise be recalled that this affidavit was prepared by the German Agent in America from notes which he made in Berlin, and the German Agent's draft was forwarded to Berlin, for execution. Before the affidavit was executed, the word " me " was changed to " us ", so that the executed form of the affidavit (Ger. Ann. 71) contained the statement that

[aa] *Note by the Secretariat*, this volume, p. 322.

Gerdts was " unknown to us ", that is, to both Hilken and Hinsch, up until Sunday, April 29, 1917. To the original draft of the affidavit, as found in German Annex 132, was added also the statement that, since " Hilken reported that Gerdts had stated to him certain particulars with regard to the submarine enterprise, which only Herrmann could have known, I [Hinsch] was then of the opinion that Gerdts had really come from Herrmann and was not, by any chance, an agent of the American Intelligence Service who had taken this book away from a messenger of Herrmann at the border " (Ger. Ann. 71, p. 4).

This false statement that Hilken did not know Gerdts until the meeting in Hilken's home on Sunday, April 29, 1917, was repeated by Hinsch in German Annex 72, p. 3, where Hinsch says:

" Hilken and I saw Raoul Gerdts for the first time at the end of April, 1917, when he brought the message from Herrmann."

As a matter of fact, Hilken, two days before the meeting in his home, had invited Gerdts to stay at his home, had given him $175, and left him there as a guest while Hilken went to New London to consult Hinsch, thus indicating clearly that this was not the first time that Hilken had seen Gerdts. Surely Hilken, on Friday, would not have been paying money to Gerdts and leaving him as a guest in his home, and, on Sunday, been discussing with Hinsch whether Gerdts, by any chance, was an agent of the American Intelligence Service who had taken the " book " away from a messenger of Herrmann at the border.

An examination of the Hilken-Lowenstein-Hoppenberg correspondence discloses the fact that about four months preceding the meeting in Hilken's home Hilken sent Lowenstein a letter, introducing Gerdts and recommending him for a position. In addition, Gerdts was so well known to Hilken that, in his diary for April 29, 1917, Hilken makes an entry that was " dining with ' cousin Raoul ' and Hinsch ". (See, *supra*, this Opinion, p. 121.) [bb]

Hinsch claimed that on account of the fact that he and Hilken did not know Gerdts before the meeting in Hilken's home, they had a discussion as to whether Gerdts could be trusted with a large sum of money such as $25,000. If this discussion took place, it was not because Hilken did *not* know Gerdts, but probably because he *did* know him, for, as we have seen in another connection, Hilken did not have a high opinion of Gerdts (Ex. 976, Ann. E, pp. 103, 104).

Hinsch's added touch, explaining why he became convinced that Gerdts was not an agent of the American Intelligence Service who had taken the " book " from a messenger of Herrmann at the border, was as false as his claim that Hilken did not know Gerdts.

Thus, we have another example, showing that Hinsch was only too willing to accommodate his statement to the needed proof, and his spurious affidavit can no longer be used to attack the Herrmann message.

(5) Was the message written in a magazine or a book with a stiff cover?

It was claimed by Hinsch that on the Sunday when he went to visit Hilken in his home in Roland Park, about three weeks before he started on his trip to Mexico, Hilken showed him a book from which the unprinted white front or back fly leaf had been torn or cut out and that " it was a book with a stiff cover " which was of the ordinary size of a novel (Ger. Ann. 71, p. 2).

The source of this claim is probably in Gerdts' first affidavit where he stated that Herrmann gave him an order and instructions which were " written in lemon juice on a page in a book of poetry " and that " in the same book of poetry there was another order also written in lemon juice " (Ex. 626 (a), verified January 11, 1929, Rec. p. 2772).

[bb] *Note by the Secretariat*, this volume, p. 324.

It will be observed that Gerdts did not say that " the book of poetry " had a stiff cover.

In his second affidavit of October 28, 1931 (Ex. 979, Ann. D-1), Gerdts was shown four photographic copies from the Blue Book magazine and identified the same as the actual message which he carried.

In his third affidavit of July 17, 1933, he was shown photostats of four pages of the Blue Book magazine of 1917 containing the Herrmann message and he again recognized these four pages as a copy of the message which he carried to Baltimore and he stated that the book in which the message was written was similar to a January 1917 Blue Book attached to his affidavit (Ex. 979, Ann. A).

The fact that when Gerdts arrived in New York he was carrying a magazine containing a message for Hoppenberg, is clearly established in the affidavit of Johan A. van Emmerik, dated October 28, 1932 (Ex. 948).

Van Emmerik was a naturalized American citizen, born in Holland, and came to the United States in May, 1916. Before coming to the United States he had spent a number of years in the Far East obtaining experience in all branches of the rubber industry. On arriving in New York he became intimate with Ed Weber, manager in New York for Weber, Schaer & Co. and he rented desk room in Weber's office in a building on Water Street, which had an entrance on Pearl Street.

Together with Weber, van Emmerik enjoyed considerable patronage from the Eastern Forwarding Company in supplying rubber for the cargoes of the submarine merchantmen, and became friendly with Hoppenberg, the manager in New York for the Eastern Forwarding Company. He also became friendly not only with Hoppenberg but with some of his friends among whom were Herrmann and Raoul (Gerdts).

In February, 1917, Hoppenberg abandoned his office on Battery Place and shared Weber's office in the aforesaid building.

The day after Hoppenberg's death Raoul (Gerdts) arrived in the office and Gerdts and van Emmerik had a meal together at Reisenwebers, a famous German restaurant. Gerdts was wearing a raincoat and carried a magazine which he said contained a message to Hoppenberg and also stated that he had to find Hilken. At the restaurant Gerdts kept the magazine beside him at the table and a waiter when placing the food on the table picked up the magazine by the cover and tore it. At this Weber flew into a rage and insisted on checking the magazine but Gerdts protested against it.

This experience was indelibly impressed on van Emmerik's memory. Gerdts left immediately for Baltimore.

In the oral argument of 1932 the German Agent seems to ridicule the idea that Gerdts was so careless " as to be carrying this message so that everybody might see it " and he says:

" Certainly if this message were authentic Herrmann would have cautioned Gerdts very much indeed. He would have instructed him to be as careful as possible so that nobody would see that he was carrying a secret message." (Oral Argument, 1932, p. 199.)

It was not unnatural, in the first place, for Gerdts to take the magazine to Hoppenberg for it was to Hoppenberg that he was to deliver the magazine.

By his argument the German Agent seems to think that the magazine was transparent and would advertise the fact that it contained a secret message which was supposed to be invisible!

3. Attack by Osborn and Tannenberg Acting as Investigators or Sleuths

The third attack on the Herrmann message was by Osborn and Tannenberg cooperating as investigators or sleuths. Reduced to its last analysis, they charge that the Blue Book magazine of January, 1917, in which Herrmann wrote the message, had been purchased in New York City in February, March or April, 1931, from Abraham's Book Store, and, therefore, the message written therein was not the actual message written by Herrmann in 1917 and carried by Gerdts to Baltimore in April, 1917, but that the message produced by Hilken had been forged by Herrmann in 1931.

According to Osborn, a short time previous to October 28, 1931, he was engaged by Dr. Tannenberg " to examine the Herrmann message in the claim against Germany " (Ex. R with Osborn's Exam. July 9, 1937).

On October 28, 1931, he made a " pilgrimage " to Abraham's Book Store " to see if he could obtain a copy of the Blue Book Magazine of January, 1917 " (Ex. R with Osborn's Exam. July 9, 1937).

On the same date, to-wit, October 28, 1931, Osborn wrote Dr. Tannenberg two letters, the first evidently before his visit to the book store. In this first letter, he related the receipt of bound copies of the Blue Book Magazine including the January, 1917, number, secured by Dr. Tannenberg from the Library of Congress. He expressed surprise at their good condition, and he stated some of the problems before him as an expert. He expressed his intention on that date:

" to visit the old magazine places [1] here and will try to find a series of magazines covering perhaps four months time on paper similar to that used by the Blue Book Magazine Company."

He stated that it would be desirable to get a number of magazines printed on paper of the same kind and perhaps to file a page from each showing the gradual change in the magazine covering a period of six months. Nowhere in this letter does he indicate any opinion on the problems before him as an expert (Ex. P with Osborn's Exam. July 9, 1937).

After his visit to Abraham's Book Store, Osborn on the same date, to-wit, October 28, 1931, wrote a second letter to Dr. Tannenberg. In that letter, after relating his visit to the book store, and " an interesting and exciting pilgrimage " which he had had, he said:

" I am putting the matter into the form of a deposition, thinking that perhaps you will want to present it but I am doing this partly while the matter is fresh in my mind and not suggesting that this is the final form. The proposed deposition which I enclose will give the information regarding my morning experience.

" You will see from the proposed deposition enclosed herewith that in the first instance *no particular magazine was sought for, but merely ' an old magazine '* but the second inquiry asked for an additional copy or specifically for a copy of the January, 1917, Blue Book Magazine.

" My recollection is that your conference regarding the demand for $750,000 was either in March or April, or about that time, [2] and *I have no doubt that the January, 1917, Blue Book in evidence in this case was bought at this store last Spring.*

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[1] Instead of visiting " old magazine places ", on October 28, 1931, Osborn in fact only made a " pilgrimage " to Abraham's Book Store and satisfied himself that the Blue Book containing the message was purchased there in the spring of 1931. His visit to Abraham's was undoubtedly due to the fact that Osborn on October 28, 1931, had been advised by Stein that the claimants had purchased a copy of the January, 1917, Blue Book at Abraham's on April 29, 1931.

[2] As to the " conference regarding the demand for $750,000 ", when this letter was read by Dr. Paulig in his examination of Osborn, p. 299, the figure was reduced from $750,000 to $7,500, and in his question based upon this letter, Dr. Paulig

" The fact that a second copy was asked for would indicate either that those who purchased the evidence of this claim were seeking a copy of the magazine, or that another attempt to manufacture the document was necessary or thought advisable, and then the best of the two could be used.

" Of course, it would be impossible I suppose to say who might have gone to this store to secure this copy of the magazine, but you may be able to guess who it was, but I suppose *it would be difficult to arrange* so that Mr. Meyers could see whether or not he could recognize the man.

* * * * * * *

" I obtained the December, 1916 copy of this magazine and also the February, 1917, copy." (Ex. Q with Osborn's Exam. July 9, 1937.) (Emphasis supplied.)

From the above letter it will clearly appear that Osborn, since the dictation of his first letter and after his visit to Abraham's Book Store, had already come to a definite conclusion on the question as to which he was employed as an expert. That this is so is further confirmed by the entry in his diary (Ex. U with Osborn's Exam. July 9, 1937) for October 28, 1931, which reads as follows:

" In the morning went to old book dealers for copy of January, 1917 Blue Book in Explosion case. Learned that copy used in this case was probably procured at Abraham's. Wrote Dr. Tannenberg & prepared affidavit for Mr. Meyers, employed at Abraham's."

The proposed affidavit which was prepared by Osborn on October 28, 1931, for Meyers to execute reads as follows (Ex. S with Osborn's Exam. July 9, 1937):

" H. MEYERS, being duly sworn, deposes and says:

" My name is H. Meyers, and I am connected with Abraham's Book Store at 141 Fourth Avenue, New York City.

" About six or seven months ago, approximately March or April of this year, a man called at this store and I waited upon him, and *he asked for ' old magazines ' of eleven or twelve years of age, without specifying any particular magazine or exact date.* I got out some of the old magazines, including a bundle of copies of the Blue Book, and he said, ' I will take this number ', which was that of the January, 1917, Blue Book, and paid for it and took it away with him.

" About a week afterwards a telephone inquiry came to the store, asking whether we had another copy of the January, 1917, Blue Book Magazine, and I informed the inquirer that we had. We keep a list of the magazines we have on hand on separate cards, and our card originally indicated that we had one magazine of December, two of January, and some of the following months. In response to this telephone inquiry someone came and obtained the second copy of the January, 1917, Blue Book Magazine, which was delivered in response to this telephone inquiry.

" Mr. Meyers further deposes and says that this Abraham's Book Store advertises that they have on hand copies of old magazines, and this fact is advertised on the windows in the front of the store.

" *Mr. Meyers further deposes and says that he does not know the purpose of this deposition or what its bearing may be.*

" Mr. Meyers further deposes and says that he does not think that he could recognize the man who first came for the magazine but that he might do so, his recollection being that the man wore a topcoat and this recollection had some connection with the date at which time the first magazine was obtained." (Emphasis supplied.)

At the time of his examination, Osborn also produced a paper prepared by himself entitled " Statement of Mr. Albert S. Osborn ". In this paper Osborn

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again uses the language " $7,500 " instead of " $750,000 " and he asked Mr. Osborn: " Have you any recollection of that? * * * A. I do not know what that refers to at all. I do not recollect anything about it." See Osborn Exam., July 9, 1937, pp. 292, 299, 300.

gives his version of his trip to Abraham's Book Store in the following language (Ex. R with Exam. of Osborn July 9, 1937):

" STATEMENT OF MR. ALBERT S. OSBORN

"On October 28th, 1931, shortly after I had been engaged to examine the Herrmann message in the claim against Germany, I went to Abraham's Book Store at 141 Fourth Avenue, New York City, to see if I could obtain a copy of the Blue Book Magazine of January, 1917. I met there Mr. H. Meyers, a clerk, and, according to my best recollection, he said:

" ' *About six or seven months ago*, approximately *March* or *April* of this year, a man called at this store and I waited upon him, and *he asked for* " *old magazines* " *of eleven or twelve years of age, without specifying any particular magazine or exact date.* I got out some of the old magazines, including a bundle of copies of the Blue Book Magazine, and he said, " I will take this number ", which was that of January, 1917, Blue Book Magazine. He paid for it and took it away with him.

" ' About a week afterwards', Mr. Meyers continued, ' a telephone inquiry came to the store, asking whether we had another copy of the January, 1917, Blue Book Magazine, and I informed the inquirer that we had. We keep a list of the magazines we have on hand on separate cards, and our card originally indicated that we had one magazine of December, two of January, and some of the following months. In response to this telephone inquiry someone came and obtained the second copy of the January, 1917, Blue Book Magazine, which was delivered in response to this telephone inquiry.'

" Mr. Meyers informed me that he thought it would be impossible for him to recognize the man who first came for the magazine, but that he might be able to do so. " *On the same day of this interview I made a written memorandum regarding this interview, and it is from that memorandum that I am now making this statement.*" [1] (Emphasis supplied.)

A comparison of these papers (Osborn's second letter of October 28, 1931, his draft of Meyers' affidavit, and the " Statement of Mr. Albert S. Osborn ") discloses the fact that H. Meyers, the " clerk " interviewed by Osborn and from whom he bought two magazines, made a statement to Osborn of the circumstances of selling two copies of the Blue Book Magazine of January, 1917.

In the " Statement of Mr. Albert S. Osborn " (Ex. R), Meyers is quoted as follows:

" About six or seven months ago, approximately March or April of this year, a man called at this store and I waited upon him, and he asked for ' old magazines ' of eleven or twelve years of age, without specifying any particular magazine or exact date."

This language is copied verbatim in the proposed deposition, and, in Osborn's second letter of October 28th, this same point is emphasized by the following language:

" You will see from the proposed deposition enclosed herewith that in the first instance no particular magazine was sought for, but merely an ' old magazine ' * * *." (Ex. Q with Osborn's Exam. July 9, 1937.)

There can, therefore, be no mistake as to what Meyers told Osborn about the sale of the first Blue Book magazine, namely, that the prospective purchaser " asked for ' old magazines ' of eleven or twelve years of age, without specifying any particular magazine or exact date ".

There is no controversy that the Herrmann message was delivered to Hilken late in April, 1917. Would a prospective purchaser in 1931 have in mind forging a 1917 message in requesting a magazine of eleven or twelve years ago? If

[1] This contemporaneous memorandum was never produced by Osborn.

he had purchased a magazine of "eleven years of age", he would have gotten a magazine published in 1920; and if he had purchased a magazine of " twelve years of age ", he would have gotten a magazine published in 1919. Obviously no magazine of this character would have fitted his purpose.

On October 29, 1931, Osborn wrote another letter to Dr. Tannenberg in which he used the following language:

" If you think it is advisable to get an affidavit from Mr. Meyers of Abraham's Book Store, this perhaps could be done on Saturday. *I have an idea that Mr. Meyers will not hesitate to sign an affidavit, with perhaps a small compensation, $10 or possibly $25.* Nothing was said about this in any way the other day, but of course he must have inferred that the magazine had been obtained for some purpose that was being investigated.

" It seemed to me that the affidavit might be obtained *without his knowing what it was for*, not that the matter is concealed from him, but that this would show that he was entirely non-partisan in the matter.

" *I think it is absolutely certain that this is where the magazine was obtained that was used in this case* * * *." (Correspondence filed by Osborn Sept. 16, 1937.) (Emphasis supplied.)

Under date of November 6, 1931, H. Meyers executed an affidavit, prepared by Dr. Tannenberg, purporting to give Meyers' account of the interview with the prospective purchaser. In the affidavit as prepared by Tannenberg and as executed by Meyers, the corresponding paragraph reads as follows:

" Several months ago, according to my best recollection, approximately in *February*, March or April of this year, a man called at this store and Mr. Abraham, Jr. the owner's son, waited upon him. I was present when this man came in. The man asked for a *Blue Book Magazine of the year 1917 without specifying any particular monthly issue of that year.* We keep our old magazines dating back many years in the back room of our store. So Mr. Abraham, Jr. asked me to get a copy of the Blue Book Magazine from the year 1917 from the back room." (Ger. Ann. 55, Ex. (a.)) (Emphasis supplied.)

It will be observed that there are several differences between the affidavit as prepared by Osborn and the affidavit as prepared by Dr. Tannenberg.

In the Osborn draft, Meyers is represented as saying: " I waited upon him ". In Tannenberg's draft, he is represented as saying: " Mr. Abraham, Jr. the owner's son, waited upon him ".

In Osborn's draft, the statement was that the purchaser *asked for old magazines of eleven or twelve years of age without specifying any particular magazine or date.* In Dr. Tannenberg's draft, the statement is that he " asked for a Blue Book Magazine of the year 1917 without specifying any particular monthly issue of that year ".

In the second letter of October 28, 1931, and in the " Statement of Mr. Albert S. Osborn " and in the affidavit prepared by Osborn for Meyers to execute, the time of the visit of the purchaser was " about *six or seven months ago*, approximately March or April of this year ". In the affidavit as prepared by Dr. Tannenberg, the time of his visit is stated to be " *several months ago*, according to my best, recollection, approximately in *February*, March or April of this year ".

Here we have another example of changing an affidavit to meet the needed proof. It will be recalled that when Hinsch's affidavit, attacking the Herrmann message, was first prepared, it was stated therein that Gerdts was unknown to " me " (Ger. Ann. 132); but, when it was finally executed, it was changed to meet the needed proof so as to read unknown to " us " (Ger. Ann. 71).

Manifestly the affidavit of Meyers, as originally prepared by Osborn, would not have met the needed proof, but would have been disproof of the very fact which the German Agent was trying to establish.

It is also a remarkable fact that the " Statement of Mr. Albert S. Osborn " (Ex. R July 9, 1937) has on its face changes and notations in the handwriting of Dr. Tannenberg. [1] One of the additions written by Dr. Tannenberg is that immediately before the word " March ", the word " February " is inserted in pencil so as to make the same read " approximately *February*, March or April of this year ".

If Osborn was telling the truth in his " Statement ", in his draft of Meyers' affidavit, and in his second letter of October 28, 1931, Meyers' statement of the facts relating to the sale and purchase of the Blue Book magazine in February, March or April, 1931, would be of no use in this case to show that the purchaser intended to forge in the magazine requested a message purporting to have been written about the middle of April, 1917.

On the 22nd of August, 1932, the German Agent executed an affidavit entitled " Statement of the Agent of Germany ", giving an account of the activities of himself and Osborn in securing the Blue Book magazines and the information from Abraham's Book Store through the " clerk ", Mr. Meyers (Ger. Ann. 55). In this statement he related an unsuccessful attempt to get a copy of the Blue Book magazine and other magazine copies requested by Osborn for purposes of test and comparison; he endeavored to get such magazines while in New York but was not successful.

After his return to Washington, Osborn advised the German Agent that he, himself, would try to obtain a January, 1917, copy of the Blue Book magazine which he thought might be obtained more easily in New York than in Washington. The German Agent's statement then proceeds as follows:

" On the occasion of my next stay in New York, at the beginning of November, 1931, Mr. Osborn *told* me that he had inquired of the news dealer in the building where one could obtain old numbers of magazines; that the news dealer had given him the name of Abraham's Book Store; that he had looked up the address of this store which he had found was Abraham's Book Store at 141 Fourth Avenue, New York City, and had gone to that store, on October 28, 1931, to see if he could obtain there a copy of the BLUE BOOK MAGAZINE of January, 1917. Mr. Osborn further *told* me that in that store he had met a clerk whom he had asked whether they had a January, 1917, copy of the BLUE BOOK MAGAZINE; that the clerk had gone to look and on his return had told him that they did not have a January, 1917, copy but did have a December, 1916, and a February, 1917, copy of the BLUE BOOK MAGAZINE and that he recalled that several months ago they had sold the only two copies of the January, 1917, issue of the BLUE BOOK MAGAZINE they had had at their store at that time; and that in the course of the ensuing conversation the clerk, whose name he later learned was Meyers, had told him, in substance:

" That several months ago, approximately February, March or April of last year, a man had called at their store and asked for *an old magazine or a BLUE BOOK MAGAZINE of 1917, (Mr. Osborn was not quite certain whether he had understood the clerk correctly)*, without specifying any exact date; that he had gotten out a bundle of copies of the BLUE BOOK MAGAZINE of 1917; that he had sold to the man, upon his request, a copy of the January, 1917, BLUE BOOK MAGAZINE and that the man had paid for it and taken it away with him." (Ger. Ann, 55, pp. 1, 2.) (Emphasis supplied.)

A comparison of this statement with the record as we now have it will show certain remarkable discrepancies from the facts.

First, according to the German Agent's statement,Osborn made to the German Agent a *verbal* report of Meyers' dealings with the prospective purchaser. The German Agent failed to mention the fact that Osborn in October had made

[1] See Dr. Paulig's question to Osborn, Exam. July 9, 1937, pp. 295, 296.

three written records, identical in language, of Meyers' statement and sent them to him in a letter confirming and emphasizing these statements.

Second, the German Agent represents that Meyers' statement as given by Osborn was as follows:

" That *several months* ago, approximately *February*, March or April of last year, a man had called at their store and asked for *an old magazine or a BLUE BOOK MAGAZINE of 1917, (Mr. Osborn was not quite certain whether he had understood the clerk correctly)*, without specifying any exact date; * * *." (Emphasis supplied.)

whereas, as will clearly appear from Osborn's second letter of October 28th, and from Osborn's statement and Osborn's proposed draft of the affidavit for Meyers to sign, Meyers' statement was as follows:

" About *six* or *seven* months ago, approximately March or April of this year, a man called at this store and I waited upon him, and *he asked for ' old magazines ' of eleven or twelve years of age, without specifying any particular magazine or exact date.*" (Emphasis supplied.)

Third, in the letters and draft of the proposed affidavit and in the statement of Osborn, there was no intimation or suggestion that the writer was uncertain as to whether he understood Meyers, but the statement of Meyers, repeated three times and emphasized in the letter sending the draft of the proposed affidavit, was definite and certain; whereas in German Annex 55 the statement is made that " Mr. Osborn was not quite certain whether he had understood the clerk correctly ".

When the letters of October 28, 1931, and the " Statement of Mr. Albert S. Osborn " were introduced by the present German Agent on July 9, 1937, with Osborn on the stand (Osborn's Exam. July 9, 1937, pp. 292-300), no explanations were offered by Osborn of these discrepancies and no questions were asked in regard thereto.

There are other statements in German Annex 55 which are worthy of notice. On page 2 we find the following:

" On November 5, 1931, I went to Abraham's Book Store * * * and asked for Mr. Meyers. I met Mr. Meyers and *referred briefly to Mr. Osborn's visit at his store about a week ago.* I asked Mr. Meyers about the sale of the two January, 1917, BLUE BOOK MAGAZINE copies which he had mentioned to Mr. Osborn * * *." (Emphasis supplied.)

The implication here is that Osborn was *not* present.

In the affidavit of Herman Meyers, executed October 29, 1932 (Ex. 954), referring to the sale of magazines which he made to Osborn, Dr. Tannenberg and Dr. Grossman, he gave an account of a telephone call from a man who gave his name as Osborn, and inquiry for the Blue Book magazine for January, 1917, and of Osborn's first visit (October 28, 1931) to the store, and then his affidavit proceeds as follows:

" Afterwards, early in Novenber 1931, Mr. Osborn returned to my store with another gentleman whom he introduced as Dr. Tannenberg. Dr. Tannenberg told me that he represented the German government in the Black Tom matter. *Both he and Mr. Osborn questioned me a lot about the number of January 1917 Blue Books* which I had sold, and as to the times when I might have sold them.

" *Mr. Osborn then asked me if I would sign* an affidavit of what I had said. As a matter of fact, I hesitated to sign an affidavit. I had never made an affidavit in a law suit before in my life. Moreover, my recollection of the times was too vague for any positive fixing of dates, and I did not want to sign so indefinite a statement. Mr. Osborn and Dr. Tannenberg, however, were apparently satisfied with the indefiniteness of my statement, and *Mr. Osborn took me aside and asked me*

if I would make the affidavit for Dr. Tannenberg as a favor, saying that Dr. Tannenberg wanted it for his record, and was buying a number of magazines from me.

" The next day Dr. Tannenberg returned with a written statement, and asked me to sign it. This is my affidavit of November 6, 1931, which, as I have seen in Washington, is now marked German Annex 55 (a)." (p. 7) (Emphasis supplied.)

In view of the letters written by Osborn to Dr. Tannenberg set out above, the paper entitled " Statement of Mr. Albert S. Osborn ", the proposed affidavit drafted by Osborn, the " Statement of the Agent of Germany ", and the testimony given above by Meyers, it is interesting to read the oral argument of the German Agent, Dr. Tannenberg, at Washington in 1932, bearing on the same subject, where the German Agent (Oral Argument, 1932, p. 225) said:

" I stated in my affidavit that Meyers at that time volunteered further information and that Osborn informed me about this matter. When I went to New York I of course *interviewed Meyers alone*. There is in Meyers' affidavit which has recently been presented by the American Agent (Exhibit 954) a statement to the effect that Osborn and I went to Abraham's Book Store where Osborn introduced me. In my statement, Annex 55, I said that I, after having received this information from Osborn, went to Abraham's Book Store and examined Meyers there. *Mr. Osborn has not taken any part in this investigation.* The fact that he informed me about what he had learned for what it was worth does not speak against him.

" *There are further statements in Meyers' recent affidavit to the effect that Osborn asked him to give me an affidavit because the German Agent would then buy a number of magazines.* I can assure the Commission that the witness is mistaken.

I examined the witness personally on November 5 and 6, 1931. Mr. Osborn was at Abraham's Book Store on November 5 in connection with the purchase of magazines. The American Agent has used this affidavit by Meyers in his attempt to discredit Osborn. I think the short reference to my examination of Herman Meyers is sufficient to dispose of that criticism. Obviously Meyers did not realize what these statements meant, and obviously he was mistaken." (Emphasis supplied.)

Osborn filed with the Commission transcripts from his diary, relating to the sabotage cases, but the transcript (Ex. H) did not include entries for October 28th or for November 5th, 1931.

In Osborn's diary for October 28, 1931, there is the following entry:

" In the morning went to old book dealers for copy of January, 1917 Blue Book in Explosion case. Learned that copy used in this case was probably procured at Abraham's. Wrote Dr. Tannenberg & prepared affidavit for Mr. Meyers, employed at Abraham's."

Under examination of Osborn by the Umpire, July 8, 1937, the following occurred (p. 160):

" I find in your diary, but not in the transcript of the diary, a record of your going there. How did you omit that from the transcript you furnished me?

" A. This transcript was made by my secretary.

" Q. When you produce it I think you vouch to us for its accuracy, Mr. Osborn.

" A. It says that I went to old book dealers for a copy of January, 1917, Blue Book. That is October 28th.

" Q. Go on, read the rest of it.

" A. ' For copy of January, 1917, Blue Book in explosion case. Learned that copy used in this case was probably procured at Abraham's. '

" Q. From whom did you learn that?

" A. That was an inference.

" Q. You do not say you inferred it; you say you learned it. Now, Mr. Osborn, you use the English language accurately. From whom did you learn it?

" A. The copy in this case was probably ——

" Q. From whom did you learn it?

" A. The manager there told me that someone had bought the January book a few months before and this was merely an inference; I did not know and he did not know at all anything about it excepting that there was that particular magazine bought a few months before, and also there were some other circumstances connected with the interview. Shall I tell you what they were?

" Q. I do not want them. I want answers to my questions and not speeches."

It may be a mere coincidence, but it is also a fact, that on October 28, 1931, Mr. Stein inquired of the claimants where they had purchased a January, 1917, Blue Book, and he got the information on that date that it had been purchased at Abraham's Book Store (Ex. 982, Ann. B, pp. 13, 14; and id. Ann. D, pp. 2 and 3; also Trans. Stein Exam. Oct. 26, 1937, pp. 404, 410).

In the course of the examination of Osborn by the Umpire on July 8, 1937, the following colloquy occurred (p. 165):

" Q. Do you confine yourself to the examination of disputed documents, or do you do investigative work?

" A. I DO NO INVESTIGATIVE WORK. [Emphasis supplied.]

" Q. How did you come to take an affidavit from Mr. Meyers? Is that part of the examination —

" A. I did not take any affidavit from him.

" Q. Were you present when one was taken?

" A. No.

" Q. I find an entry in your book, ' Wrote Dr. Tannenberg and prepared affidavit for Mr. Meyers, employed at Abrahams '. What does the word ' prepared ' mean?

" A. I included in my letter to Dr. Tannenberg the statement that I thought that information that I had obtained should be put in the form of an affidavit.

" Q. And you prepared one?

" A. Yes, I think so, a suggested one. What I prepared was not used.

" Q. Well, now, I would like to know again whether the English language is accurately used in your diary? Does ' prepared ' mean 'prepared ' or ' suggested '?

" A. That was put in the form of a suggestion. That was sent to Dr. Tannenberg. My affidavit was not used.

" Q. Mr. Osborn, you have been on the witness stand many, many times?

" A. Many times.

" Q. And it will do you no good to fence with this Commission.

" A. I am not going to try to do it.

" Q. You are trying to do it, in my opinion.

" A. I am sorry.

" Q. I am sorry, too.

" A. I did not mean to do that.

" Q. I think you are competent enough to give me categorical answers and you are certainly competent enough to understand my questions.

" A. I will try to do it exactly.

" THE UMPIRE. I think I have no further questions."

In this connection it is interesting to note the entry in Mr. Osborn's diary for November 5, 1931, reading as follows:

" Dr. Tannenberg here. Spent the day with him on explosion case. *Went with him to Abraham's Book Store & arranged about affidavit of H. Meyers.*" (Emphasis supplied.)

Thus it appears from Osborn's diary that on October 28, 1931, he " *prepared an affidavit* for Mr. Meyers, employed at Abraham's "; and on November 5, 1931, he went to Abraham's Book Store *with Dr. Tannenberg* and " *arranged about affidavit* of H. Meyers ". In spite of this, in his 1932 argument, the German Agent assured the Commission that when he went to New York:

" I of course interviewed Meyers *alone* ".

And he further said:

" Mr. Osborn has not taken any part in this investigation."

He also denied that Osborn asked Meyers to give him an affidavit.

Under examination by the American Agent, Osborn quibbles again in the use of words when he claims that the only purpose for which he went to Abraham's Book Store was:

" to see if I could get a copy of the magazine, and this information was volunteered to me and I merely made a copy of it in this form, partly to fix my immediate recollection of what had occurred." (p. 238)

He further claimed that the main purpose in preparing the affidavit was to put in definite form the information which he had been given. He did not make any reference to the assurance in his letter, not yet produced, that Meyers would be willing to make an affidavit with a " small compensation " — $10 or $25. When the German Agent's argument, stating that " Mr. Osborn has not taken any part in this investigation ", was read to him, he said: " That is true "; and he afterwards added:

" excepting giving him the information that came to me. * * * but the information was volunteered; I did not go there for the information " (p. 239).

The American Agent then read him the entry in his diary for November 5th showing that *he went with Tannenberg* to Abraham's Book Store and " arranged about affidavit of H. Meyers ", and asked him: " so you and he went there to arrange for an affidavit by Meyers? "

" A. I went with him *to show him the way*, more than anything.
" Q. He did not know the way?
" A. I suppose he could have found it, but I went with him.
" Q. It was necessary for you to go with him to show him where the book store was, Abraham's Book Store?
" A. No, I do not think it was necessary but I found the man that had given me the information before and introduced Dr. Tannenbaum to him and Dr. Tannenbaum prepared —— " (p. 239).

Again he was asked (p. 240):

" When you went with Dr. Tannenberg to Abraham's Book Store, you went there to get the affidavit, did you not?
" A. Dr. Tannenberg did.
" Q. But you went with him to help him get the affidavit, did you not?
" A. I think that he and Mr. Meyers had to go somewhere, I do not remember where, but the ending of it, my recollection is I had no part in it at all."

And again:

" Q. Dr. Tannenberg in the same argument said, ' When I went to New York I, of course, interviewed Meyers alone '; is that correct?
" A. Well, I introduced him to Mr. Meyers.
" Q. Then he did not go alone; you went with him to show him the way?
" A. *I did not say I went to show him the way.* I went to introduce him to the man who had given me the information; * * * But as far as his interviewing Mr. Meyers was concerned, that was his own matter; I did not take any part in that. * * * " (p. 240) (Emphasis supplied.)

As we have seen above, Osborn, in response to a question by the Umpire, specifically stated: " I do no investigative work " — and tried to wriggle out of the position he was placed in when he had to admit he had prepared an affidavit for Meyers' signature. Neither he nor the German Agent referred to the fact that he had written a letter to the German Agent making the sly suggestion that " Mr. Meyers will not hesitate to sign an affidavit, with perhaps a small compen-

sation, $10 or possibly $25 " and that " the affidavit might be obtained without his knowing what it was for ".

Under these circumstances, any further work which Mr. Osborn did *as an expert* was necessarily colored by his opinion, already formed, and by the character of the work which he had done as an investigator.

Another example of the activities of Osborn and the German Agent as investigators or sleuths is found in the Qualters' story. The object of the development of this story was to further the preconceived conclusion of Osborn that Exhibit 904 is not the magazine used by Herrmann in Mexico in 1917 to transmit a message to Hilken but that it is a magazine which Herrmann obtained in 1931 from Abraham's Book Store in New York City and therefore that the message written and found in Exhibit 904 is a forgery.

The Umpire, in the Washinton Decision of December 3, 1932, reviews the evidence then in the file with reference to the Qualters' story, as follows (Decs. and Ops., pp. 1024-1026): [cc]

" Another matter of note is that the January, 1917, Blue Book, when filed with the Commission, concededly bore certain marks in lead pencil opposite some of the titles of the stories on the index pages. These apparently went unnoticed by Hilken or Herrmann or the American Agent. Some time after the submission of the magazine the German Agent observed them. He subsequently bought a number of other issues of the Blue Book for other months of the year 1917 to be used for comparison and for the use of his expert. These he procured from Abraham's Book Store in New York. They contained similar marks. In several of them were found bills which indicated that the magazines had been delivered by a newsdealer in Brooklyn to a house at 756 Madison Street in Brooklyn. Further investigation developed that one Qualters lived in that house and had in 1930 sold a large number of Blue Book, Red Book, and Adventure magazines to Abraham's Book Store and had received a check for $12 in payment therefor.

" The evidence, in my judgment, is entirely conclusive that Qualters did make such a sale, but it is not clear that he sold complete sets of all three magazines covering the years from 1911 to 1929 as he states. Subsequently both Agents purchased at Abraham's Book Store numerous magazines of the kinds mentioned. Sixteen of all those purchased contained horizontal marks and cross-marks on the index pages; some 53 of them contained only horizontal marks. The German Agent seeks to prove by the Qualters ' testimony that these marks were made by Horace Qualters and John Qualters, his brother, when and as they read the articles marked. He seeks also to account for the absence of marks during a certain period by the fact that Horace was absent during the war and was not reading the magazines currently. Qualters identifies the horizontal marks in the January issue as so like his that he believes he made them.

" It appears that sometime prior to April 30, 1931, two persons purchased January, 1917, Blue Books at Abraham's Book Store. One of them is now identified as Mr. Traynor, who bought a copy on April 29, 1931, for the claimants, in order to obtain a magazine to compare with the one produced by Hilken. This copy contains no marks whatever on the index pages. The other was bought by someone who cannot be identified, whose description is most vague, the time of whose appearance at the store cannot be definitely fixed, but who, according to the testimony, did not ask for the issue of any particular month but merely for a Blue Book of 1917 and was handed a January number only because the store had two copies of that issue and could better afford to sell one of the copies for that month than to break the set by taking one of another month. Meyers and Abraham, of the bookstore, who had to do with the sales in question, do not identify Hilken or Herrmann as the purchaser of the January, 1917, Blue Book. There is no specific evidence that Herrmann, Hilken, or any agent employed by them or either of them purchased the January, 1917, number of the magazine at the Abraham Book Store.

[cc] *Note by the Secretariat*, this volume, pp. 120-121.

" Expert evidence which is not effectively challenged is to the effect that the marks as exhibited in the 1917 Blue Books and in that containing the message were not made in the order and in the manner described by the two Qualters brothers. The German Agent, however, insists that the markings found on the table of contents of the magazine containing the Herrmann message are so similar to the markings in the other magazines, some of which indubitably and concededly come from the lot purchased by the bookstore from Horace Qualters, that I may draw the conclusion that the January, 1917, magazine containing the message came from Qualters. He further animadverts upon the tardy explanations of Hilken that German agents were in the habit of using marks as keys to their codes, and of Herrmann that he believes he made the marks in the table of contents in the magazine in connection with the message to Hilken but cannot at this time determine their significance.

" If I were to draw the conclusion the German Agent desires, this would end the controversy with respect to the authenticity of the message. While the evidence arouses suspicion, I cannot find in it alone enough to reach a certain conclusion. It does, however, add to the doubts which all the other facts and circumstances recited have raised concerning the document."

Since the decision of December 3, 1932, the American Agent used the powers given him by the Act of June 7, 1933 (48 Stat. 117), to compel the Qualters to submit themselves to an examination before the Court. In endeavoring to secure their testimony the American Agent, as in other cases, met with the direct opposition from German sources. The witnesses were furnished with an attorney to resist the taking of their depositions, the same attorney who represented a German steamship company and had also resisted the efforts of the American Agent to secure the testimony of Ahrendt, Hilken, Sr., Dederer, Volz, and Hohme.

The testimony of Horace Qualters and John Qualters, taken on August 16th and 28th, and September 13th and September 20, 1933, was filed as Exhibit 978, Annexes A, B and C, on September 15, 1933, and November 1, 1933.

The original story of the method of marking the titles in the magazines as told by Horace Qualters is found in German Annex 57, and reads in part as follows:

" I am in the habit of marking on the table of contents of a magazine the story which I have read and always make a horizontal dash to the left of the title of the story which I have read. * * * My brother, after he had read a story would make a vertical mark crossing the horizontal dash which I had made before, provided he read the same story I had marked.

" I have inspected the pages containing the table of contents in the four Blue Books above referred to [of February and May, 1917, and March and April, 1918], and I am convinced as fully as I can be that the horizontal check marks which appear on the said table of contents, are the ones made by me and the vertical marks made by my brother."

This was in the form of a letter written to Dr. Grossmann, July 13, 1932, and subsequently verified.

John Qualters in a letter dated July 16, 1932, and verified the same day, writes Dr. Grossmann as follows (Ger. Ann. 58):

" I am convinced that the marking appearing on the table of contents thereof [in the four Blue Book Magazines mentioned in Horace's letter] was made by my brother and myself in the manner indecated."

In a subsequent affidavit, dated July 20, 1932 (Ger. Ann. 59), Horace Qualters repeated the same assertion with reference to the four Blue Book Magazines spoken of in his letter, and further says that he had examined the table of contents of the Blue Book magazine of January, 1917, containing the message (Ex. 904), and in particular the horizontal and vertical pencil marks appearing on the left-hand margin of the pages opposite the titles of the stories listed therein, and that

the horizontal pencil marks were exactly like the ones he used, and he had he had no doubt that these marks were made by him.

When Horace Qualters was examined by the American Agent under subpoena (Ex. 978, Anns. A, B and C) he was shown the table of contents of the original Blue Book containing the message (Ex. 904), and he failed to identify a single one of the cross-marks in that table of contents as having been made by himself or his brother, and he testified that as to the four stories there marked with cross-marks, he never read three of them. He only identified one of these stories " The White Wolf " as having been read by him, and as to " The White Wolf ", he was positive that the mark opposite that title was not made by himself or his brother (pp. 25-30). Therefore, the conclusion is inevitable, even from his testimony. that the cross-marks in said magazine were not the work of himself and John Qualters.

He was informed by the American Agent that the expert evidence which was not contradicted by Germany established the fact that the vertical lines in the cross-marks opposite the titles in the Blue Book magazine (Ex. 904), were made prior to the horizontal lines, and then he was asked:

" If that is so, would that change your opinion as to whether or not those marks had been made by you, any of those marks had been made by you?
" A. Well, the fact it is contrary to the practice that my brother and I followed it would indicate that, yes, sir.
" Q. It would indicate that the vertical marks were not made by your brother at least, would it not?
" A. Yes, it would." (Ex. 978, Anns. A, B and C, p. 42.)

In the examination of John Qualters (Ex. 978, Anns. A, B, & C, p. 74, *et seq.*), he was shown the Blue Book magazine of January, 1917 (Ex. 904), and was asked to look at the cross-marks appearing in that book and state whether they looked like the cross-marks which he had made. He looked at it and answered:

" Well, the marks do not look like my brothers, that is the crossmarks are not mine because I never made a mark like that. These marks are too small.
" Q. You never made such a small mark as that?
" A. No, I never did."

And, again, on p. 76, the following occurred:

" Q. Now look at the original magazine, Exhibit 904 and state again whether those marks, the vertical marks in the cross marks were marks made by you? A. They were not made by me."

As to the four stories indicated by the cross-marks, two of them he had certainly never read, one " The White Wolf ", sounded familiar to him, and one, " Yukon Trail ", he had read, but the mark opposite he indicated had not been made by him (id. p. 76). He also indicated that the Blue Book magazine (Ex. 904), was in a very different condition from any magazine which his brother had had (p. 77).

The expert evidence establishes beyond the peradventure of a doubt, the fact that the cross-marks opposite the titles of the four stories in the Blue Book magazine were made in exactly the opposite sequence to that testified to by both Horace and John Qualters.

It will be recalled that Horace Qualters testified that he first made the horizontal or minus sign and his brother came along afterwards and made the perpendicular or cross sign.

Gurrin (Ex. 967), and Heinrich (Ex. 968), as experts, testified that the sequence was first the vertical sign and then the horizontal sign, and an examination of

the signs by a microscope enables the ordinary individual to appreciate the truth of the expert evidence.

On this point, the Umpire in his opinion of December 3, 1932, said (Decs. and Ops. p. 1026): [dd]

" Expert evidence which is not effectively challenged is to the effect that the marks as exhibited in the 1917 Blue Books and in that containing the message were not made in the order and in the manner described by the two Qualters brothers."

In his book *Questioned Documents, Second Edition*, Mr. Albert S. Osborn at page 512, dealing with the subject of sequence of pencil marks, one over the other, uses the following language:

" The sequence of two pencilstrokes can be determined if the strokes are made with considerable pressure so as to indent or plow into the paper slightly. Indentations of this character, even if very slight, can be clearly seen with the stereoscopic microscope. The upper or last line will show a continuous indentation or furrow across the lower, similar to two crossed strokes on a piece of wax. This physical fact can, however, only be clearly seen with the stereoscopic microscope or a stereoscopic enlarged photograph.

" Pencils are made hard by including in the graphite a finely powdered clay. When a pencil mark is made with considerable pressure the path of the pencil point as worn off is a smooth glistening black line. When this line is carefully examined under proper magnification and under the suitable angle of light it will be seen on many papers that the surface of the stroke shows continuous, parallel indentations, scratches, or striae. Under just the proper lighting and magnification these scratches often show unmistakeably which of two crossed pencil lines was made last; the striae will be continuous on the last line at the crossing."

The foregoing statement unquestionably represents the conclusions of Osborn when acting as a scientist. His attitude of mind on this same question when acting as an investigator or sleuth is well illustrated by the following excerpt as from his report of August 13, 1932:

" I am informed that the affidavit of the writer [Horace Qualters], who says that in his opinion he made these various horizontal strokes in the January as well as the February to July Blue Book Magazine [of the 1917 issue], gives the information that his brother [John] read some of these articles and that he, the brother, had the habit of making a vertical stroke mostly over the horizontal stroke which had previously been made [by brother Horace]. *Without this information it would probably have been impossible to have said anything about this particular point* but it is a fact that many of these notations, which now appear as crosses, do show that a different pencil was used in making the vertical, or nearly vertical, stroke than was used to make the horizontal stroke. I call attention to the three crosses in the first column in the February magazine, which all show a blacker, heavier vertical stroke, and in my opinion there are numerous others which show this same characteristic. Some of the crosses do not show that two pencils were used, although two pencils may have been used of a similar character. Some of the cross-marks do not contain all of the characteristics already described, but there are a sufficient number, in my opinion, on which to base the opinion that many of the notations in the magazines from February to July were made by the same hand that made those in the January magazine." (Emphasis supplied.) (Ger. Ann. 68, pp. 6, 7)

Applying the tests well known to Osborn, the American experts, Gurrin and Heinrich, were able to determine that the cross-marks in Exhibit 904 were made in exactly the opposite sequence from what Horace and John Qualters had testified was their custom in marking titles of stories read by them.

Herman Meyers, the man who sold the two Blue Book magazines about which there is so much testimony in this case, was shown Exhibit 904, and in Exhibit

[dd] *Note by the Secretariat*, this volume, p. 120.

954, dated October 29, 1932, and filed November 15, 1932 (Ex. 954), he made the following statement:

" Thus I may as well say at the beginning that I called on Mr. H. H. Martin, at his office in the Investment Building, in Washington, on October 7, 1932; that Mr. Martin showed me the January 1917 Blue Book which is marked ' Ex. 904 '; and that, in my opinion, it is impossible that this is a magazine which was sold from our store. Both of the January 1917 copies of the Blue Book sold from our store were in good condition, and both had front covers on them.

" From my experience as a dealer in old magazines for the past sixteen years, it seems to me impossible that either of the two January 1917 Blue Books which we sold, even assuming rough and unusual treatment of them since the sale, could now present the appearance and show the deterioration of this Ex. 904."

He also testified, p. 2:

" I am told that Dr. Tannenberg has used my affidavit of November 6, 1931, to argue that one of the purchases of the January 1917 issues of the Blue Book from our store was made by or on behalf of one Fred Herrmann. On October 4, 1932, the man whose photograph is annexed as Annex No. 2 was introduced to me as Fred Herrmann, and I was asked whether or not I recognized him. I did not recognize him. * * * on seeing this Mr. Herrmann I was immediately struck by his strong resemblance to Colonel Lindbergh, or at least it seems so to me. I am sure that if I had ever seen this man before I should remember it, and I am sure that I have never seen him before in my life.

" There has also been introduced to me a Mr. Hilken, whose photograph is annexed as Annex No. 3. This likewise is most certainly not the man whom I have in mind as having made the purchase. He is not nearly so tall, and is much older."

By referring to his stock book records, Meyers was able to fix the time of the sale of the two magazines in the following language (p. 5):

" It was not until after the new stock record was made up, doubtless early in April 1931, that the Qualters and Lincoln magazines were, for the first time, together placed on our upstairs shelves for sale. I am therefore convinced that neither of the sales of the January 1917 Blue Books, mentioned in my affidavit of November 6, 1931, was made prior to April 1931."

When, therefore, the testimony given by Horace Qualters and John Qualters under subpoena is supplemented by the affidavit of Meyers, the man who sold the two January 1917 Blue Books about which so much testimony has been given, it becomes perfectly clear that it was impossible for Herrmann or Hilken, either directly or indirectly, to have purchased such a magazine and used it in this case, and the attempt on the part of someone connected with the German case to manufacture evidence has again failed.

4. The Charge by Osborn and Stein that a Report by Stein had been Suppressed

The genesis of this charge is found in a letter of Mr. Osborn to Dr. Tannenberg, dated April 21, 1932 (Osborn Exam. July 8, 1937, pp. 169, 170, Ex. G). This letter written by Osborn to the German Agent, referring to the brief of the American Agent, filed February 29, 1932, contained the following:

" On page 15 there is a veiled reference, ' an eminent handwriting expert ', to Mr. Stein, but there is no explanation of why he was not asked to make a report on the case outside of the handwriting, or, *if he did make a report, no reference is made to what became of the* reports he made." (Emphasis in original.)

This letter of Mr. Osborn to Dr. Tannenberg was sent to the Umpire by the German Commissioner in a letter dated at Hamburg on May 18, 1932. There

was a blue pencil underlining in Osborn's letter, corresponding to the underlined [italicized] portion set out above.

In Dr. Kiesselbach's letter to the Umpire (Ex. G, Osborn Exam., July 8, 1937, p. 168), he used the following language:

" The letter deals with the criticism raised by Mr. Bonynge in his Motion [Brief?] of February 29, 1932, with regard to Mr. Osborn's opinion. In Page 2 thereof *I marked a passus which refers to Mr. Stein's report and corroborates rather strongly the information I had and communicated to you, according to which Mr. Stein made a further report outside of the handwriting but not produced by claimants.*

" The remark might be valuable for our endeavours to come in this point to the truth." (Emphasis supplied.)

According to the German Commissioner's letter, he had already, before May 18th, communicated to the Umpire a charge to the effect that a report which Mr. Stein had made outside of handwriting had not been produced by the claimants. No information is given by the German Commissioner as to the source of his original report to the Umpire; but it is perfectly clear that the German Agent had forwarded to the German Commissioner, and not to the Commission, the paper from Osborn which contains the veiled charge, namely, that Stein had made a report which had not been filed by the American Agent.

The Umpire, in his letter of May 28, 1932 (Ex. G, Osborn Exam., July 8, 1937, p. 172), replied to the German Commissioner's letter and agreed with his conclusion in the following language:

" I agree that this paragraph seems to indicate that Mr. Stein's opinion was had on matters extraneous to the mere handwriting."

Under date of November 4, 1932, Stein wrote a letter to Henry N. Arnold, one of the attorneys representing the claimants, containing the following language (Ex. 982, Ann. B, Ex. A):

" The printed report of the argument at Boston in the Black Tom case leaves no doubt but that the use of my supplementary report on the handwriting in the Wozniak letters only is a distinct detriment to my reputation as a document examiner of ability and integrity. This report gives the impression that I believed the magazine message and letters to be genuine, while you know that I never gave any such impression, but on the contrary reported both in writing and verbally that they were not genuine and were not written in 1917. The interview regarding the writing on the edges of the magazine will vividly recall one of these reports.

" If my complete report had been used as evidence, no one could misunderstand what my opinion was regarding the documents.

" The argument states that I examined the handwriting only. This is not true as everyone knows who came in contact with me and I feel this misrepresentation keenly.

" You will recall that after my first report on June 10, 1931 against the genuineness of the magazine message and the Wozniak letters, I suggested that an examination of handwriting of the alleged writers written in 1917 and near to 1930 would likely show, in addition to the other things on which I had reported, that none of these documents had been written in 1917. This examination was made and the report [1] which you used was the result. Standing alone, this report seems to indicate that I was supporting the documents; but when read in conjunction with my earlier report and the knowledge of why the handwriting examination was made, it is clear that it is merely a negative result.

" Manifestly it is unfair to me to use only this part of my report which does not represent my conclusion regarding the documents. If permitted to stand as

[1] Stein apparently refers to his two reports, each dated June 26, 1931, on the handwriting of the Herrmann message and the Wozniak letters, respectively, Ex. 904 (2) and Ex. 905 (5).

it now is, I am allowing myself to be used to support the genuineness of the documents which I believe to be fraudulent. This, I can never allow. Such conduct would be especially repulsive to me since now this case comes before Mr. Justice Roberts for whom during his active practice I gave service on many varied and important matters and whose confidence I prize highly.

" In justice to me my report should be used as a complete unit and not a part which misleads a reader into the belief that this was the only report I made.

" I have sent a copy of this letter to Mr. Bonynge so that some voluntary action may be taken immediately to correct this unfairness."

After this letter was forwarded to Mr. Arnold and a copy sent to the American agent, an immediate attempt was made by Mr. Arnold to see Mr. Stein, but Stein refused and made an appointment for the next day at eleven o'clock. At that time Mr. Bonynge, the American Agent, Mr. Peaslee, Mr. McCloy, and Mr. Arnold visited Mr. Stein at his office and Mr. Stein produced what purported to be a copy of his alleged suppressed report. All four of the parties interviewing Mr. Stein denied any knowledge of any such report. As a result of that interview Mr. Stein wrote Mr. Arnold a letter dated November 5th (Ex. 982, Ann. B, Ex. B) which reads as follows:

" After the conference today with Mr. Bonynge, Mr. McCloy, Mr. Peaslee and yourself, I have the following statement to make:

" You have assured me, and I believe it that you never saw my report or heard of my report to Mr. Peto in the Canadian Car and Foundry Case on June 10, 1931. In view of this statement, I wish to withdraw all of my statements that I have made to you in my letter of November 4.

" Further my attention is called to the report of the oral argument and I am satisfied that no use of my report was made before the Commission except the proof of the handwriting in the Wozniak letters and the Herman message. With this in view, I wish to withdraw any statement in my letter that might in any way reflect upon Mr. Bonynge as having misrepresented me before the commission.

" I desire to withdraw my letter of November 4, in its entirety."

The gentlemen present were assured by Mr. Stein that he had not communicated the charge made in his first letter to anyone.

The Commission had its hearing on November 21-25, 1932. This was followed by the decision of December 3, 1932 (Decs. and Ops. pp. 1004-1036) [ee]. The Petition for Rehearing was then filed on May 4, 1933.

During the examination of Albert S. Osborn, July 8, 1937, the copy of the letter of A. S. Osborn, dated April 21, 1932, the letter of Dr. Kiesselbach dated May 18, 1932, and the copy of the letter of the Umpire dated May 28, 1932, from which quotations have been made above, were introduced in evidence as " Ex. G " with the Examination of Osborn (pp. 169-172).

In the decision of the Commission on the 3rd of June, 1936, the Umpire, referring to the allegations of the Petition for Rehearing said:

" Its allegations are, inter alia, that before the case was pleaded at Washington the then German Commissioner brought it to the knowledge of the Commission that according to information received by him Claimants had obtained a report from one of their experts the contents of which were adverse to the genuineness of the main documents on which they relied but were withholding such report from the Commission."

After this reference, the Umpire made a statement showing that he had, when practicing law, retained Mr. Albert S. Osborn several times and had also consulted Mr. Elbridge W. Stein on one or more occasions. He then stated as follows:

[ee] *Note by the Secretariat*, this volume, pp. 107-127.

"Just before the date set for hearing in the sabotage cases (probably some time in November 1932), Mr. Stein attempted to get into communication with me by telephone. He wished an interview with me concerning the sabotage cases in which I knew he was a witness for the claimants. I refused to allow him to communicate with me.

"During the meetings of the Commission preliminary to the hearing, Dr. Kiesselbach advised Mr. Anderson and me that the claimants had suppressed an expert report adverse to the authenticity of the Wozniak letters and the Herrmann message. I cannot say that Dr. Kiesselbach specifically stated the source of his information.

"The communication naturally disturbed me but I knew of no action that the Commission or I, as Umpire, could take in the premises and so stated.

"My impression that there had been some such suppression was strengthened by Mr. Osborn's statement, in one of his affidavits, that it was remarkable that no opinion by Mr. Stein, a competent expert in such matters, had been submitted as to the age of the documents but only an opinion as to handwriting, a matter that was uncontested."

The Umpire, in his opinion, further said:

"The Umpire and the American Commissioner hold, that Claimants have shown, that there was no sufficient ground for suspicion, and that for this reason Claimants are entitled to a reconsideration. The German Commissioner, whilst doubting that the Claimants were actually wronged (especially as in his view mere suspicions never can be a basic element of juridical findings) takes the stand, that in international arbitration it is of equal importance that justice *be done* and that *appearances show clearly* to everybody's conviction that justice *was done*. He does not think that the second requirement was satisfactorily complied with in the present case, and for this reason, he accedes to the conclusion of the other members of this Commission." (Emphasis in original.)

The affidavit of Mr. Osborn to which the Umpire referred was made on August 13, 1932, and so far as the question now being considered is concerned, reads as follows (Ger. Ann. 78, pp. 1, 2):

"The second surprising reports are from Mr. Elbridge W. Stein, of New York, which merely express the opinions that the Herrmann message was written by Herrmann and the Wozniak letters were written by Wozniak, regarding which there is no controversy. Mr. Stein is not merely a handwriting expert but an expert of national reputation on all classes of problems relating to questioned and disputed documents including paper and ink problems relating to age of documents. His report says briefly: 'I am an examiner of questioned documents including questions regarding disputed handwriting inks, paper, pens, pencils and those things which enter into the physical makeup of a document. I have provided myself with the most modern scientific apparatus — photographic, optical and chemical — for the thorough investigation of all document questions.' No reports are filed from Mr. Stein covering the controverted questions in the investigation, and it is difficult to understand why these unnecessary reports of his should have been included while no other reports are presented."

The part of Mr. Stein's report which is quoted above, giving his qualifications, were additions to his first report, made at the request of Mr. H. H. Martin, Counsel for the American Agent.

An examination of the quotations set out above will show that in his letter to the German Agent, Osborn, on April 21, 1932, made a veiled reference to a suppressed report. After that time and before May 18, 1932, Dr. Kiesselbach, the German Commissioner, had received information which he communicated to the Umpire, according to which Mr. Stein made a further report outside the handwriting, but not produced by claimants.

On May 18, 1932, the German Commissioner in his letter to the Umpire

reiterated the charge of a suppressed report and for that purpose enclosed the letter written by Osborn to Dr. Tannenberg.

After the above decision of the 3rd of June, 1936, Elbridge W. Stein and his stenographer, Albert S. Osborn, Albert D. Osborn, M. A. Loughman, and L. A. Peto were examined before the Commission and various exhibits were filed with their testimony. Many other exhibits have been filed since the decision of June 3, 1936, and the Commission has had the benefit of lengthy and voluminous briefs, both of the American Agent and of the German Agent.

Nothing has transpired since the decision of 1936 to change the conclusion which was reached by the Commission in its decision of June 3, 1936, that there was no sufficient ground for the suspicion of a suppressed report.

On the contrary, the evidence adduced since that decision strengthens the conclusion there reached and leads to the definite conclusion that the report, alleged by Stein to have been delivered on June 10, 1932, was never delivered to the claimants' attorneys nor delivered to nor received by any of the claimants, nor was any notice thereof given to the American Agent, his attorney, or to any attorney for the claimants, prior to Stein's letter of November 4, 1932, to Mr. Arnold, which letter was withdrawn by Stein on November 5, 1932.

On page 109, Examination of July, 8 1937, Stein said he had discussed his alleged suppressed report only in his office with his secretary, and he denied that he ever discussed the report or spoke of its existence to anyone connected with the German Embassy, the German Agent, or experts who were employed by Germany and he especially denied having discussed the report with Osborn, Sr., or Osborn, Jr.

In spite of this denial by Stein, we find that the charge of a suppressed report reached Osborn, was by Osborn brought to the German Agent, was by the German Agent brought to the German Commissioner, and by the German Commissioner brought to the attention of the Umpire.

A study of the examination of Stein by the Umpire, the German Commissioner, the American Commissioner, the American Agent, and the German Agent shows clearly that he was evasive, given to subterfuge and self-contradiction. It is clear from the record that his alleged report of June 10, 1932, was never brought to the knowledge of any attorney representing the claimants or to the American Agent or his counsel. Although he claims to have sent a copy of this report, without a covering letter, to the office of one of the claimant companies, the occupants of the office and Mr. Peto deny that they have ever seen a copy of this report.

The fact that Stein never delivered his alleged report of June 10th and never notified any of the claimants, or their counsel, the American Agent, or his counsel, that it had been delivered is clearly established by the record.

First: Stein's claim that he advised his clients both in writing and by the delivery of his alleged report of June 10th that the instruments were not genuine and were not written in 1917, is disproved by his letter of November 4th read in connection with his handwriting reports.

Stein claimed in his letter of November 4, 1932, that he had advised his clients both in writing (i.e. by his alleged report of June 10) and verbally that the Herrmann message and the Wozniak letters were not genuine and were not written in 1917; and that after his report of June 10, 1931, against the genuineness of those instruments, he " suggested that an examination of the handwriting of the alleged writers written in 1917 and near to 1930 would likely show, * * * that none of these documents had been written in 1917 "; and he claimed that the report (of June 26, 1931) which was filed with the Commission was the result; in other words, he claimed that the reports used and filed on June 26,

1931, showed that none of the documents had been written in 1917. Let us examine his reports to test the verity of his claim.

In his " Report of an Examination of Handwriting in a Magazine " (Blue Book magazine of January ,1917) Stein summarizes his report as follows (Ex. 904 (2); Ex. A with Exam. of Stein, July 8, 1937, p. 216):

" (1). I am of the opinion that the writing in the magazine was written by the same writer who wrote the diary in 1915 and the statement in 1930.

" (2). I have no opinion whatever regarding the time when the writing in the magazine was written from an examination of the writing alone in comparison with the writings of 1915 and 1930."

In his " Report of an Examination of Three [Wozniak] Letters " Stein summarized his report as follows (Ex. 905 (5); Ex. A with Exam. of Stein, July 8, 1937, p. 221):

" (1). That the three letters of 1917 were written by the same writer who wrote the 1916, 1926 and 1927 letters and the matter on the photograph.

" (2). That there is not sufficient difference between the writing of 1916 and that of 1926 and 1927 to identify the three letters of 1917 as having been written either in 1917 or later. It should be understood that I cannot say that these three letters were not written in 1917, neither can I say that it would have been impossible for them to have been written in 1927 or later. The positive part of my opinion is that the 1917 letters were written by the writer of the other matter."

Both of these reports were dated June 26, 1931, and Stein's diary (Ex. T, Stein Exam., July 8, 1937) for that date has the following entry:

" Report on letters and secret message sent to Mr. Arnold."

It is remarkable that, although in his testimony he denominated these reports as " supplementary ", and his alleged report of June 10th, as his *main* report, the only entry in his diary for June 10th is as follows: " Examined Book for Mr. Peto 10:30 to 1 P. M.", and no entry is made for his so-called main report.

In both of these cases a careful examination of the body of the reports and of the conclusions therein stated and quoted above absolutely proves the falsity of the claim made in Stein's letter of November 4th, to-wit, that an examination of the handwriting of the alleged writers written in 1917 and near to 1930 would likely show that none of these documents had been written in 1917, for in his report on the Herrmann message he says:

" I have no opinion whatever regarding the time when the writing in the magazine was written from an examination of the writing alone in comparison with the writings of 1915 and 1930."

In the report on the Wozniak letters he says that there is not sufficient difference between the writing of 1916 and that of 1926 and 1927 to identify the three letters of 1917 as having been written either in 1917 or later.

Thus the falsity of Stein's contention in his letter of November 4th is clearly established by an analysis of that letter and of the reports made by him, without any necessity to resort to his testimony or to his diary.

Second: Stein's claim transcends the bounds of reason.

The problem before the claimants in 1931, after the Herrmann message was produced by Hilken and when Baran offered to sell them the Wozniak letters, was, first, to determine whether the instruments were actually in the handwriting of the writers, Herrmann and Wozniak, respectively; and, second, when that question should have been settled affirmatively, to determine whether they were otherwise genuine.

If the instruments, though admitted to have been in the handwriting of the writers, were written *after* 1917, then, so far as the claimants were concerned, they were of no value to them and any examination and report on the handwriting would have been absolutely unnecessary. Conversely, if a negative report on the handwriting had been obtained, there would have been no further necessity for an examination and report on their genuineness. This question would have been settled by the report on the handwriting.

If on June 10, 1931, Stein had verbally and in writing advised that the instruments were not genuine and that they were not written in 1917 when they purported to have been written, is it reasonable to suppose that his clients would have employed him to pass on the question of handwriting?

Third: Stein's claim is contradicted by the facts in the record.

(a) Stein never sent a covering letter with his report;

(b) The report bore no date except in pencil;

(c) Although he charged $350 for his handwriting reports, which was a very reasonable charge, considering the work done and the importance of the case, he never put in a bill or received any money for his alleged report of June 10, 1931, whereas the record shows that Osborn, for his reports and services in connection with the same documents, received $12,500;

(d) Although his diary has six references in the month of June, 1931, to his work and interviews regarding the Herrmann message and the Wozniak letters, the first reference is found on June 10th. All six references are set out below:

" Wednesday, June 10, 1931
" Examined Book for Mr. Peto 10:30 to P. M. [1]
" Tuesday, June 16, 1931
" Conference with Mr. Peto and counsel on *1917 writing* 2:30 to 4:30 [2]
" Wednesday, June 24, 1931
" Mr. Loughman telephoned for an appointment tomorrow — 9 A. M.
" Thursday, June 25, 1931
" Mr. Arnold and Mr. Loughman here in Peto's matter
" Friday, June 26, 1931
" Report on letters and secret message sent to Mr. Arnold
" Monday, June 29, 1931
" Revised reports sent to Mr. Martin in Peto's matter." (Emphasis supplied.)
(Ex. T. Stein Exam., July 8, 1937.)

(e) Although in his letter of November 4, 1932, he designates his reports on the handwriting of the instruments " supplementary reports ", these reports nowhere indicate that they are supplementary reports, and they do not in any manner refer to any prior or contemporaneous reports.

(f) A careful study of the record, including the examination of Stein and Osborn, will show that Stein was not employed by the claimants until after June 10, 1931, the alleged date of the report; that he never saw the Wozniak letters till June 16th; that he never had sufficient opportunity to examine the instruments in order to make a comprehensive study and report on the genuineness of the instruments other than the question of the handwriting.

Even if Stein had made a report on the Herrmann message on June 10, after an examination lasting from " 10:30 to 1 P. M.", as stated in his diary, such an examination and report would have been worse than useless, and his report, in the light of the time devoted by the other experts, both those employed by Germany and those employed by the claimants, would indeed have been to

[1] " Book " evidently refers to the Herrmann message. No mention is made of the Wozniak letters.

[2] " 1917 writing " evidently refers to the Wozniak letters.

paraphrase his own letter, a distinct detriment to his reputation as a document examiner.

Stein's threat in this case to bring his clients into disrepute before the tribunal where their claims were pending, a copy of which was sent to the American Agent for the same purpose, shows that he was endeavoring to bolster up Osborn's attack on the Herrmann message and was willing to go to any length to accomplish that purpose, even to the extent of being disloyal to his clients.

While Osborn has denied that he was the source of the information which came to the German Agent and by the German Agent was brought to the German Commissioner with reference to the charge of the suppressed report, a careful study of his evasive answers on this question and of the evidence given by Stein, convict Stein and Osborn of being the source of the information brought finally to the Umpire. The events in this record relating to this charge of the suppressed report are sorry ones in juridical history, and a part of this unhappy history is the manner in which the question of Osborn's fee was presented to the Commission by the then German Agent. (See *infra*, p. 270.) [ff]

5. The Attack by the Experts

It has been clearly established that Hinsch was guilty of perjury in claiming that he ceased sabotage activities after the U-boat enterprise started. On the contrary, after Herrmann came back to America with new devices, sabotage was carried on by him (Hinsch) and by Herrmann, under Hilken, as paymaster, with redoubled energy and with new devices.

We also know that, in order to bolster up his claim that he had ceased sabotage activities after Hilken returned from Europe in 1916, Hinsch was guilty of making false statements as to his absences from Baltimore and from New London during the time of the U-boat activities at those places, respectively, as American ports. We also know that in order to prove that Gerdts was unknown to Hilken, Hinsch resorted to the worst forms of fabrication.

As we have already seen, Germany brought forward Ahrendt for the purpose of discrediting the Herrmann message, and Ahrendt in his affidavit tried to persuade the Commission that no written message was delivered at all.

After Siegel's first statement had destroyed the efficacy of Ahrendt's attack on the message, Hinsch, while admitting that a written message had been delivered, resorted to another fabrication, namely, the written message was very short with a request for money and an identification of Gerdts, but he claimed that Gerdts brought an oral message, which, as we have seen, conformed with the message in the Blue Book magazine of January, 1917, in many particulars but differed therefrom in some particulars.

As we have already seen, where the oral message, as reported by Hinsch, did depart from the message in the Blue Book magazine, and from Gerdts' original affidavit, the oral message departed from the truth.

Under these circumstances, when we begin to study the expert evidence we have this situation:

(1) It is admitted that Herrmann sent a written message by Gerdts to Baltimore.

(2) The Blue Book magazine of 1917, produced by Hilken, contains a message admittedly written in the handwriting of Herrmann.

(3) Herrmann, who wrote the message, has identified the same.

(4) Siegel, who dictated it, identified the message in a statement written in his own handwriting.

[ff] *Note by the Secretariat*, this volume, p. 429.

(5) Gerdts, the bearer of the message, has identified the message in the Blue Book as genuine.

(6) Hilken, to whom the message was sent, has produced and identified the message.

(7) Herrmann and Hilken, after first being unwilling to admit their responsibility for the Black Tom and Kingsland disasters, have either directly admitted their responsibility or have made admissions whence their responsibility must follow.

(8) Ahrendt, Woehst and Hinsch, whose affidavits have been brought forward by Germany for the purpose of discrediting Hilken and Herrmann, have themselves been discredited and have been proven to have been guilty of perjuries of the worst character.

Under these circumstances, the Herrmann message, as contained in the Blue Book magazine of January, 1917, stands without the stigma which rested upon that instrument when the matter came before the Commission at Washington in 1932. The direct attacks upon the message, made by Hinsch and Ahrendt, have been shown to be false and their testimony introduced for the purpose has been shown to be perjured.

The attempts by Hinsch to discredit the message by his representations as to the oral message have also miserably failed. Since the instrument has withstood the direct attacks, and the internal evidence shows no anachronisms and no statements which are contradicted by the record, a resort to the expert evidence seems unnecessary, especially as the Umpire in 1932 said that, as the expert evidence then stood, it was evenly balanced.

When we come to examine the expert evidence introduced by Germany for the purpose of attacking the message, we find that the spearhead of the attack is Albert S. Osborn.

Before Osborn began to make his study, he had assumed the role of an investigator and sleuth, and we have seen that, in this character, he became a zealous partisan determined to destroy the message before he had ever subjected the same to any expert tests.

We have also seen that in this role, in conjunction with the German Agent, the evidence, gathered by Osborn as an investigator and sleuth, was twisted and warped from its original form so as to meet the needed proof. We have also seen that, in conjunction with Stein, he was responsible for the false charge of a suppressed report, designed not only to substantiate the German attack on the instrument, but also to bring Stein's clients into disrepute and to smear the American Agent.

It is needless to say that any expert evidence brought forward under such circumstances must be taken *cum grano salis*, if not altogether rejected as unworthy of consideration in a juridical proceeding.

In one of his so-called expert reports (Ger. Ann. 78) Osborn, referring to the handwriting report of Stein, used the following language:

" No reports are filed from Mr. Stein covering the controverted questions in the investigation, and it is difficult to understand why these unnecessary reports of his should have been included while no other reports are presented." (p. 2.)

In his examination of July 8, 1937, pp. 175,176, Osborn was asked to define the terms " unnecessary reports " and " other reports ", contained in the above quotation, and his replies were evasive and unsatisfactory.

It was brought out on the examination of Osborn that he did not know anything about the terms of employment of Stein by his clients, whether it embraced any other subject than a report on handwriting or not (Exam. July 9, 1937, p. 218). Osborn also claimed that Stein had not discussed with him the

matter of the suppressed report (Exam. July 8, p. 188) and that his " statements in regard to that matter were all based on the fact that Mr. Stein was qualified to make this examination " (Exam. July 9, p. 223). Here, then, is an example where the zeal of the sleuth overcame the scientific spirit of the expert, and led Osborn, in a so-called expert report, to make a thinly veiled charge, repeated in his letter to the German Agent, of a suppressed report when no ground existed therefor.

In the decision at Washington of December 3, 1932, the Umpire, in treating the subject of expert evidence, analyzed the same as follows (Decs. and Ops., p. 1026): [gg]

" This consists of about one thousand pages. The questions submitted to the experts are in my belief novel. They involve at the foundation certain known qualities of ink and paper. But as one reads the testimony on both sides one is impressed with the fact that the experts themselves had to resort to experiments with lemon-juice writing on new and old paper in order to reach their conclusions. Many of the opinions of the experts on the one side are countered by diametrically opposite results stated by those on the other. I agree with the arguments of both Agents that certain of the experiments and tests which they criticize are not beyond fair criticism and fail to carry conviction. I entertain no doubt that all the experts retained by both litigants were inspired by a desire to do their honest best with a very difficult problem. Both sets of experts evidently believe in the soundness of their conclusions, for they challenge the Commission to make certain experiments and examinations for itself, and it is hardly conceivable that they would do so unless they felt that the results of such experimentation by laymen would justify their confidence. My experience in this behalf has, however, been most unsatisfactory and *has only tended to confirm the feeling that on the expert evidence alone my judgment would be left in balance as to the authenticity of the document.* Expert evidence is often an aid in determining questions of the sort here presented; but it is far from an infallible guide, as witness the fact that several of the experts for the claimants convinced themselves of the authenticity of the Wozniak letters. This comment does not by any means apply to all of the experts who testify about the Herrmann message, and it is not to be taken as indicating that I have the slightest doubt that all of the expert's opinions are honestly entertained. It is mentioned merely as an illustration of the fact above stated, that, *at best, expert evidence can usually be only an aid to judgment*, and not always in and of itself so conclusive as to carry conviction.

" I need only add in summary that the most careful study and consideration of the expert evidence with respect to the Blue Book message convinces me that upon that evidence alone I should not be justified in affirming the authenticity of the document. I am therefore compelled to revert to the other evidence." (Emphasis supplied.)

The Umpire, after a careful analysis of the expert evidence as it stood in 1932, felt that, on the expert evidence alone, his judgment would be left in balance as to the authenticity of the instrument. This conclusion was reached while he labored under the impression conveyed to him by the German Commissioner that a report by Stein unfavorable to the genuineness of the Herrmann message had been suppressed, and when he was without any knowledge of Osborn's actions as an investigator and his complicity in changing the facts ascertained by him so as to make Meyers' affidavit conform with the needed proof.

It follows of necessity that the introduction of those facts into the record has overthrown the balance, and, as all of the other experts employed by Germany followed Osborn's lead, such evidence must now be reexamined in the light of Osborn's bias and unusual activities.

[gg] *Note by the Secretariat*, this volume, p. 121.

Osborn's Employment as an Expert

(*a*) *By the Claimants.* — It is perfectly clear from the record that after the Herrmann message was produced, the American Agent made every reasonable effort to have that instrument examined by an impartial expert, and to avoid what afterwards developed, a battle of the experts in regard thereto.

It is also clear that the claimants were anxious to employ Osborn, but they were met by the proposition that he might have been employed by Germany. An effort was made to ascertain whether his previous work for the German Agent prevented his employment by the claimants.

Osborn's diary for June 4, 1931, contains the following entry (Ex. U, filed July 9, 1937):

" Mr. Leonard Peto, Hotel Roosevelt, came in regarding new documents in case involving Canadian Car & Foundary Co. U. S. v. German Govt. Told him it would be necessary for to be ' released ' before I could examine matter for him."

The entry for June 11, 1931, is as follows:

" Mr. Loughman, of the Canadian Car & Foundry Co. called with letter from Mr. Peto regarding German Commission case."

Under date of June 10th, L. A. Peto wrote a letter to Osborn referring to a " recent talk " and to a letter enclosed from Mr. Martin, Counsel for the American Agent before the Mixed Claims Commission. In that letter Peto states as follows (Ex. E, filed July 8, 1937):

" I would like to point out that the Mixed Claims Commission is a Court or [of?] Arbitration, and during its existence has had about thirty thousand cases on which to pass. Unless the matter on which you were consulted by Dr. Grossman specifically referred to matters in the Black Tom or Kingsland cases, there is no reason that we can see why you should not give us your opinion on the document which we wished you to examine.

" You will see from the enclosed letter that the only expert opinion submitted by Germany in any of the cases before this Court was from a Mr. J. V. Haring.

" We cannot overlook the possibility that our opponents might have consulted you without any intention of presenting your opinion. We will appreciate it, however, if you will give us a little fuller information as to whether you feel free to express an opinion on matters in these cases."

It is clear from the terms of the above letter that on June 10, 1931, the date on which Stein claims to have made his report, the question as to whether Osborn would be employed as an expert by the claimants had not been decided. It is also clear that whether Osborn should be employed as an impartial expert had not yet been decided. The fact that it had not been decided as late as June 12, 1931, whether Osborn would be employed by the claimants is evidenced by the following entry in Osborn's diary for that date:

" Mr. Loughman telephoned for Mr. Peto. Told him that I could not examine the matter for him because of ethics."

Thus not until June 12, 1931, did the claimants learn that it was impossible for them to employ Osborn as an expert. (As we have already seen, this fact negatives the claim of Stein that he had been employed as an expert to pass upon the genuineness of the instruments, and that he did deliver his main report on June 10, 1931.)

In his oral argument at Washington, 1932, in a statement justifying a fee of $5,000 to Osborn, the German Agent said (p. 136):

"Mr. Osborn was consulted by me from the beginning of July, 1931 to February 10, 1932, * * *

" Mr. Osborn, as I said, worked from July to February on this matter."

(*b*) *By the Commission.* — The matter of Osborn's employment by the Commission as an impartial expert was still open on September 15, 1931, because on that date the American Agent wrote to the Umpire a letter from which the following is quoted:

" If, after consideration of the observations I hereinafter make, the Commission shall decide that it is desirable to have the documents examined by any other expert, the American Agent would prefer to have the examination made by Mr. A. S. Osborn for the Commission, notwithstanding the fact that the German Agent has heretofore consulted Mr. Osborn in these cases."

The above paragraph is quoted by Dr. Tannenberg in his letter to the Umpire, dated September 19, 1931 (Ex. 940), hereinafter quoted.

Under date of September 15, 1931, Osborn wrote to the German Agent a letter which contained the following:

" It of course will have to be arranged as to whether I am engaged by the parties jointly or whether I am engaged by the Commission, and of course some understanding will necessarily have to be reached regarding my compensation." (Correspondence filed by Albert S. Osborn, Sept. 16, 1937.)

On the next day, September 16th, Osborn again wrote the German Agent a letter containing the following:

" The more I think about it, the more I am inclined to think that my examination in the claims case perhaps ought to be for you rather than for the Commission.

* * * * * * *

" This claim represents, I think, a larger amount than any case in which I have ever appeared, and of course if my services should be valuable the charge for the services naturally should be consistent with the case and the work done. * * *

" Of course it would be perfectly proper, I think, for you, if you see fit to do so, to say to the Commission that you had already interviewed me on more than one occasion and that under the circumstances it perhaps would be better for me to appear for the German Government." (Id.)

This letter is summarized by Osborn's diary entry for September 16, 1931, as follows:

" Mr. Stein came over. Examined typewriting specimens with him.

" Wrote Mr. Tannenberg, Washington, that perhaps it would be better, under the circumstances, that I make examination for German Govt." (Ex. W., Osborn Exam., July 9, 1937.)

Under date of September 19, 1931, the German Agent wrote Osborn a letter, acknowledging receipt of Osborn's letters of the 15th and 16th, respectively, in which he recited as follows:

On the 15th of September Osborn's son advised the German Agent over long distance telephone that a Mr. Loughman had come to Osborn's office on that day and informed Osborn that the claimants or the American Agent had suggested to the Commission that the Commission retain Osborn as their expert for the purpose of examining in regard to their authenticity the documents proffered by the American Agent.

Osborn's son then advised the German Agent that Osborn had taken the matter under consideration and reached the conclusion that he would not only be willing to act as a non-partisan expert for the Commission, if the Commission should decide to select Osborn for such purpose and the German Agent would acquiesce, but that Osborn felt confident that he would be in a position to render to the Commission an impartial report, notwithstanding the fact that he had

been previously employed by the German Agent in a matter pertaining to the same cases and that Osborn had been consulted by the German Agent in the course of the last two months in regard to the same documents.

After reciting his contact with the Umpire and his law clerk and indicating that he had postponed his trip to Boston and further consultations with Osborn in regard to the documents, the German Agent then says (p. 2):

" I have today written a letter to the Umpire of the Commission, a copy of which I enclose for your information. I have informed the Umpire in said letter that *I would be willing to release you from your employment by the German government and to consent to your engagement by the Commission as a non-partisan expert to examine the documents in question on their behalf, in case the Commission should decide to retain you as their expert.* You will note from my letter to the Umpire that *I have made this consent dependent upon certain conditions, viz., that you should not be required to disclose to the Commission or any one else the contents of the discussions I had with you and your son and that there should be no further consultations or interviews with you whatsoever either on the part of the German Agent or on the part of the American Agent or the private parties concerned or any one representing, or acting for or on behalf of, said parties.* These conditions are prompted solely by the desire to enable you to completely disregard any and all of the arguments I have discussed with you or any opinion that may have been expresssed, in the course of your consulation by me, and to make the examination of the documents in question solely as a non-partisan expert on behalf of the Commission." (Emphasis supplied.)

The explanation given by Osborn in his examination of July 9, 1937 (pp. 195 *et seq.*), as to why he should not be required to disclose the contents of the discussions he and his son had with the German Agent was, to say the least, very vague and unsatisfactory.

In the letter written by the German Agent to the Umpire, dated September 19, 1931, a copy of which was enclosed by the German Agent to Osborn, in the last preceding letter, the relations between the German Agent and Osborn are set out as follows (Ex. 940; also correspondence filed by Osborn Sept. 16, 1937):

" In this connection I may be permitted to state briefly the connections between Mr. Osborn and the German Agent.

" In or about August of last year Mr. Osborn was consulted by my predecessor in office, Dr. von Lewinski, in a matter pertaining to the Black Tom and Kingsland cases, which matter, however, has no relation to any of the evidence proffered by the American Agent in support of his supplemental petition for a rehearing in these cases. This employment, as far I am informed, terminated at the end of August 1930.

" After the American Agent had presented to the Commission the evidence proffered in support of his aforesaid supplemental petition, on July 1st, and prior to the oral argument in the said cases at Boston, at the end of July of this year, I consulted Mr. Osborn in regard to the purported original documents proffered by the American Agent. Mr. Osborn was then engaged by me for the purpose of advising me in this matter and making an impartial examination of the documents in question for my own guidance and information. Mr. Osborn is at present still engaged by me for that purpose, although, as I have stated above, immediately after having been informed of the contents of your letter to Mr. Bowyer of the 14th instant, I arranged with Mr. Osborn to discontinue my consultations with him until the question of his employment as a non-partisan expert to examine the documents in question on behalf of the Commission had been decided.

" I informed the Commission of Mr. Osborn's previous and present engagement by the German Agent at the time the Commission consulted the two Agents regarding the possible service of Mr. Osborn as expert to examine the documents in question impartially for the Commission and inquired of the two Agents if either Agent knew of any objection to Mr. Osborn serving as such expert and whether either Agent had previously consulted Mr. Osborn on any point."

After setting out these relations, the German Agent then made the offer to release Osborn, upon the conditions enumerated in his letter to Osborn of the same date.

On October 14, 1931, the Umpire, with the concurrence of the two Commissioners, forwarded a joint letter to the two Agents stating as follows (Decision of Dec. 15, 1933, p. 65 of Rept. of Amer. Com. of Dec. 30, 1933):

" It has proved impossible to carry out the American Agent's suggestion that Mr. Osborn be employed by the Commission. Mr. Osborn himself is unwilling; the American Agent now objects; the German Agent's consent is subject to restrictions, and the Commission could not accept restrictions. The Commission has now decided not to make further search for a satisfactory expert. In view of Mr. Osborn's standing in his profession, we would welcome the presentation of his testimony if the German Agent himself desires to offer it. The Commission still reserves its right to admit new evidence in these cases."

Thus, so far as the Commission was concerned, the employment of Osborn was under consideration until October 14, 1931.

A careful analysis of the facts recited above, mostly in the form of letters and diary entries of Osborn, establishes clearly the following propositions:

(1) Although the claimants had been anxious to employ Osborn as an expert to examine the instruments, he refused to consider this employment on account of " ethics " and this refusal was first communicated to the claimants on June 12, 1931.

(2) After that time the Commission itself was anxious to employ Osborn as an impartial expert and the American agent was perfectly willing for this to be done, if Osborn's engagements with, and obligations to, Germany were not of such a character as to unfit him as an impartial expert.

(3) Osborn had been engaged by the German Agent for definite work before June 4th and his commitments in this regard were of such a character as to make him believe it unethical to accept employment from the claimants unless he secured a " release " from the German Agent.

(4) In spite of the desire of the Commission to employ Osborn as an impartial expert, Osborn preferred the employment of the German Agent and one of the salient reasons was his hopes of a larger fee than he thought he could have secured from the Commission.

(5) The German Agent was willing to release Osborn from the obligations of his employment by Germany but only upon condition that Osborn should not be required to disclose to the Commission or anyone else the contents of the discussions which the German agent had had with Osborn and his son.

Under these circumstances, when Osborn's connection with the Qualters story is recalled, it is not surprising to learn, as we will see hereafter, that Osborn's attitude towards the questions at issue before the experts was far from scientific and that his attitude towards the members of his profession who differed with him in the discussion of these questions was intemperate and overbearing.

The question of what was Osborn's fee is not an important one, except for the effect it had upon the Commission in its decision of 1932 and on the good faith of the German defense. In the oral argument on November 22, 1932, the German Agent in discussing the question of Osborn's fee said (p. 136):

" Will the American Agent contend that a man of Mr. Osborn's standing and experience *would sell his reputation for a moderate amount of money?*

" Mr. Osborn was consulted by me from the beginning of July, 1931, to February 10, 1932, and during this period had worked on his opinions for more than six months. I had had various consultations with him in July, 1931, further consultations after the Boston argument, after the Commission in its memorandum of October 14, 1931, suggested that the German Agent present Mr. Osborn's testimony.

Mr. Osborn was occupied with this investigation and examination of these documents from the middle of October to the end of December. He was consulted by me in February in regard to the watermarks. He has made numerous examinations and tests. He prepared an elaborate set of exhibits. And *when his work was completed and I asked for his bill he presented to me a bill for $5,000.*

" I wish to make this statement because the American Agent has attempted to show that Osborn has been unduly influenced by the matter of his fees.

" Mr. Osborn, as I said, worked from July to February on this matter. The months of October, November, and December were taken up entirely by this work. And I submit to the Commission that in view of this enormous amount of work performed by Mr. Osborn the fee is, indeed, a very moderate amount, and in my opinion the best illustration that the whole attack on Mr. Osborn is wholly unjustified. *Certainly a man of his standing would not sell his reputation for that amount of money.*" (Emphasis supplied.)

The inference and the direct statement of the German Agent is perfectly clear that, *when Osborn's work was completed and the German Agent asked him for his bill, he presented a bill for $5,000, and that was not a sufficient amount of money to justify him in selling his reputation!!* No intimation was made by the German Agent that on August 22, 1932, exactly three months before he made the statements in the argument above, Osborn had presented a second bill for $7,500, which had been approved; and on November 18, 1932, four days before his argument, Germany had made a partial payment of $1,500 on the bill for $7,500 (Osborn's Exam. of July 9, 1937, pp. 201-203, 263-265; Memorandum by the German Agent dated June 1st, 1936, and filed June 1st, 1936).

In Osborn's examination by the American Agent on July 9, 1937, the American Agent quoted from the 1932 argument of the German Agent at Washington (p. 136) and then asked (Exam. July 9, 1937, p. 265):

" Now, as a matter of fact, on November 22, 1932, you had actually received in cash from the German Government the sum of $6,500 and you had arranged with Dr. Tannenberg in August of that year that you were to get altogether $7,500 for your last payment, so that there was still due $6,000 on that? Is that correct? "

To which Osborn replied:

" A. That is correct excepting the matter of dates. I don't know about the dates."

The Problem for Experts Stated

When Exhibit 904 was filed, the American Agent filed with it as Exhibit 904 (1) the affidavit of Aloysius J. McGrail and also the handwriting report of E. W. Stein, Exhibit 904 (2) dated June 26, 1931, filed July 1, 1931.

The handwriting report of Stein was never attacked, but the German attack was based upon the proposition that, although the instrument was in the handwriting of Herrmann, it was written by Herrmann in 1931 and not in 1917.

The problem presented was a simple one:

Was the message, which was contained in Exhibit 904, written before Gerdts, the messenger, left Mexico for Baltimore in April, 1917, or was the message written in a magazine which was purchased from Abraham's Book Store in April, 1931? Or, to state the problem in more general terms, was the message written when the paper was comparatively new and not deteriorated or was it written when the paper was about fourteen years of age?

In order to solve this question, it is possible for the layman, as well as the expert, to examine Exhibit 904 and determine certain definite facts from this examination.

(1) The message was written cross-wise to the print on four pages of the Blue Book magazine beginning at page 700 then in sequence backwards on 698, 696, and 694. The message consists of 34 lines, 9 of which are written on page 700, 10 on page 698, 11 on page 696, and 4 on page 694.

(2) The message shows evidence of having been developed by heat and the first page (700) shows much more evidence of scorching or heat than the other pages.

(3) An examination of the reverse pages, that is to say, 699, 697, 695, and 693, on which there is no writing, discloses the fact that the lemon juice or liquid has seeped through distinctly on each of these reverse pages both from blots on the other side and from the writing where there are not blots.

(4) The writing on the first page (700) is much heavier and there are more blots on that page than on any other.

(5) The lemon juice or liquid has struck through, or penetrated, all of the written pages and in many places it is possible by using a mirror on the reverse page to read the words from the back, and this is true on all of the four pages.

(6) The deterioration of the paper by coloring and embrittlement is much more noticeable around the edges than in the other portions of the page, but all the pages containing the message have become very brown and show a deteriorated condition.

(7) The coded part of the message is contained in numbers. For instance, 1755 and 1915 are the first two numbers mentioned in the message. By neglecting the lefthand digit in each number and reading the other three digits backwards, we get from the first number the code number 557 and, from the second, the code number 519. These numbers now indicate the pages in the magazine on which the names corresponding to these numbers are indicated by pin pricks. There are about one hundred and seventy pin pricks scattered throughout the magazine. The question before the experts was whether there were physical signs from which it was possible to deduce whether the writing or the pin pricks, or both, were incorporated in the magazine when it was comparatively new or when it was about fourteen years of age. On this question more than a thousand pages of expert evidence in the form of reports and exhibits were produced before the Commission. As the Commissioners are not experts, the question before the Commission now, as formerly, is whether, from this logomachy, any definite and tangible results may be deduced which will assist the Commission in deciding the question as stated above.

The danger here, as in all questions where experts line themselves upon each side, is whether it is possible to detect these cases in which the experts are endeavoring to make the worse appear the better reason.

Before considering the specific questions at issue between the two groups of experts, it is well to state some facts which may be gathered from their testimony and seem to be well established.

The paper on which the message is written is known as mechanical wood pulp paper, that is to say, it is manufactured from ground wood, or wood fiber. This is a mechanically prepared fiber made by the simple abrasion of a log of wood and the fiber is not subjected to any chemical purification (Heinrich, Ex. 925, p. 5; Hibbert and Minor, Ex. 923, p. 10). The Blue Book magazine of January, 1917, was printed on paper made up of three parts mechanical wood pulp fiber and one part chemical wood pulp fiber, all derived from coniferous wood (Heinrich, Ex. 925, p. 5). In all mechanical wood pulp fiber paper, resins are present and according to the test made by Dr. Little, resin is present in the paper of Exhibit 904 forming .72% (Little, Ger. Ann. 30, p. 5; Heinrich, Ex. 925, p. 6).

On account of the presence of resin, mechanical pulp wood paper is subject to chemical change which may be brought about by exposure to light and air,

moisture and heat (Hibbert and Minor, Ex. 923, p. 10; Heinrich, Ex. 925, p. 6).

The changes which occur in mechanical pulp wood paper after it has been put in magazine form have been classified variously by various experts. Heinrich classifies them as follows:

(1) Stretching and softening;
(2) Yellowing; and
(3) Embrittlement.

Brittleness is the increased tendency of a paper to crack on bending and is an important property in considering the question as to the age of the paper (Hibbert and Minor, Ex. 923, p. 20; Heinrich, Ex. 925, pp. 6, 13-15). Neither the stretching and softening of the paper nor the yellowing of the paper indicates deterioration or necessarily age. Pulp wood paper will yellow at an early age if exposed to sunlight and yet the paper, until it does reach the stage of brittleness, has not yet come into a deteriorated form (id.).

Brittleness is usually the result of the fact that the resins in the wood fibers undergo a hardening such as is observable in ordinary pine trees when the turpentine flowing therefrom becomes hard by exposure to the air and heat.

The present condition of Exhibit 904 shows that all the edges have become embrittled and break merely from handling or opening the magazine and the final stage of this brittleness is that the paper will crumble into dust or powder when rubbed between the fingers. A characteristic quality of brittleness in pulp paper is that when it begins to break it will break in straight lines (Heinrich, Ex. 925, p. 14; Hibbert and Minor, Ex. 923, p. 25).

The changes in wood pulp paper by deterioration are usually gradual unless subjected to unusual conditions.

A copy of the Blue Book Magazine of December, 1916, was filed as Annex 3 to Osborn's first affidavit and copies of the Blue Book Magazine for February, March, April, May, June, and July, 1917, were filed as Annex 4a.

A comparison of these magazines with Exhibit 904 shows that while there may be some differences of deterioration among themselves, they are all in much better condition than Exhibit 904. The margins do not break and chip by bending and the corners when bent do not break. It is impossible, however, to say this of Exhibit 904; for the embrittlement has reached such a stage that most of the margins have already broken off, and it wil be recalled that Meyers, when he saw Exhibit 904, said that it was impossible that that book could have been sold from his store in 1931, because of its deteriorated condition.

In endeavoring to solve the question before the Commission, the contest between the experts has focused around four points:

(1) Whether it is possible from the condition of the one hundred and seventy odd pin pricks to determine the age of the paper when the pin pricks were put through the paper.

(2) Whether it is possible, from the perforations and abrasions by the pin, to determine the age of the paper when the message was written thereon.

(3) Whether it is possible, from the extent to which the lemon juice has penetrated or struck through the paper, to determine the age of the paper at the time when the writing was imposed thereon.

(4) Whether it is possible, from a comparison of the handwriting of Herrmann at or about the time when the message was alleged to have been written in 1917 with his handwriting or at about the time when it was claimed by Germany that he wrote it in 1931, to determine at which time he actually wrote the message.

There are some other subordinate inquiries, but, if these are settled, it may be unnecessary to consider the lesser ones.

We shall now take up the four questions enumerated above in their order.

(1) *Is it possible from the condition of the one hundred and seventy odd pin*

pricks to determine the age of the paper when the pin pricks were put through the paper?

The first expert report introduced by the American Agent was the affidavit of Aloysius J. McGrail (Ex. 904 (1)), who sustained the authenticity of the instrument largely upon the condition of the pin pricks.

Osborn, in his original affidavit of December 19, 1931, filed without exhibit number January 9, 1932, designated the attempt of McGrail to settle this question by pin pricks as a presumptuous undertaking. Subsequently the American Agent introduced the report of the Bureau of Standards (Ex. 912 (1)) made by R. E. Lofton, a technician of the Bureau of Standards, the report of Gustavus J. Esselen (Ex. 922), and the report of E. O. Heinrich (Ex. 925), all of which confirmed the report of McGrail; and the war of the experts had begun.

We will endeavor to trace briefly the course of this controversy, but first it is pertinent to give the qualifications of Captain McGrail.

At the time of his affidavit Mc Grail was a chemist employed by the Ludlow Manufacturing Associates, Ludlow, Massachusetts. He graduated from Harvard University in chemistry in June, 1913. For three years thereafter he was assistant in chemistry at the Catholic University of America, at Washington, D. C., and received in 1916 the degree of Doctor of Philosophy for original work in chemistry.

In the spring of 1918 he was recommended by Professor Theodore William Richards of Harvard University, and commissioned as a First Lieutenant in the United States Army for Military Intelligence duty, and, at the time of making his first affidavit, he was a Captain in the Reserve Corps of the Military Intelligence Division of the General Staff.

His record during the war is as follows: In 1918 he was assigned to duty at the New York Laboratory of The Postal Censorship Committee where he served until the middle of July, 1918. He was then sent to Washington in charge of the laboratory for secret writing of the Military Intelligence Division of the General Staff and at the time of the Armistice was transferred to Paris for similar duty in connection with secret writing and was there assigned to the American Commission to Negotiate Peace. He continued in Paris until the middle of March, 1919, when he was appointed assistant to the Military Attaché of the American Embassy in Paris where he was placed in charge of the Code Office. He also had supervision over the laboratory for secret writing at the Postal Censorship Bureau in Paris as well as of the laboratory at Advanced General Headquarters at Trier. This assignment continued until October 1, 1919, when he was ordered back to the United States for demobilization.

In McGrail's first affidavit of June 28, 1931 (Ex. 904 (1)), in discussing the subject of pin pricks, his report is as follows (p. 5):

" The secret writing refers to perforations of other pages of the magazine which, for convenience, I shall call pin pricks, though the nature of the instrument used to make the perforations is not determinable.

" Inasmuch as the writing refers to pin pricks, which are made a part of the message, the writing must be as old as the pin pricks. I have therefore made a microscopic study of some of the pin pricks, to determine, if possible, whether they are new or old. In my opinion the pin pricks are substantially as old as the magazine itself."

After examining a great many perforations or pin pricks in the Blue Book magazine of January, 1917 (Ex. 904), and giving their characteristics, he concludes his examination as follows (p. 8):

" It is not possible by a microscopic examination to reach a definite conclusion with respect to every pin prick. It is possible that the fibers in the sides of the aperture of an old pin prick may not have deteriorated sufficient, or show other positive indications of age, for a positive statement concerning it. On the other hand

certain of the pin pricks which I have examined do in my opinion afford positive evidences of age. As will be noted from the foregoing analysis, the sides of the apertures of some of these pin pricks, those made through the inked areas of letters, are black. This black is caused by the bending into the aperture of the inked surface fibers. The ink film on these bent surface fibers has not broken, indicating that the ink was comparatively fresh at the time when the punctures were made. In new pin pricks, on old paper, the ink film on surface fibers is usually broken. In the case of new punctures, of course, the ink has become thoroughly dry before the puncture was made, the ink film is brittle, and breaks when the puncture is made. Though this is not a positive test it is one which affords strong evidence.

" Others of the pin pricks noted in the foregoing analysis show that the fibers in the sides of the apertures are oxidized to the same extent as the surface of the paper through which the punctures were made. In new pin pricks on old paper the fibers in the sides of the apertures show lighter in color than the surface of the paper through which the punctures are made.

" Inasmuch as I was instructed not in any way to mar the document submitted to me for examination, I did not make new pin pricks in this document. I did, however, make punctures in a magazine of the same age and paper. My examination of these newly made punctures invariably showed the fibers in the sides of the apertures to be of a lighter color than the surface of the paper; and invariably showed, even where the punctures were made directly through a printed letter, that the film, being now very dry, fractured."

In answer to McGrail's affidavit, Osborn, in his original affidavit of December 19, 1931, filed January 9, 1932, treating of the subject of perforations or pin pricks, uses the following language (p. 16):

" To attempt to answer a question of this kind, as to whether punctures through printed letters were made five months after the printing or several years after the printing, is in my opinion a *presumptuous* undertaking. Printing ink is one of the most permanent of substances and does not go through a change within a comparatively few years which would furnish the basis for any scientific opinion of this kind. I do not undertake to say that these punctures were made long after the date of the printing, but I do undertake to say that it is impossible to determine the date or approximate date of the puncturing of a letter, printed with ordinary printing ink, if the problem is whether the puncture was made five months after the printing or several years after the printing." (Emphasis supplied.)

After a discussion of this matter he says, on p. 17:

" I therefore do not undertake to say that these pin-pricks were made either in 1917 or in 1931, and I think that it would be highly dangerous in an important investigation of this kind to depend in the slightest degree upon evidence based upon physical characteristics of this kind."

In his second affidavit of May 29, 1932, McGrail, treating of the same subject, used the following language (Ex. 921, p. 21):

" I now wish to refer to what I consider to be further strong affirmative evidence of the authenticity of the message. Mr. Osborn and Mr. Clark have been quite free in stating that nothing can be observed from the condition of the pin pricks, although Mr. Osborn has not hesitated to base a ' definite and positive conclusion ' on the authenticity of the magazine upon three very small and doubtful physical phenomena. He has termed my investigation of all the pin pricks in the message (approximately 175 in number) ' presumptuous and highly dangerous in an investigation of this kind'. In my original affidavit I enumerated the observations which I had made and specified in some detail the reasons for my conclusions. Both Mr. Osborn and Mr. Clark, supplemented by Mr. Skinner, have denied that any difference can be observed between the condition of a pin prick made at the present time in paper which is fifteen years old and a pin prick made in paper which is of similar quality but approximately five months old. They make other objections to my observations and conclusions which I shall deal with hereafter. Mr. Osborn

states that in the case of needle or pin pricks in old and new paper ' the physical results of the various perforations are practically the same'. Off-hand, it might appear that an examination of pin pricks is too fine a test to be persuasive — but it is not so. Mr. Osborn, I think, has spoken after a too hasty examination of his own experiments. A careful examination and training in the use of a microscope should enable one to observe the decided differences between pin pricks through old paper and pin pricks through new paper, under proper magnification. Anyone experienced in the use of a microscope knows the difficulties of translating to one who is not used to such an instrument what he sees during an examination of this kind but, with the use of photographs, I hope that this difficulty will be overcome.

" In the case of pin pricks made in new paper in the normal manner employed by one pricking out a secret message, the apertures are never sharp. The edge of the aperture is an irregular line. The fibre of new paper is so resilient that within a few hours after the piercing instrument has perforated the paper, fibres or bundles of fibre resembling a flap, spring back into what was approximately their original position and partially close the hole so that the outline of the hole from the reverse is lenticular or in simpler terms is shaped somewhat like a half-moon. The phenomenon is noticeable both from the obverse and reverse of the aperture. It is rarely seen in pin pricks made today in paper which is of an age corresponding to that of the paper in the Blue Book Magazine of January 1917."

After discussing many examples of perforations in the Blue Book magazine of 1917, and some in other magazines. he concludes the discussion as follows (p. 28):

" I have felt it advisable to go into some detail in discussing the condition of the pin pricks and their bearing upon the question at issue, not only because Mr. Osborn and others have referred to my investigation of this phase of the evidence as presumptuous, but also because of my very firm conviction that, given an impartial and thorough investigation of the pin pricks, the significant characteristics which they, as a whole, possess will become quite apparent. It is true that one pin prick is a very tiny thing, but the question at issue is the age of this document, when certain forces were brought to play upon it; namely, the pressure of a pen and the perforation by a needle, pin or similar instrument. There are approximately 175 places where the paper was perforated by such an instrument. Is it not natural to suppose that with so many physical phenomena to judge from, there would be some reliable evidence of the reaction of the paper to the forces which were applied to the paper to create these phenomena? With a microscope to enlarge the object and with an ability to interpret what one sees in a microscope, it would certainly appear reasonable to suppose that with so many instances to judge from, quite as much could be learned as from a few small indentations made by a pen.

" In page 36 of the joint affidavit of Messrs. Skinner and Clark it is stated that, in their opinion,

' No conclusion can be drawn from the color of the fibres (of paper) when observed under the microscope.'

" My opinion is quite otherwise.

" From the foregoing, I believe the reasons for my opinion as to the authenticity of the document in question are clear, as are also my reasons for believing that many of the conclusions of the experts on behalf of the German Government are absolutely unsound."

Under date of June 4, 1932, the Bureau of Standards submitted to the Commission Exhibit 921 (1), the report of R. E. Lofton, a technician in the Bureau Standards, on " Pin Pricks in Herrmann message in Blue Book Magazine for January, 1917 ". Lofton had before him McGrail's affidavit of May 29, 1932, and the photomicrographs by McGrail, and reported to the Commission that he had made some additional photomicrographs of the pin pricks in the Blue Book magazine and a microscopic examination of the fiber; that he had read the reports of Hibbert, Minor, Esselen, and McGrail, and then he states:

" I agree with the above named experts that there is in general a great difference in the microscopic appearance of pin pricks made in very old, cheap paper and in

new paper of the same approximate fiber composition, such as that on which the Blue Book Magazine for January 1917, and for June 1932, are printed. This statement is based upon a microscopic examination of the appearances and characteristics of pin pricks made by me within the past week in paper from the Blue Book Magazine for January 1917, and from the Blue Book Magazine for June, 1932.

" I have found when pin pricks were made in the paper of the Blue Book Magazine for January 1917, that the paper usually breaks abruptly, splits or tears in rather straight lines to form well-shaped angles about the entering pin point or needle point, similar to the manner in which hard, brittle and lifeless rubber, glass or ice usually breaks. On the other hand, pin pricks made in the paper from the current issue of the same magazine showed that the paper or fibers yield gradually before, or are pushed to one side by, the entering point to form holes which are more rounded and are more or less masked by fibers and fiber-bundles which have sprung back into the holes after the point has been removed. This latter condition is one which would logically be expected because of the natural resilience and elasticity of new fibers."

He attached to his report two photographs, one showing the appearance of the pin pricks made in the paper from the Blue Book magazine for January, 1917 (furnished him by Mr. Martin), and the second, showing the characteristic appearance of pin pricks made in the Blue Book magazine for June, 1932. He also stated that he had made a thorough examination under the microscope at a magnification of 100 diameters of the pin pricks to be found in the Blue Book magazine for January, 1917 (Ex. 904).

He then states his conclusions as follows:

" In my opinion, based upon twenty year's experience in the microscopic study of the fiber composition and properties of papers, and upon my observations of pin pricks made in the paper of the two numbers of the Blue Book Magazine referred to above, and of a study of the pin pricks forming a part of the Herrmann message in the Blue Book Magazine for January, 1917, marked ' Exhibit 904 ', one can, with proper microscopic equipment and training, and a sufficient number of examples, distinguish between pin pricks made in new wood pulp paper and pin pricks made in very old wood pulp paper, such as those in paper as old as that on which the Blue Book Magazine for January, 1917, was printed.

" It is also my opinion, based upon my examination of the above mentioned Exhibit 904, and upon my examination of pin pricks in the Blue Book Magazines referred to above, that the pin pricks in such exhibit are characteristic of those which have been made in paper of the wood pulp type when such paper was relatively new."

After the filing of Exhibit 921 (1), Osborn filed his affidavit of August 13, 1932 (Ger. Ann. 77, filed August 15, 1932). In this affidavit Osborn refused to distinguish between pin pricks in a new and an old magazine in the following language (p. 35):

" If an opinion is to be based upon this pin-prick evidence alone it would be just as reasonable to say that these pin-pricks in the Blue Book Magazine of January, 1917, were made in March or April, 1931, as in April, 1917."

After making this assertion Osborn made a very severe attack upon Lofton's affidavit and accused him of a gross error showing carelessness, or lack of accuracy in observation, that casts serious doubt upon the report of the witness. In this attack he uses the following language (p. 35):

" Because of its source, the Lofton pin-prick report perhaps deserves special attention. It is in a number of ways a surprising document. In the first place, in illustration of this extraordinary and very doubtful testimony about determining the age of paper by sticking pins through it, this witness presents two photographs of a most peculiar character, about which he says:

" I have made photo-micrographs by transmitted light at a magnification of 100 diameters to show the characteristic appearance of pin-pricks made in old and in new paper.'

" That they are made by transmitted light for such a purpose is the first surprising fact, if one really desired to show the physical evidence, but still more surprising is the alleged enlargement of 100 diameters. The photographs filed measure 3.5 inches in width, between the objects farthest apart. If this length is divided by 100, the information is obtained that the original of this exhibit, if it was enlarged 100 diameters, was less than the size of the interior of the small ' o ' in this typewriting, or .035 of an inch in width. The illustration contains nineteen pin-pricks, which could hardly have been grouped in this small field without interfering with each other. A gross error of this kind shows a carelessness, or lack of accuracy in observation, that casts serious doubt upon any report of this witness. It is of course charitable to say that the inaccurate statement is a blunder, but it is difficult to understand how an error of this kind could be made by an experienced examiner. By mere observation and inspection it should appear that an enlargement of the 100 diameters of a pin-prick would make a large aperture.

" Measurements show that the originals of the pin-pricks that I have photographed stereoscopically, 0-29, 0-30 and others, range in size of aperture from about $^1/_{80}$ of an inch to $^1/_{120}$ of an inch. It is obvious that a pin-prick of $^1/_{120}$ of an inch, enlarged 100 diameters, would show an aperture of one inch. In order to answer the practical purposes for which they are made, pin-pricks would necessarily be made large enough so that they would be visible, and it is not probable that a pin-prick of this kind would be made smaller than from $^1/_{80}$ to $^1/_{120}$ of an inch."

German Annex 80, dated August 13, 1932, filed August 15, 1932, is the affidavit of Skinner, Clark, Griffin, and Billings. These experts, referring to the photographs made by Lofton, make the same charge as Osborn made, in the following language (p. 27):

" These photographs are misleading, not only because the magnification is wrongly stated, but because they are taken with transmitted light and give no opportunity to see whether the photographs were taken on the printed body of the page or on the unprinted margin."

In answer to these criticisms of Lofton's report, the Acting Director of the Bureau of Standards filed Lofton's " Reply to the criticisms of the German experts relating to my report of a study of pin pricks in the Blue Book Magazine for January, 1917 and of the same magazine for June, 1932 " (Ex. 963 (6)).

In this report Lofton, after quoting the criticisms copied above, stated as follows (p. 3).

" The magnification used in making the photomicrographs was 100 diameters, as stated in my report."

He then states that after receiving the criticisms he had checked up in order to be doubly sure, on the magnification used, and found it to be as stated in his report.

He then describes in detail the methods used by him in making the pin pricks and the photomicrographs, and shows clearly that the criticisms made by Osborn and also by Skinner, Clark, Griffin, and Billings had no basis whatever, and closes his report as follows (p. 10):

" I should perhaps state, in conclusion, that all the work in connection with the report I made to the Commission and with these comments and photographs was done by me personally. I again state that these results are accurate and that no blunders were made. I, therefore, have no desire to withdraw or modify any statement made in the original report, and this supplementary report is purely explanatory of the original."

Thus we have another example of Osborn's zeal as an investigator, coloring his work as an expert, and leading him to make a baseless and false charge against a scientist in the employment of the Government, devoting his life to the ascertainment of truth, who, in this case, had no interest except to ascertain the facts and report them to the Commission.

The report of Gustavus J. Esselen, filed June 1, 1932, fully sustains the report of Captain McGrail on the subject of pin pricks and disposes of the criticisms made by Osborn in this respect. In his report (Ex. 922, p. 33), Esselen says:

" In spite of the remarks of Mr. Osborn and Mr. Clark on the question of pin pricks, my study of this matter has clearly shown that there is a very distinct difference between pin pricks made recently in 1917 issues of the Blue Book, as compared with pin pricks made in 1929 or 1931 issues of the Blue Book, particularly if these pin pricks are examined on the reverse side under proper optical conditions. In fact, the exhibits which Mr. Osborn himself has prepared and submitted as Exhibits O-P-1 to accompany his Expert Opinion, clearly show these characteristic differences. These differences will be shown hereafter by means of suitable stereo-photographs. In view of my own investigation of this subject, it is my opinion that the pin pricks to be found at several places in the January 1917 issue of the Blue Book which contains the Herrmann message, are characteristic of pin pricks which are made in relatively new paper and are quite distinct in their characteristics from pin pricks which are made in similar paper after it is thirteen or fourteen years old.

" In this connection, I would like to invite particular attention to two stereo-photomicrographs which I have taken of Exhibit O-P-1 filed by Mr. Osborn with this Expert Opinion. One of these stereo-photomicrographs, Exhibit E-25, shows the reverse side of pin pricks which Mr. Osborn made recently in issues of the Blue Book Magazine for February 1917; the other stereo-photomicrograph, Exhibit E-26, shows the reverse side of pin pricks made by Mr. Osborn at the same time in issues of the Blue Book Magazine for October 1931. While I shall discuss the characteristic differences between these two sets of pin pricks in more detail later on in this report, I will merely invite attention at this time to the fact that the reverse side of the pin pricks made by Mr. Osborn in the recent issues of the Blue Book Magazine show all of the characteristics of the reverse side of the pin pricks in the original message; and furthermore, these characteristics are entirely distinct from those shown by the pin pricks which Mr. Osborn made recently in the old magazines. As illustrative of the reverse side of the pin pricks in the original message, there are filed with this report three stereo-photomicrographs, showing the reverse side of typical pin pricks on various pages of the original message. (Exhibits E-27, E-28, and E-29.) A glance at these will show that they are of the same general character as the pin pricks made by Mr. Osborn recently in fresh paper, indicating that the paper on which the Herrmann message appears was relatively fresh at the time the pin pricks were made in it. This matter is considered in more detail later in this report."

Again, after carefully considering the subject and examining a number of pin pricks in Exhibit 904, Esselen concludes his discussion as follows (p. 57):

" I have examined a large number of pin pricks in the original message and the three which are illustrated in Exhibits E-27, E-28 and E-29 are typical of those which I have found in the message itself. In other words, the pin pricks in the magazine containing the Herrmann message are typical of pin pricks made at the time the paper was fresh rather than of pin pricks made after the paper was old. This is an added indication that the magazine was relatively new at the time that the Herrmann message was written in it."

Dr. Esselen's qualifications as an expert are as follows:

He graduated at Harvard College with the degree of Bachelor of Science, Magna cum Laude in Chemistry, in 1909. He taught chemistry at Harvard and continued his study in the Graduate School, receiving the degree of Master of

Arts in 1911, and of Doctor of Philosophy in 1912. At the time of making his affidavit he had, for fourteen years, practised as a consulting chemist in many fields of research and specialized in the practical application of chemistry of cellulose, which is the chemical name for fibrous material of which paper is composed. He acted in an advisory capacity for manufacturers of paper, and on two separate occasions made special investigations in Europe in connection with the problems of the Pulp and Paper Industry. He helped translate from German into English Heuser's " Textbook of Cellulose Chemistry "; prepared the chapter on " Cellulose and its Derivatives " in the book entitled " Colloidal Behavior ", edited by Bogue, and was the author of the chapter on " Cellulose Industries " in " The Manual of Industrial Chemistry ", edited by Rogers. He was a member of the Technical Association of the Pulp and Paper Industry, a Councillor-at-Large of the American Chemical Society, a Director of the American Institute of Chemical Engineers, and a Fellow of the American Association for the Advancement of Science. Surely, with Esselen's support of Lofton, there is no ground for charge that Lofton's opinion was presumptuous and dangerous.

Edward O. Heinrich filed Exhibit 925 and eight Annexes, all dealing with Exhibit 904. At the time of filing his Exhibit 925, Heinrich had been for twenty-four years engaged in scientific investigation and microscopy, particularly as applied to police science and the detection of crime. The greater part of his practice had consisted in the examination of disputed documents and handwritings offered as legal evidence.

He has qualified in the courts of a great many states as an expert in chemistry and microscopy, and on all subjects concerning disputed documents and handwriting.

In 1908 he graduated from the University of California with the degree of Bachelor of Science in chemistry. At that institution his work was a study of chemical engineering, with special attention to legal chemistry. He has made himself familiar with all available English, German and French works on the subject of questioned documents and handwriting. He has also made an extensive study of the composition of and method of manufacturing paper.

He maintains in Berkeley, California, a fully equipped scientific laboratory for special research in the field of questioned documents, and in the field of microchemical analysis.

He has been City Chemist of the City of Tacoma, Washington; Engineer of Tests of the City Tacoma, Washington; Chief of Police of the City of Alameda, California; Director of Public Safety of the City of Boulder, Colorado, and a Lecturer at the University of California on Criminal Investigation and Disputed Handwritings.

Heinrich made an extensive study of the subject of pin pricks in Exhibit 904. He made a number of experiments with new paper of the grade used in Exhibit 904, and with other papers of that grade in various stages of deterioration. He made binocular magnification of the various pin pricks and he used such magnification for his study of each one of the 170 pin pricks which he observed in Exhibit 904, and he compared these with the exhibits submitted by Osborn. The result of his study is thus stated (Ex. 925, p. 41):

" I find that the pin pricks in Ex. 904 show the characteristics of pin pricks made in fresh paper. Out of the 170 pin pricks examined, I found less than 2% in which the characteristic phenomena of pin pricks in new paper were not clearly shown. I am, therefore, of the opinion that the pin pricks in Ex. 904 were indubitably made at a time when the paper of the magazine was in a comparatively fresh and pliable condition.

" My microscopic study of Mr. Osborn's exhibit (his Annex 2, OP-1) disclosed that the pin pricks which he has submitted display the same identifying characteristics of youth and age which I have described above."

And, again, on p. 44, he states as follows:

" If I had had but a small number of pin pricks for examination, it would probably have been difficult, if not impossible, for me to reach a positive conclusion. Ex. 904, however, presents so many examples of pin pricks for examination that no one could find it difficult to determine from them a question as to whether the paper was new, or considerably embrittled, at the time when they were made. With so much material available, I have been able to form a positive conclusion that it is impossible that the pin pricks could have been made at any time the paper was in anything like its present condition of embrittlement, or at any time other than when the paper was comparatively fresh."

Hibbert and Minor did not make an extended report on the subject of pin pricks but their conclusion is thus indicated (Ex. 923, p. 50):

" As this affidavit is already much longer than we would wish to have it, we will not enter into any detailed discussion of the question of the condition of the pin pricks in the original message or Mr. Osborn's comments thereon. Lest our silence on this point be construed, however, as agreement with the statements of the German experts in this regard, we wish to record our view that in our judgment the condition of the pin pricks in the original message bears strong evidence that the paper was fresh when the message was written in the magazine. In this connection, we also wish to state that the color of freshly exposed interior fibres in a perforation of paper can, with the proper use of the microscope and in some cases even with the naked eye, be readily observed and distinguished from the color of old, long exposed fibres. The difference of color is particularly noticeable in the case of fresh tears in old surface-yellowed paper and here the naked eye frequently can observe it."

In the oral argument at Washington, 1932, page 216, the German Agent simply based his whole argument on pin pricks upon Osborn's experiments and tests and stated that:

" he has demonstrated, in our opinion, conclusively that there in no difference. We find the same appearance in paper of 1917 as in paper of 1931."

But the German Agent contended that:

" whatever physical evidence there might have been in these pin-pricks that evidence was destroyed, whether the pin-pricks were made in 1917 or in 1931 or at any time in between."

On the contrary a careful examination of the stereophotographs which have been prepared and filed by Esselen and those which were prepared and filed by Osborn, himself, will convince even the lay observer that the evidence has not been destroyed and that the distinction which has been observed by McGrail, Lofton, Esselen, and Heinrich is too distinct to be neglected.

(2) *Is it possible from the perforations and abrasions by the pen to determine the age of the paper when the message was written thereon?*

In his original affidavit of December 19, 1931, it was contended by Osborn that the Blue Book magazine of January, 1917, had reached a condition of pronounced deterioration at the edge of the sheets at the time the writing was done, that the paper had softened and weakened at the edge of the sheets to such an extent, and that the deterioration of the paper at the edges had progressed so far, that when the writer came to the edge of the sheet " as shown in two places at the edges on page 698 and page 694, the two nibs of the pen actually stuck through the paper " (p. 5).

The first instance given by Osborn of the nibs sticking through the paper was on page 698 in connection with the word " bunch " and he claimed that the ink actually went through the hole and discolored even the last page of the message which was 694 and was the second sheet under 698.

The second instance of perforation, noted by Osborn, was in the figure 6 on the second line of the writing on page 698.

The third instance is in the letter " s " in the word " greetings " in the last line on page 694.

Then Osborn goes on as follows, page 6:

" On both of these pages other writing near at hand, not on the edge of the sheet, shows that the paper was not softened and weakened in the middle of the sheet but only near the edge. *On these portions of the sheets not a single instance is found where the pen either cut, or stuck through, the paper.*" (Emphasis supplied.)

In the joint affidavit of Skinner and Clark, dated January 26, 1932, German Annex 25, we find the following at page 37:

" Upon our examination of the original January 1917 copy of the Blue Book Magazine, we find that the writing on the bottom margin of the pages shows at five different places punctures of the sheet or ruptures of the surface fibers by the pen point; whereas *no similar puncturing of the surface fibers is shown in the body of the page*, proving that the paper must have been written on when the margin of the pages had already become deteriorated by natural ageing." (Emphasis supplied.)

Thus we have Osborn charging that " on these pages not a single instance is found where the pen either cut or stuck through the paper ", when the writing is " not on the edge of the sheet "; and Skinner and Clark echoing this charge when they say that " no similar puncturing of the sheet or rupturing of the surface fibers is shown in the body of the page, proving that the paper must have been written on when the margin of the pages had already become deteriorated by natural ageing."

In response to these charges, that there were no punctures or pen cuts in the body of the sheets or through the pages, Heinrich, examining the same instrument, reports in his affidavit of May 31, 1932 (Ex. 925, p. 29), that he found five pen punctures (complete perforations and fifteen pen-digs (almost complete perforations), in the central areas of the pages, that is, elsewhere than in the margins. The location of the punctures ar set out by Heinrich as follows (p. 29):

" Page	Line	Word	Letter	
700	4	and	n	Punctured at foot.
698	1	bearer	a	Punctured on upper left side.
698	3	of	f	Punctured on up stroke of lower loop.
698	5	go	g	Punctured on up stroke of lower loop.
694	1	Sei	S	Punctured on up stroke opposite turning movement closing base of letter ".

In German Annex 77, Osborn's affidavit of August 13, 1932, referring evidently to the claim as set out above by Heinrich, he says, p. 13:

" This Heinrich report also admits that the pen of the writer of the message actually perforated the paper at the margin *in three places*, and then contends that the same quality and character of perforations are found in the middle of the pages. This is not the fact. A careful microscopic examination discloses that at least most of the alleged defects in the center of the sheet were *not caused by the pen* but were in the paper itself, as they are in other sheets. There is such a defect on page 694 between the first and second lines, under the word ' to '." (Emphasis in original.)

As reported by Esselen in his affidavit dated May 28, 1932, Exhibit 922, page 42, there are two pronounced punctures made by the pen in writing in the following places:

On page 698 there is an obvious cut in the letter " g " in the word " go " in the fifth line of the message. This cut can be viewed by the naked eye and is

clearly shown in the stereophotograph made by Esselen and filed with his report as Ex. E-8. The reverse or underside of the hole is also shown in separate stereophotograph Ex. E-8a.

On page 700 the pen made an actual hole in writing the letter " n " in the word " and " in the fourth line of the message. Esselen's stereophotograph E-11 brings out the hole clearly and the stereophotograph E-11a exhibits the hole on the reverse side of page 699 of the message. Both of these holes, however, can be seen plainly with the naked eye.

The other stereophotographs filed by Esselen with his report give a number of examples where the pen either pierced the paper or made deep indentations as follows:

1. On page 694 the final " s " in the word " funds " shows that the pen made a deep dig into the paper followed by a skip before the writing started again.

2. On page 696 the pen dug deeply into the paper in making the dot over the " i " in the word " with " in the first line of the message.

3. On page 698 the pen stuck into the paper in making the letter " r " in the word " here " in the fifth line of the message. In this case the pen stuck into the paper, then interrupted, and then started again.

In all three of these last cases the stereophotographs show clearly the deep indentations.

(3) *Is it possible from the extent to which the lemon juice has penetrated or struck through the paper to determine the age of the paper at the time when the writing was imposed thereon?*

On this question the experts are in direct opposition.

In Osborn's first affidavit of December 19, 1931, filed January 9, 1932, he reports as follows (p. 2):

" The writing on the four pages of the Blue Book Magazine of January, 1917, appearing on pages 700, 698, 696 and 694, was in my opinion written a number of years after its alleged date of April, 1917. My opinion is based on the fact that the paper was old when the writing was done. These pages show in the writing itself unmistakable physical evidence that there was a pronounced difference, when the writing was done, in the condition of the paper at the edge of the sheet as compared with the middle of the sheets. This changed condition in wood pulp paper is positive evidence of age."

And again on page 5 he says:

" The Blue Book Magazine of January, 1917, in which the disputed writing appears on the four pages, in my opinion, had undoubtedly reached a condition of pronounced deterioration at the edges of the sheets at the time the writing was done. This paper in this January, 1917, magazine, when the writing was done, had softened and weakened at the edges of the sheets to such an extent, that is, the deterioration of the paper at the edges of the sheets had already so far progressed, that when the writer came to the edge of the sheet, as shown in two places at the edges on page 698 and page 694, the two nibs of the pen actually stuck through the paper. On page 698 where the word ' bunch ' appears the pen actually cut the paper and the ink ran through to the page underneath which, as the magazine was lying, was page 696, and there is some indication on the earliest photostatic photographs (See Ex. 904, 2c, and 904, 3a) that the ink actually went through and discolored even the last page of the message, which was 694 and was the *second sheet* under 698 where the word ' bunch ' appears."

In his affidavit of December 21, 1931, filed on the same day as Osborn's first affidavit, January 9, 1932, Frederic C. Clark, one of the German experts, after giving the composition of the paper used in Exhibit 904 and stating that " decomposition is the result of the action of sunlight, air and certain gases ", then

states that this deterioration is first recognized as a slight discoloration of a brownish color, then this brownish color deepens and finally it results in the fiber crumbling into a dustlike material. He then states as follows (Ann. 10 to Osborn's Opinion, p. 6):

" A paper composed largely of ground-wood pulp may show good writing qualities with pen and ink while the paper is relatively new. As deterioration sets in, however, and the paper becomes actually brittle, it then shows very poor writing qualities with pen and ink, as the pen points may actually tear the paper even with slight pressure, and the ink tends to go through the paper more readily where deterioration has taken place. If badly deteriorated, a ground-wood paper may be so absorbent to ink as to carry the ink all the way through the paper, staining the opposite side, very much as in the case in writing on a piece of thin blotting paper. The rapid absorption of ink where the paper is badly deteriorated is due to the fact that in the deterioration set up, the ground wood fibers lose their fibrous form and are reduced to a dustlike material, and this dustlike material more rapidly absorbs ink from a pen than occurs where the fibers show no or very light evidence of deterioration."

Again at page 13 he said:

" Based upon the evidence presented above and my knowledge of ground-wood papers, it is my opinion that the paper used in the above mentioned copies of the Blue Book Magazine of an age of two years could be written on with pen and ink at the unprinted margin without tearing or roughening up of the surface and without penetration of the ink through the paper, such as occurs when discoloration and embrittlement have reached an appreciable degree. It is my further opinion that with the paper used in the Blue Book Magazine, the tendency to deteriorate will progressively increase so that with paper as old as that used in the 1917 Blue Book Magazine, it would be difficult if not impossible to write on it with ink and particularly with a heavy pen stroke at the margin of the paper without a marked roughening up of the surface and penetration of ink through the paper."

A comparison of Osborn's first affidavit and Clark's affidavit will show clearly that the latter was filed to substantiate the former in the statements made and quoted above. It is pertinent to note that at the time when Clark made his affidavit he had not even seen Exhibit 904 about which he was testifying.

In opposition to the view expressed by Osborn and Clark, is the affidavit of Charles J. J. Fox (Ex. 919).

Charles James John Fox at the time of making his affidavit was a doctor of Philosophy and a Fellow of the Institute of Chemistry of Great Britain and Ireland. From 1897 to 1901 he studied at University College, London, under Sir William Ramsay and Professor F. G. Donnan. During 1901 he studied at the University of Paris. From 1902 to 1904 he studied at the Universities of Leipzig, Breslau and Berlin. From 1904 to 1907 he was a member of the staff of the Chemistry Department of University College, London, and cooperated with Professor Fridtjof Nansen in Oceanographical research. From 1907 to 1914 he was Professor of Chemistry at the College of Engineering, Poona, India. During the World War he was Major, Royal Artillery, engaged in munition work and for a time a member of the General Staff of the Army Department. From 1919 to 1925 he was Principal and Professor of Chemistry at the Royal Institute of Science, Bombay. Since 1925 he had been a partner in the firm of Cross and Bevan, consulting and analytical chemists, London, specializing in the Cellulose Industries. He is the author of various scientific and technical memoirs and monographs, including articles in the Encyclopedia Britannica on Cellulose, Rayon and Paper, and also in Thorpe's Dictionary of Applied Chemistry, new edition.

Fox in his affidavit (Ex. 919, dated May 20, 1932, filed June 1, 1932) examined the contention of Osborn (p. 6) and of Skinner and Clark (p. 7) and of

Little (p. 7), all of whom came to the conclusion expressed by Osborn that the paper of the sheets containing the Herrmann message " had undoubtedly reached a condition of pronounced deterioration at the edges of the sheets at the time the writing was done ". He also examined the contentions made by Clark in Annex 10 to Osborn's Expert Opinion, p. 8, and summarized the conclusions of the affidavits filed on behalf of Germany as follows (p. 9):

" 6. Broadly summarized, the conclusions of these affidavits filed on behalf of the Germans as I understand them are as follows:

" (1) That wood pulp paper of the kind used in the Blue Book Magazine deteriorates with age, the deterioration manifesting itself in a progressive browning and embrittlement beginning at the edges of the pages and spreading inwards towards the middle of the pages.

" (2) That this deterioration is slow in ' normal ' conditions of handling and storage, such as in a library, with the consequence that a number of years elapse before there is any serious deterioration sufficient to affect writing quality.

" (3) That the writing quality of the paper when new and undeteriorated is better than when old and deteriorated and particularly is it better at the edges of the paper.

" (4) That since the inscription in the Blue Book Magazine of January, 1917, displays signs of difficulty in writing especially at the edges of the paper, such difficulty being indicated by roughening, penetration and such like effects on the paper, visible mainly at the edges of the paper but not in the middle, therefore the paper was some years old at the time the inscription was written and consequently older than the twenty-one weeks between the date of the Magazine's being printed and April, 1917."

After discussing the subject of deterioration of paper showing the different conditions and factors which make for deterioration. Fox then discusses the subject of " Evidence of absorption and penetration " (p. 16) and shows clearly that wood pulp paper is more absorbent when comparatively young than it is when it grows old; that on account of progressive hardening of the resin ingredient of ground wood in wood pulp paper, its writing quality improves with age and its absorbent quality decreases.

In this connection he made some experiments with the time of penetration of lemon juice into magazine papers at different ages and reports his results as follows (p. 21):

" Time of Penetration of Lemon Juice into magazine papers of different ages. (See Exhibits XXXIII to XXXVIII hereto inclusive)

Magazines Tested	Thickness 1/1000 Inch	Times measured on different pages	
Blue Book, March 1917	5.85	90 minutes	116 minutes 20 seconds
Adventure, January 1917	6.6	98 minutes 20 seconds	88 minutes 20 seconds
Adventure, 15 April, 1932	5.15	6 minutes 48 seconds	10 minutes 19 seconds ".

After making this table Fox says:

" Any observer of these exhibits will be able to notice that the lemon juice has spread to a much larger area on the new paper of the 1932 issue than it has on the old paper of the two 1917 issues."

An examination of Exhibits XXXIII to XLb, filed with Fox' affidavit, verifies his conclusions.

After a careful and scientific treatment of the subject, a part of his conclusion is stated as follows (p. 25):

" It follows from this, by easy deduction, that blurring, feathering and penetration of the writing fluid are, in my opinion, more likely to happen with new paper than with old. Therefore, it is my belief, also, that the inscription with lemon juice in the Blue Book Magazine of January, 1917, was written when the paper was new and easily wetted, and easily penetrated because easily wetted. The blurring and feathering of the writing and the penetration of the paper at some places at the edges and towards the middle of the page alike, are much more likely evidence of the difficulty of writing on new paper than evidence that, at such places, the paper may have been weak, because old, at the time of its being written upon. It follows also, and it is my opinion, that the giving way of the paper at the edges is merely the effect of age, and such giving away must sometimes happen to occur where there happens also to be some writing near by. It is my opinion that this fact, in itself, cannot be accepted as evidence that the paper was old when the inscription was written. However that may be, the inscribing of the word ' bunch ' on Page 698 was very evidently completed quite satisfactorily at the time it was written, and the final ' h ' shows signs of blurring or feathering, which, in my opinion, is evidence that the page was relatively new and undeteriorated at that edge at the time it was written. This opinion is strengthened by the circumstance that there appears to have been penetration of the writing fluid into the two pages below, which I believe was the more likely to have occurred if the paper was relatively new at the time of writing than if it was old, though penetration, even then, is no doubt also always dependent, to some extent, upon the stiffness and sharpness of the pen and the skill of the writer, including the speed at which he writes. If and when deterioration at the edge of the pages does ultimately set in so that the paper there gives way in consequence of increase of brittleness, it is to be expected that it will give way more easily where the pen has indented it and deposited upon it an acid substance (citric acid) which has a markedly deteriorating action."

After Fox' affidavit (Ex. 919) had been filed the joint affidavit of Skinner, Clark, Griffin, and Billings, consisting of 144 pages, dated August 13, 1932, was filed on August 15, 1932. One of the chief purposes this affidavit was to discredit Fox' affidavit; and for this purpose they say (p. 71):

" All of the data furnished by Fox on rate of penetration in old and in new paper contributes nothing that is not well known. He goes to great length to prove that new paper has a higher rate of penetrability than old paper. In the disputed message there is no appreciable strike-through of the writing except on the first page, and even there the strike-through occurs only where it is clearly evident that an abnormal and excessive amount of writing fluid was applied to the paper. If Fox had actually seen the reverse side of the pages on which the message was written, instead of reproductions of the written side only, and had applied the results of his tests to the question at issue, his only logical conclusion would have been that the paper was old when the message was written." (Ger. Ann. 80.)

In making these statements these four experts were jointly guilty of several egregious errors.

First, they assert that there is no appreciable strike-through of the writing except on the first page, and even there the strike-through occurs only where it is clearly evident that an abnormal and excessive amount of writing fluid was applied to the paper.

An examination of the pages in Exhibit 904 on which the message was written and of the reverse pages, shows that there is an appreciable strike-through on every page.

These four experts also say that, if Fox had actually seen the reverse side of the pages on which the message was written, instead of copies of the written

side only, and had applied the results of his tests to the question at issue. his only logical conclusion would have been that the paper was old when the message was written.

Fox filed, with his Exhibit 919, Annex A which contained photographic Exhibits I to XLb. I and II are photographs of page 700 and page 699 of the Herrmann message, page 700 being the page on which the first page of the message occurs and page 699 being the reverse page. Even in this photograph it is easy to see that the strikes-through occur not only where there is an abnormal amount of the fluid but also where there is a normal amount of fluid.

Exhibit III is a photograph of page 698 and Exhibit IV is a photograph of page 697. Page 698 contains the second page of the message and 697 is the reverse side of page 698. An examination of the photograph of 697 as well as of the original, shows also many examples of strikes-through which are observed even in the photograph.

Exhibit V is a photograph of page 696 and Exhibit VI is a photograph of page 695.

In these pages the same phenomena appear as in the prior ones.

Exhibit VII is a photograph of page 694 and Exhibit VIII is a photograph of page 693. The strikes-through here are evident and numerous. Page 694 is the last page of the Herrmann message and page 693 is the reverse page, and, on this reverse page, there are evident many cases of strikes-through where the use of the liquid is normal. In fact, there is no abnormal use of the liquid on page 694 and only one on page 696 and no abnormal liquid on page 698, and yet, every one of these cases, there are strikes-through evident on the photographs as well as on the original Exhibit 904.

William J. Hurst, a graduate of Pratt Institute in the Department of Chemistry, post-graduate in Organic Chemistry at the Polytechnic Institute of Brooklyn, N. Y., where he obtained the degree of Bachelor of Arts in Chemistry, and who also took a post-graduate course in Coal Tar Dye Chemistry at Columbia University, was at the time of his affidavit chief chemist for S. S. Stafford, Inc., manufacturers of writing inks, typewriter ribbons and carbon papers. He had qualified as an expert examiner of questioned documents in Federal and State courts in New York, Massachusetts, New Jersey, Connecticut, Pennsylvania, and Maryland. He made an expert report on Exhibit 904, which was filed on June 1, 1932, as Exhibit 924.

After an examination of Exhibit 904 his report on the instrument contained the following (p. 2):

" The writings on the pages of the imposed message show spreadings similar to known effects of writing on fresh paper of the wood pulp magazine type. On the reverse side of these pages, i. e., on pages 699, 697, 695 and 693 evidences of the penetration is markedly shown and the absorption of ink by new paper and the penetration of ink in the fibers of new paper and the seeping through the fibers to the back or the reverse of new paper is clearly shown. The extent of the penetration can be readily observed by anyone who examines the original document or photographs of the reverse of the pages on which the message has been written.

" In the original message the nature of the blurs on page 700 is particularly significant. The blurs are approximately the same size on the reverse as on the obverse of the page and both the obverse and the reverse show that the paper was fresh at the time of the writing and that the writing was done before the pronounced natural resistance to penetration due to substantial ageing had set in. Furthermore, the blurring, feathering and absorption of the writing, when any substantial amount of lemon juice was on the pen, is a most significant indication of the freshness of the page at the time the writing was done. The extent to which the writing itself penetrated the paper which, when compared with the decided

resistance of old paper to the penetration of writing gives further evidence of the freshness of the page at the time of writing. I made a microscopic examination of the original message and found the book to be of a yellowish brown appearance, which is characteristic of aged paper, particularly of the wood pulp magazine quality. On the outer edges of the pages there is a darker coloration, more brownish in hue, and this prevails throughout the entire magazine, particularly at the bottom edges. This brownish edging is also characteristic of aged paper and is produced by atmospheric contact, which has an action similar to that of the mid-summer's sun or ultra-violet rays. This action is more rapid on wood pulp papers which are the types generally used for cheap magazines and newspapers.

" On pages 700, 698, 696 and 694 I particularly noticed that on the bottom of the pages (the page-numbered end) the pages appear brittle, and in these cases the edge was cracked and pieced out. It is my opinion that the pages were affected by the application of the hot iron which dried the paper and the ageing, due to contact with the atmosphere, has caused the hardening and brittleness of the edges.

" Conclusion: From an application of well known principles respecting the relative penetration of ink through fresh and aged paper to the condition of the original message, it is, in my judgment, conclusively shown that the message was drafted in the magazine when the magazine paper was comparatively new and fresh. The points which prove this are the spreading of the writing on the paper, the penetration and absorption of the lemon juice through the fiber of the paper, and the extent of the penetration as shown on the reverse sides of the written pages. If the writing had been done on old paper, with no heavier stroke than employed by the writer of the original message, there would not have been such a tendency of the lemon juice to spread or to penetrate through the fiber of the paper to the reverse side. This tendency of writing fluid to penetrate new paper is clearly observable in any examination of writing on fresh paper of this type and it harmonizes completely with the action of the writings in the original message. On the other hand, writing on old paper of this type has a tendency to be compact, non-spreading and strongly resistant to the penetration to the reverse side. Another corroborating point, in my judgment, is the brittleness of the paper at the edges. Whereas the whole written pages had the application of a heated iron to develop the invisible ink, the brittleness does not extend to the entire message, but is restricted to the edges. It is my opinion that the hot iron was used many years ago and that the action of the atmosphere upon the edges of the paper created this pronounced brittleness. In other words, the early drying up of the moisture on the paper prepared the way for a pronounced brittleness of the edges through atmospheric contact with the lapse of time."

In order to establish whether the message was written in April, 1917, or around about April, 1931, the affidavit of Gerald Francis Gurrin was introduced. The same affidavit contained the data from which it was clearly established that the plus signs in the table of contents of the Blue Book Magazine of January, 1917 (Ex. 904), were made in exactly the opposite sequence which the Qualters brothers were accustomed to use in marking the titles to articles read by them.

At the time of making his affidavit (Ex. 918), Gerald Francis Gurrin was practicing his profession as " a Handwriting Specialist and Examiner of Questioned Documents ". Gurrin had made a special study of the subject of handwriting and everything appertaining to disputed and forged documents for the past 28 years. In his professional work he had been consulted by His Britannic Majesty's Treasury (Director of Public Prosecutions), Admiralty, War Office and most of the Government Departments, as well as by the Criminal Investigation Department, Scotland Yard, City of London Police, County Police Forces of England and Wales, the Bank of England, and the principal Joint Stock Banks. He had been accepted and recognized as an expert witness on matters concerning disputed handwriting and documents in the Supreme Courts of the British Isles, in civil and criminal cases, as well as in Naval and Military Courts Martial.

After reading the various expert affidavits already on file he came to the conclusion that the matter was not one which a handwriting specialist was best qualified to decide, since it involved questions which only a trained analytical chemist could pass upon, and, therefore, he referred the matter to Dr. C. J. J. Fox, and Dr. Fox's affidavit was produced as the result of this reference.

In Exhibit 967, Gurrin filed an affidavit which dealt with certain questions affecting the Herrmann message. The question which he endeavored to answer was as follows (p. 9):

" Whether there is evidence in this message sufficient to establish either that it was written in April 1917 or at a much later date; namely, sometime in 1930 or 1931."

In discussing this question he said (p. 10):

" From my own experience, confirmed by experiments made for the purpose of this case, I know that on the application of a non-viscous fluid to new wood pulp paper absorption is very speedy, commencing to spread around the spot to which it is applied immediately on application. If the liquid is applied with a pen, the spreading takes place beyond the area defined by the tracks of the pen. Absorption, of course, also takes place downwards into the fibres of the paper and becomes visible on the back of the sheet if the paper is turned over after the short space of time required to write two short words. This fact can be tested in an elementary way by the dipping of a feather into lemon juice and the application of a tiny spot to a piece of new paper of the type in question. Immediately the spot is on the paper an area of dampness in the form of a halo appears around the spot. If the paper is turned over, it will be seen that the dampness appears on the reverse side practically at once.

" I further know that as wood pulp paper ages it becomes harder and less absorptive. In this conditon the writing fluid is not absorbed quickly. It does not flow out laterally from the pen, but is confined roughly to the area marked by the writing instrument, much in the same way as though the writing were being effected upon a sized paper. If the elementary test of the drop of liquid is applied, absorption does not give the immediate effect of a halo around the spot, but the liquid is confined to its original area for a considerable time, sometimes even for the whole period of the drying process. Further, the liquid is not visible at once upon the back of the paper."

Gurrin's findings were as follows (p. 11):

" With these conditions in mind, I have examined the message commencing on page 700 of Exhibit 904. I find

" (a) That the writing fluid has run out laterally from the pen, sometimes to a considerable extent, normally beyond the pen tracks and only being confined to the pen tracks when the amount of liquid on the pen was failing.

" (b) *That absorption has taken place to the extent of making the writing visible on the reverse sides of the pages.*

" (c) The lateral spreading of the fluid occurs to its greatest extent at the beginning of the message. This does not, I think, result from increased absorbency at that point. It is a condition frequently found in invisible writing and is often due to the fact that it is difficult to appreciate when writing with a colorless or almost colorless liquid whether or not too much of the fluid is contained in the pen." (Emphasis supplied.)

After discussing the subject of visibility of the writing upon the back of the paper and the pen punctures in the margin. Gurrin then states as follows (p. 13):

" Reviewing the facts, bearing upon the age of this message, we have

" (a) Spreading of the writing fluid laterally beyond the pen stroke;

" (b) Absorption into and through the paper to the extent of visibility and, in parts, legibility on the reverse sides of the pages; and

" (c) Absence of increased spreading or puncturing towards the edge of the paper."

And then he states as follows:

" In my judgment, (a) and (b) constitute affirmative evidence of the fact that the message was written when the paper was relatively new, whereas (c) is negative evidence in the sense that it shows that there was no appreciable disparity between the condition of the margins of the pages and the centers of the pages when the message was written.

" On considering the value of these facts, taken together, I feel that all are inconsistent with writing an old paper. Furthermore, I can find no facts which are consistent with writing upon old paper. In these circumstances I think it is a reasonable and sound deduction that the paper was in comparatively new condition when the writing fluid was applied and, certainly, far younger than 14 years old."

Esselen, treating the subject of deterioration of wood pulp paper and the comparative writing surfaces presented by old paper and by new paper, files as Exhibit E-31 with his exhibit, six pages, one from a March, 1916, Blue Book; one from a January, 1917; another from a September, 1917, and a fourth from an April, 1918, Blue Book. He also filed a page each from a May, 1930, issue of the Blue Book magazine, and a February, 1932, issue of Ranch Romances. The writing on all of these pages was done in as nearly the same manner as was possible for him to perform the experiment. He describes the result of his experiments as follows (Ex. 922, p. 19):

" I wish, however, to invite particular attention to two things in connection with the resulting writing. The first is that there is practically no tendency for the lemon juice marks to spread or feather on the old paper, whereas on the more recent paper, there is a very distinct tendency for the lines to blur. In the second place it will be noticed that in no case has the lemon juice penetrated the paper of the 1916, 1917 or 1918 Blue Books, whereas there is considerable penetration shown on the paper from the more recent issues."

Again, referring to the same subject matter, Esselen says (p. 32):

" The manner in which the lemon juice writing penetrated through the paper in a large number of places on all four pages of the message as is indicated by the photographs of both the obverse and reverse sides of these pages (Exhibit E-38a-h-Photographs taken March 8, 1932), as well as the manner of penetration, is further indication that the paper was not old at the time that the message was written on it."

And, again, on p. 52, he states as follows:

" While I am aware of rare cases where lemon juice writing has penetrated old paper contrary to the general tendency, nevertheless in such cases, the feathering and blurring which is characteristic of the penetration on fresh paper was not noticeable. A glance at the Herrmann message, for example, page 700, and the reverse side, page 699, immediately shows that the writing not merely penetrated, but that it blurred in a manner characteristic of fresh paper on which writing is imposed. The tendency for lemon juice writing to penetrate fresh paper and not to penetrate old paper is also well illustrated in Exhibits S. & S. #1, #2, #3, #4, #5, #6, #6, #7, and #8 which were filed with the joint affidavit of Messrs Skinner and Clark (Annex 25 to Mr. Osborn's Expert Opinion). Photographs of the obverse and reverse of each of these exhibits are filed with this report as Exhibits E-39a-39n inclusive. These photographs were taken on March 28, 1932. Exhibits S. & S. #1, #3, #4, and #8 are pages taken from the Blue Book Magazine for July and August 1931; while Exhibits S. & S. #2, #5, #6, and #7 are taken from issues of the Blue Book Magazine for February 1917 and December 1917. Inasmuch as these exhibits were prepared with an entirely different purpose in mind, they illustrate without any bias, the fact that the lemon juice writing penetrates fresh paper and does not penetrate old paper. An examination of the reverse side of these eight exhibits shows this point very clearly. None of the four

pages from the February 1917 or December 1917 issues of the Blue Book Magazine show any signs of penetration of the writing, whereas all four of the pages from the July and August 1931 issues of the Blue Book Magazine show that the lemon juice writing has penetrated through the paper. In my opinion, these facts are further indication that the January 1917 Blue Book used for the Herrmann message was not old at the time that the message was written in it."

Hibbert and Minor made a most careful and scientific analysis of the physical characteristics of Exhibit 904 and an examination of the affidavits of McGrail, Osborn, Herrmann, Hilken, Stein, Skinner and Clark, and Little, and present their conclusion as follows (Ex. 923, filed June 1, 1932, p. 3):

" The conclusion we have reached after a careful study of each of these affidavits and of the document, and after an extensive investigation extending over three months, into the physical and chemical properties of cheap magazine papers such as have been used in the Blue Book and similar magazines covering the period 1916-1932, is that the secret message in question, found in the January, 1917 copy of the Blue Book could not have been written within the last two or three years.

" The experimental evidence obtained by us indicates clearly that the message was written while the paper was relatively new, that is, within a period of less than two to three years after the issue of the magazine."

In the course of their report, they made a careful study of the causes bringing about changes and deterioration of paper, applied their studies to issues of the Blue Book magazine for the period 1916-1932, reviewed the testimony of the experts for Germany, and in the course of their report discussed the evidence submitted by Osborn in part as follows (p. 47):

"V. DISCUSSION OF EVIDENCE SUBMITTED PREVIOUSLY BY MR. ALBERT S. OSBORN

" A careful examination of the evidence submitted by Mr. Albert S. Osborn as to the actual date of the writing of the message in the January, 1917, Blue Book shows his conclusions are based almost entirely on a certain assumption relating to the properties of paper, and the changes which paper undergoes with age. " He states (page 2):

" ' The writing on the four pages of the Blue Book Magazine of January, 1917, appearing on pages 700, 698, 696 and 694, was in my opinion written a number of years after its alleged date of April, 1917. My opinion is based on the fact that the paper was old when the writing was done. These pages show in the writing itself unmistakable physical evidence that there was a pronounced difference, when the writing was done, in the condition of the paper at the edge of the sheets as compared with the middle of the sheets. This changed condition in wood pulp paper is positive evidence of age.' "

And then they say: " On what does he base ' this unmistakable physical evidence '? "

They assert that Osborn's evidence for this is the existence of certain paper perforations discovered in the Herrmann message, and they quote Osborn's conclusion as to these perforations (pp. 5 and 6) heretofore quoted in this opinion. Hibbert and Minor then resume (p. 49):

" Mr. Osborn had before him, in the Blue Book in question, an obviously very badly deteriorated magazine, and one characterized by a very pronounced brittleness of the outer margins of its pages.

" This paper had certain distinguishing characteristics which made it highly susceptible to atmospheric conditions such as light, air, heat and moisture.

" It had been stored for many years under unidentifiable conditions; had been inscribed with an acid writing fluid known to bring about deterioration of paper with age; had been subjected to the action of an abnormally high temperature at

the time the message was developed, and thereafter again exposed to sundry influences. Each of these factors could have exerted a profound influence on the paper, as demonstrated in the extensive series of tests carried out by us, and a realization of this fact alone should have called for the greatest caution on the part of Mr. Osborn in drawing conclusions based exclusively on a visual and microscopic inspection of the edges of the magazine.

" In view of our results, it is most reasonable to suppose that at least some of the perforations noticed by Mr. Osborn did not exist at the time the message was written. It is highly probable that during the writing of the message, certain spots of high lemon juice concentration, together with a thin compact fiber surface were developed, and that under the influence of a abnormally high temperature (occurring during the development of the message) and after a considerable period of time, very friable spots were formed. Due to repeated handling of the pages of the magazine, fracture then took place at these places. Cf. our Table IV, the word ' with ' in page 698 of the message and the numeral 5 on page 696. (See page 31 of this affidavit.)

" This tendency, together with the existence of clear evidence of punctures in the middle of the pages which with much greater basis than is present in the case of Mr. Osborn's examples, can be called actual pen punctures, leaves Mr. Osborn with no real foundation for his opinion.

" As to the word ' bunch ' appearing on page 698 of the message, we believe our experiments as shown in Section V of our series of exhibits, when examined with our Table IV, show exactly what took place. The fact that the lemon juice penetrated through not only to the reverse page but also to the next lower page, is in our judgment one of the most convincing indications, among a number, that the paper was fresh when the writing occurred. With the decided resistance of old paper to any penetration, even to the reverse page, the penetration to the next lower page of the ' h ' in this word, as shown by the early photographs of the message is most eloquent of the newness of the page at the time of writing." (Emphasis in original.)

Dr. Hibbert, at the time of filing the Exhibit 923, occupied the E. B. Eddy Chair of Industrial and Cellulose Chemistry in the Pulp and Paper Research Institute attached to McGill University, Montreal, and had occupied that position since 1919. He is a Fellow of the American Association for the Advancement of Science; the Textile Institute, England; the Society of Chemical Industry, England; the German Chemical Society; and the Technical Section of the Canadian Pulp and Paper Association. He is a graduate of Victoria University, Manchester, England, with the degrees of B. Sc., M. Sc., and D. Sc., and obtained the degree of Doctor of Philosophy in chemistry at the University of Leipzig. He has been on the research staff of the du Pont Company and has done work for the Mellon Institute, and has been a Consulting Chemist for New York City. For ten years preceding the making of his affidavit he carried out numerous investigations dealing with the chemistry of cellulose, lignin and other constituents of pulp and paper.

Dr. Minor, at the time of making her affidavit, was actively engaged as research chemist with the Association of Rag Paper Manufacturers, having been engaged in that Association since 1928. She graduated with the degree of Bachelor of Science at Drury College, Springfield, Missouri, and obtained her degree of Doctor of Philosophy in Chemistry at Bryn Mawr College in 1917. She was Professor of Chemistry at Huguenot College, South Africa, from 1911 to 1914, and from 1917 to 1918 was Professor of Chemistry at Goucher College, Baltimore. From 1918 to 1920 she was the Chief Chemist at Hammersley Manufacturing Company, makers of newspaper, wax paper and other grades of wood paper. She had been consultant for the pulp and paper industry at the Emerson Laboratories, and Chief Chemist of the Collins Manufacturing Company, manufacturer of rag paper. She is the author of numerous articles on

general paper problems, and is a member of the Technical Association of the Pulp and Paper Industry.

The Herrmann message, Exhibit 904, was submitted to Admiral Sir William Reginald Hall, who was Director of Naval Intelligence of Great Britain from October, 1914, until February, 1919. In that position he had occasion to handle a great number of messages written by German agents which were intercepted by the British authorities during the World War and also employed similar systems of communication. During that time his organization intercepted and deciphered and decoded upwards of 15,000 German secret communications in the form of cablegrams, radiograms, invisible writings and other code, cipher or other secret communications, and this number does not include the work of the British Censor's office.

Among other messages intercepted by him was the famous Eckardt to General Staff telegram so often quoted in this record, verifying Herrmann's authority to destroy the Tampico oil fields. The intercepted telegrams which are in this record were the product of Admiral Hall's organization.

In a letter to President Wilson dated March 17, 1918, Walter Hines Page, Ambassador to Great Britain, thus describes Admiral Hall (Hendrick, *Life and Letters of Walter H. Page* Vol. 3, p. 361):

" Hall is one genius that the war has developed. Neither in fiction nor in fact can you find any such man to match him. Of the wonderful things that I know he has done, there are several that it would take an exciting volume to tell. The man is a genius — a clear case of genius. All other secret service men are amateurs by comparison."

After an examination of the Blue Book message, Hall reported his conclusion as follows (Ex. 920):

" I am unreservedly satisfied that the message contained in the Blue Book Magazine for January, 1917, is genuine and that it was written when it purports to have been written, to-wit, early in the year 1917 in an invisible fluid, and developed by heat shortly after. There can be, in my opinion, no reasonable doubt on this subject.

" In reaching this conclusion the experiments of the experts who testified for Germany regarding the characteristics of the paper have confirmed in no small measure my opinion that the message was written in 1917, for their experiments of writing with lemon juice on paper of different ages illustrate a simple fact which I think is reasonably well known. I am quite sure that the original writing in the original message filed with the Commission was placed upon the magazine when the paper was in a green or fresh condition and not after the paper had become seasoned and less subject to the penetrating action of liquids. An examination of the pages of the original message through a microscope shows that the marks on the reverse of each page of writing come from the fluid soaking through the paper. A similar seepage of liquid shows in the experiments of the experts upon similar paper of recent manufacture, but it does not show to the same extent, if at all when writing is now placed on paper that has already become crisp with age."

While Admiral Hall does not attempt to qualify as an expert on paper or ink, his opinion deserves attention since it is confirmed by the greatest experts in the world on the point which Hall discussed and the experience which he had had in intercepting, deciphering and decoding secret communications enabled him to take the expert opinions and come to a definite conclusion thereon.

An examination has been made of the claim of the experts for Germany that the heel marks left by the iron indicate that the yellowing of the margins had occurred before the iron was applied, and therefore that the paper was old before the writing was imposed upon the paper (Ger. Ann. 25; Ger. Ann. 80). The fallacy of this argument has been clearly exposed by Fox (Ex. 919, pp. 27, 28).

as well as by the experiments of Esselen (Ex. 922, pp. 48-52); of Hibbert and Minor (Ex. 923, pp. 45-47); and by Heinrich (Ex. 923, pp. 20 *et seq.*).

Indeed, an examination of Exhibit 904 would seem to indicate that no clear deduction may be made as to whether the present condition of the magazine would indicate that heat had been applied to an old instrument or age had affected an instrument which had been heated when comparatively new.

(4) *Is it possible from a comparison of the handwriting of Herrmann at or about the time the message was alleged to have been written in 1917, with his handwriting at or about the time when it was claimed by Germany that he wrote it in 1931, to determine at which age he actually wrote the message?*

In Exhibit 925, Heinrich had before him the following exemplars of Herrmann's handwriting:

(a) Photostatic copy of application for passport, dated January 12, 1915;
(b) Photostatic copy of application for passport, dated June 10, 1915;
(c) Photostatic copy of emergency passport application, dated March 4, 1915;
(d) Photostatic copy of letter dated June 16, 1915, from Fred L. Herrmann to State Department. All in handwriting of Herrmann;
(e) Photostatic copy of letter dated June 24, 1916;
(f) Original small notebook containing 13 pages of handwriting of Herrmann, written some time between 1915 and 1920;
(g) A writing in invisible ink in the January 1932 issue of LOVE STORY MAGAZINE;
(h) Original letter to Mr. H. H. Martin, dated March 13, 1931.

Heinrich reports that he has examined all the above exemplars of Herrmann's handwriting and compared them with the writing of the message. This examination was undertaken to determine whether or not there were any characteristics in these writings having a date significance.

He further reports as follows (Ex. 925, p. 44):

" The only manner in which the writing of the Herrmann message differs from any of the exemplars is in the matter of speed and size of writing. * * * the passport application dated January 12, 1915, affords an example of relatively slow writing which is strikingly similar to the slow writing of the Herrmann message."

Heinrich further reports, therefore, that he is of opinion that the Herrmann message was written by the writer of the Herrmann exemplars.

He found one change in the Herrmann writings which has a date significance as follows:

" This change appears in the writer's treatment of the letter ' t ', when that letter occurs at the end of a word. In the older examples of the Herrmann writing the final ' t ' is crossed with a short bar, in the standard form. In the later Herrmann writing the final ' t ' is crossed with a swinging stroke which rises from the foot of the stem, passes through it to the left, and then, turning to the right, crosses it again at a suitable height. The resulting form is something like that of an 8." (Id. p. 45.)

Heinrich found that the later form was in use by Herrmann as early as 1915, but it was used only occasionally. The exemplars of recent date show a practically 100% use of the later form, i. e., the rapidly written form shaped like an " 8 ". The writing of the period 1915-1916 just prior to the date of Exhibit 904 shows a use of the standard form almost as consistent.

The Herrmann message shows the letter " t " used at the end of a word in twenty instances. In every one of these instances the " t " is crossed in the old style, or standard form. As this old style, or standard form, is used 100% in the Herrmann message and is habitually used by the writer in his earlier exemplars,

it has a strong date significance. If Herrmann's present habit of writing the final " t " had become fixed at the time of writing the Herrmann message, Heinrich is of opinion he could not have avoided using this later style in a writing as long as the Herrmann message.

Heinrich is of opinion that the use of the " 8 " or later form in the Herrmann message was not due to the fact that he was writing with invisible ink, because the example of writing in invisible ink in the January. 1932 LOVE STORY MAGAZINE which was developed by Heinrich in Berkeley, California, contained five instances of a " t " at the end of a word, and in every word Herrmann made the " t " in the " 8 " or later form. Heinrich concludes his opinion on this point as follows (id. p. 46):

" In my opinion, therefore, the evidence afforded by the handwriting of the message, though not many-sided, and so indicative rather than conclusive, furnishes evidence that fits in, and may be considered in connection with, the physical facts above considered, which establish, beyond any justifiable doubt, in my opinion, that the message was written at the time at which the writer declares that it was written."

A careful examination of the reports filed by the German experts fails to disclose any notice of, or answer to, this argument made by Heinrich, and while it is not necessarily conclusive, it has at least persuasive effect that the Herrmann message is an exemplar of Herrmann's writing in a very much earlier form than his present method of writing.

From a careful study of the expert evidence offered by Germany attacking the message, and a comparison of the same with the expert evidence offered by the American Agent, the following propositions seem clear:

(1) The condition of the pin pricks, which has been subjected to microscopic analysis and reports, indicates that the pin pricks were put in the paper when the magazine was relatively new.

(2) The perforations and abrasions by the pen are just as noticeable in the center of the pages as in the margins and do not differ in character, thus indicating that the paper had not become embrittled when the message was written.

(3) The extent to which the lemon juice was penetrated or struck through the paper proves conclusively that the message was written on the paper when the paper was comparatively new and could not have been written in 1931.

(4) A comparison of the handwriting of Herrmann in 1915 and 1916 with his handwriting in 1930 to 1932 strengthens the conclusion already reached that the message was written at a time when the writer had the writing habits of 1915 and 1916, and not when he had the writing habits of 1930 and 1932.

The general conclusion, therefore, from the expert evidence is, that the expert evidence sustains the authenticity of the Herrmann message.

IV. CONCLUSIONS

Before reaching definite conclusions on the whole case, it is proper to examine the charges of fraud made by the German Agent.

Since the hearing of 1936, the German Agent filed his brief of November 16, 1938, and two reply briefs, one of January 12, 1939, relating to points of law, and one of January 14, 1939, replying to the American Agent's brief of December 5, 1938.

In his brief filed November 16, 1938, as well as in his brief filed January 14, 1939, the German Agent has failed to meet, in many particulars, the charges of fraud which are specifically set out and enumerated in the American Agent's brief of 1936 and repeated in his brief of September 13, 1938, and he has failed to examine or to answer the evidence adduced to sustain those charges.

Some of the subjects which have been neglected by the German Agent are: Marguerre's false testimony; Woehst's perjuries and Hinsch's perjuries, especially on the charge that Gerdts was unknown to Hilken. No answer has been attempted to the evidence adduced to show that the Lyndhurst testimony was purchased and known to Wozniak's demands for recompense, his affidavits were filed, and that payments to Wozniak did not cease even after the German Agent claims to have broken off all relations with him. No defense has been be false. No reply has been made to the charge that the correspondence between the German Agent and Wozniak showed that, after made of the conduct of the German Agent in filing Wozniak's testimony after he had received demands for recompense which were in the nature of blackmail threats.

No defense has been made of the German Agent's approval of payment by Carella, an attorney employed by Germany, of large sums of money to the Lyndhurst witnesses, both before and after their affidavits were filed, nor of his approval of the agreement which Carella made with the Lyndhurst witness that, after the termination of the cases, they should have additional remuneration " to keep C.[arella] and his people in line ".

Osborn's conduct as an investigator has neither been explained, repudiated nor upheld by the German Agent, nor has his cooperation with Stein in connection with the charge of a suppressed report been defended or repudiated.

The former German Agent's conduct in misrepresenting to the Commission the amount of fee charged by, and paid to, Osborn has been passed in silence.

On the other hand, the German Agent has interspersed in his briefs numerous charges of suppression and fraudulent conduct on the part of the American Agent, his counsel, the claimants, their attorneys, and their witnesses.

In coming to the conclusions reached in this case, an attempt has been made to exclude all of the evidence against which the charge of fraud by the German Agent has been directed, and the conclusions have been reached independently of such evidence, not because it was believed that the German Agent's accusations were substantiated, but simply in order that the conclusions reached might not be based upon evidence which had been questioned.

In consequence of this position, it has not been necessary to consider whether the Palmer reports were genuine or not, nor has the decision been affected by the Wozniak letters (Ex. 905, 1, 2 and 3) or the charge made in regard thereto. Whether the marriage certificate of Elizabeth Rushnak could have been obtained by the claimants or not has nothing to do with the decision in this case. So, also, the testimony of Larkin has not figured in the conclusions which have been reached.

In reaching the conclusion in this case, it has not been necessary to determine whether Wozniak was in Mexico or in Tupper Lake in the summer of 1917, because these questions were collateral to the issues and the decision reached thereon.

So, also, this opinion has been reached without considering the information coming from the Austrian archives, alleged to have had their origin in the German archives.

Although the German Agent has made charges of a serious character against the American Agent and his counsel, a thorough examination of the record discloses that there is no ground therefor. On the contrary, their entire good faith and earnest efforts to aid the Commission to reach a just decision are attested by a long and tedious record.

At an informal meeting of the Commission, of which no minutes were kept, and with no recorder present, the German Agent made a savage attack upon the American Agent's counsel, and indirectly upon the American Agent, charging that a report of the Bureau of Standards adverse to the genuineness of the

Herrmann message had been suppressed. This charge is repeated and amplified in the German Agent's brief of January 14, 1939.

The entire dealings of the American Agent and his counsel with the Bureau of Standards are set out in Exhibit 1006, Annex E, filed December 19, 1938.

In his report to the Commission, dated December 16, 1938, E. C. Crittenden, Acting Director of the Bureau of Standards, filed all the papers relating to this subject, except the reports of R. E. Lofton on pin pricks (Ex. 921-I and Ex. 963), which had been previously filed. In the course of his letter the Acting Director says:

" The Commission is advised that no report was requested and none was given by the Bureau in 1931 involving an examination of the Herrmann Message contained in the Blue Book Magazine, January 1917 issue, that I am advised was filed June [July] 1, 1931, with the Mixed Claims Commission, United States and Germany, as exhibit 904. Such examination as was made in the Bureau of the document in 1931 did not disclose anything that tended, in the opinion of the members of our staff who examined the document, to cast any doubt on its genuineness."

In spite of this assurance, the German Agent has again renewed his charge of a suppressed report and has endeavored again to put the Counsel for the American Agent in the position of having consciously suppressed a report unfavorable to the message.

An examination of the papers filed with Exhibit 1006, Annex E, will show that the Bureau of Standards did make some experiments with invisible fluid writing on a copy of a Blue Book magazine of January, 1917, furnished by the Counsel for the American Agent (Ex. 977). The results of these experiments were transmitted to the American Agency on July 14, 1931, by George K. Burgess, Director of the Bureau of Standards, in which the Director reported as follows:

" You will note from the inclosed report that we were unable to find any means of estimating the age the writing in question. We found that the paper in the magazine involved, another copy of the magazine of the same date, and the magazine dated August, 1931, all have practically the same composition.

" We regret that we are unable to be of assistance in this matter."

This report, which was purely negative, has no significance, and the failure of the Counsel of the American Agent to recall that such a report had been made and to file the same with the Commission as an Exhibit in this case does not in the least subject him to criticism or to the attack of the German Agent charging a suppressed report.

The German Agent, however, has not been content to accept the explanation given by Mr. Martin and the Acting Director of the Bureau of Standards as a frank and full statement as to the relations between the American Agent and his counsel, on the one side, and the Bureau of Standards on the other. He now charges that there must have been a report made in 1932, in addition to the reports made by Lofton on the pin pricks, and that the studious silence of Counsel for the American Agent and his failure to reiterate that no report was made in 1932 except the reports of Lofton is significant that there must have been another report made in 1932 unfavorable to the authenticity of the message. In our view the report which has been made by the Counsel for the American Agent in Exhibit 1006, Annex E, is a frank explanation of what has occurred, and no ground exists for the charge that either he or the Bureau of Standards has withheld from the Commission any report made by it in this case.

The Conclusion on the Question of Fraud Restated

By reference to the Summary and Conclusions on the Question of Fraud (*supra*, this Opinion p. 154),[hh] it will be ascertained that the pleadings filed on behalf of Germany were false, and were known to be false, in claiming that Germany had never authorized sabotage in neutral countries nor in the United States during its neutrality, and in claiming that, though men and material for sabotage were sent to the United States in 1916, definite instructions had been given limiting and prohibiting activity until the time when the United States should enter the war.

It has been clearly established that Wozniak, at whose bench the Kingsland fire started, and upon whose testimony the Commission relied in its decision at Hamburg, was guilty of perjury and fraud, and in addition, that, before his affidavits were filed, he demanded and received payments therefor. His demands, both oral and by letters, for compensation began before his affidavits were filed; and, although he was paid over $2,000, these demands had not ceased when Germany repudiated him as a witness. After his repudiation by Germany, he contradicted all of the important points of his former testimony.

The Lyndhurst testimony, upon which the Commission in fact based its decision at Hamburg with regard to the Kingsland fire, was false and purchased, and known to have been false before the affidavits were filed by Germany, and the witnesses producing the testimony were promised additional compensation when the case should be closed.

Ahrendt, Woehst and Hinsch, German witnesses produced to disprove the confessions of Herrmann and Hilken, are shown to have been perjurers and guilty of the grossest forms of prevarication.

Hinsch, upon whose testimony Germany mainly relied to break down the confessions of Herrmann and Hilken and to destroy the Herrmann message, began his sabotage activities under Rintelen and continued them, under Hilken as paymaster, until he was forced to flee from this country to escape a Presidential warrant of arrest. In order to substantiate Germany's false pleadings Hinsch made many false statements upon which the Commission relied in its opinions. In order to attack the Herrmann message, he was guilty of the basest forms of prevarication, and upon these the Commission relied in its decisions at Hamburg and at Washington in 1932.

We have, therefore, concluded that the decision of October 16, 1930, reached at Hamburg, must be set aside, revoked and annulled, and the cases reinstated in the position where they were before that decision was reached.

The opinion which was rendered at Washington, December 3, 1932, has already been examined and quoted (*supra*, p. 156).[ii] In that opinion, the Umpire after setting out the decoded form of the message said (Decs. and Ops., p. 1016):[jj]

"A glance through this translation will indicate that, without reference to any other evidence, it is conclusive proof to any reasonable man that (a) Herrmann and Hilken knew the Kingsland fire and the Black Tom explosion were the work of German agents and (b) that Hinsch, Hilken, and Herrmann, undoubted agents, were privy thereto, and (in the light of the record before the Commission) (c) that Kristoff and Wozniak were active participants in these events. As the American Agent has well said, I may utterly disregard all the new evidence produced and still, if I deem this message genuine, hold Germany responsible in both of the cases."

The German Commissioner concurred in the opinion and therefore approved the above deductions.

[hh] *Note by the Secretariat*, this volume, p. 347.
[ii] *Note by the Secretariat*, this volume, p. 349.
[jj] *Note by the Secretariat*, this volume, p. 115.

In a note appended to his separate opinion, the Honorable Chandler P. Andersen, the American Commissioner, used the following language (Decs. and Ops., p. 1035): [kk]

"The so-called Herrmann secret message, embodied in the Blue Book Magazine for January, 1917 (Exhibit No. 904), if accepted as authentic, would conclusively prove the liability of Germany in both the Kingsland and the Black Tom cases."

Therefore, in the decision at Washington, the Commission was unanimously of opinion that, if the authenticity of the Herrmann message be accepted, this would conclusively prove the liability of Germany in both the Kingsland and Black Tom cases.

The final conclusions in these cases, therefore, may be stated as follows:

(1) The decision of October 16, 1930, reached at Hamburg, must be set aside, revoked and annulled; and, the cases reinstated in the position they were before that decision was rendered.

(2) Since the authenticity of the Herrmann message has been established, the liability of Germany in both the Black Tom case and in the Kingsland case has now been clearly established by the record, and the cases are in position for awards.

CHRISTOPHER B. GARNETT,
American Comissioner

Done at Washington, D. C., June 15, 1939.

DECISION OF THE COMMISSION RENDERED BY THE UMPIRE

1. Within the meaning and intent of the agreement by which the Commission was constituted and its powers defined, there exists a disagreement between the two national commissioners. As I participated with them in the conferences after submission of the cases, I am cognizant of the disagreement, which makes it my duty to act in the decision of the cases. If more were needed, I have before me the certificate and opinion of the American Commissioner. Accordingly I record my opinion as Umpire.

2. I concur in the views expressed by the American Commissioner to the effect that the withdrawal of the German Commissioner, after submission by the parties, and after the tribunal, having taken the cases under advisement, pursuant to its rules, was engaged in the task of deciding the issues presented, did not oust the jurisdiction of the Commission. The full discussion of this matter by the American Commissioner renders it unnecessary for me to do more than to express my agreement with his reasoning and his conclusions. I hold that the Commission as now constituted has jurisdiction to decide the pending motions.

3. The decision filed at Washington in 1932 having been set aside, the cases are now before the Commission on the motion of the American Agent to set aside the decision on the merits rendered as the result of the submission at The Hague in 1930 and to grant a rehearing on the whole record, comprising the proofs offered before and after The Hague decision. The grounds of this motion sufficiently appear from prior decisions of the Commission.

4. As set forth in the American Commissioner's opinion, he and the Umpire agreed in the conclusion that the motion should be granted because the United States had proved its allegation that fraud in the evidence presented by Germany misled the Commission and affected its decision in favor of Germany. The German Commissioner was apprised of this conclusion before he withdrew from

[kk] *Note by the Secretariat*, this volume, p. 126.

the deliberations of the Commission. He insisted, nevertheless, that before the motion should be granted, the Commission should examine the proofs tendered by the United States to determine whether the claims had been made good. This was on the ground that, though the Commission had been misled by false and fraudulent testimony, that fact would be immaterial if, as an independent consideration, the United States had in its own cases failed to sustain the burden of proof incumbent upon it. The American Commissioner and the Umpire thereupon agreed to go beyond what they thought the necessary function of the Commission in the circumstances and proceed to canvass with the German Commissioner the cases as made by the United States. During the course of this investigation the German Commissioner withdrew.

5. Much evidence has been submitted since the decision of 1932 which corroborates the testimony of Herrmann and Hilken and weakens the attacks on their credibility. This is examined, analyzed and compared with the record as it stood when the case was submitted at The Hague, in the opinion of the American Commissioner, and no purpose would be served by restatement of the same matters in this opinion. In my view the statements of Wozniak to Department of Justice agents and to the Bureau of Naturalization; the testimony of Herrmann, Hilken, Wozniak, Ahrendt, Thorne, and Hilken, Sr., taken in open court, under the statute; and the material drawn from the files of the Eastern Forwarding Company, and the evidence as to the so-called Lyndhurst testimony, is persuasive that the Commission was seriously misled to the conclusion it reached upon the submission at The Hague.

6. All of the above tends to strengthen the cases of the United States. As is admitted, the Herrmann message, if genuine, establishes Germany's responsibility in both cases. In the decision of 1932 the Commission was unable to make an affirmative finding of the authenticity of the message. A large body of evidence has since been introduced addressed to the considerations which caused the Commission to withhold such a finding. This is examined and discussed at length in the opinion of the American Commissioner, and there is no need to add to what he has said. The circumstances of the production of the document to the claimants and the incidents of its transmission and delivery to Hilken have been cleared up. The Qualters story has been completely discredited, and its demolition involves serious implications concerning Germany's defense. The views formerly held respecting the expert evidence must be revised in the light of the evidence of Osborn and the letters and documents exhibiting his activities and attitude. Further argument and extended study of the contents of the message, and of Hinsch's and Siegel's testimony and comparison with the record as it stood prior to The Hague argument, tends to negative the adverse conclusions heretofore drawn from the references to current and past events and to persons and places contained in the message. I agree with the American Commissioner that on the evidence now before the Commission the decision must be in favor of the authenticity of the message.

7. I find that, for the reason alleged by the United States in its petitions for rehearing, — material fraud in the proofs presented by Germany, and for the further reason that on the record as it now stands the claimants' cases are made out, the pending motions should be and they are granted.

O. J. ROBERTS,
Umpire

Done at Washington, June 15, 1939.

ORDER OF JUNE 15, 1939

After the announcement of the foregoing opinion of the American Commissioner and the decision of the Commssion, the following action was taken (Minutes of meeting, June 15, 1939, pp. 1717, 1718):

" The American Agent then moved that upon the record as it now stands, that awards be entered in accordance with the opinions which have been rendered today.

" The Umpire replied that in view of what appeared in the record, and based upon the American Agent's motion, the Commission was prepared to sign awards, to be submitted by the American Agent, if approved by the Commission as to form. He further said that they might be submitted and if approved would be made at a further meeting to be called on notice.

" At this point the Joint Secretaries were directed to spread the following Order upon the Minutes of the Commission:

" 1. The decision of October 16, 1930, reached at Hamburg be, and the same is hereby, set aside, revoked and annulled.

" 2. The Commission finds, on the record as it now stands, that the liability of Germany in both the Black Tom and Kingsland cases has been established.

" 3. It appearing from the communications, each dated June 10, 1939, one from the German Agent to the Commission, and the other from the German Embassy to the Secretary of State, that Germany does not intend to exercise her right to take further part in the proceedings of the Commission, and that on the findings made and opinions handed down this day by the Commission, and from what appears in the record, awards should now be rendered to the United States on behalf of claimants; the American Agent is directed to prepare and submit to the Commission for its approval awards in each of the pending sabotage claims. These awards will be considered at a further meeting of the Commission to be called on notice, and appropriate action thereon will then be taken.

" At this point the Commission adjourned, subject to call.

" OWEN J. ROBERTS,
" *Umpire*

" CHRISTOPHER B. GARNETT,
" *American Commissioner* "

AGENCY OF CANADIAN CAR AND FOUNDRY COMPANY, LTD. (UNITED STATES) *v.* GERMANY

(*Sabotage Cases, October 30, 1939, p. 324; Certificate of Disagreement and Supplemental Opinion of American Commissioner, October 30, 1939, pp. 314-324.*)

PROCEDURE: MOTION TO DISMISS, WITHDRAWAL AND RENEWAL. — JURISDICTION: NATIONALITY OF CLAIM. — AMERICAN NATIONAL: DETERMINATION BY MUNICIPAL LAW; NATIONALITY OF CORPORATIONS, CONTROL TEST, EFFECTIVE DOMICILE. Motion of German Agent filed December 7, 1936, to dismiss for lack of jurisdiction request for rehearing of American Agent filed May 4, 1933 (see p. 160 *supra*), in so far as related to claim of Agency of Canadian Car and Foundry Company, Ltd., organized under laws of State of New York, but entirely owned by Canadian corporation. Withdrawal of motion on March 18, 1937, but renewal on April 27, 1937. *Held* that motion should be dismissed: (1) under Treaty of Berlin (preamble and art. I) and Agreement of August 10, 1922, Commission has jurisdiction to hear and determine certain claims of American nationals or American citizens, (2) meaning of " American national " is to be determined under United States

Law, term includes corporations (reference made to Administrative Decision No. V, Vol. VII, p. 119, and to municipal decisions), (3) under United States law, claimant is American national, despite Canadian ownership (reference made to municipal decisions, text writer; control test, effective domicile).

Cross-reference: Witenberg, Vol. III, p. 80 (French text).

Bibliography: Witenberg, Vol. III, pp. 74-80; Woolsey, A. J. I. L., Vol. 35 (1941), pp. 299-301.

CERTIFICATE OF DISAGREEMENT AND SUPPLEMENTAL OPINION OF THE AMERICAN COMMISSIONER ON THE QUESTION OF THE JURISDICTION RAISED BY THE MOTION OF THE GERMAN AGENT, DATED NOVEMBER 24, 1936, AND FILED DECEMBER 7, 1936.

To Honorable OWEN J. ROBERTS, *Umpire:*

On December 7, 1936, the German Agent filed a Motion dated November 24, 1936, in which he moved " to dismiss for lack of jurisdiction the petition for rehearing filed " May 4, 1933, in so far as it related to the claim of the Agency of Canadian Car & Foundry Company, Ltd. At the time this Motion was filed this claim had been pending before the Commission for over nine years. The Motion recites that " the German Agent has been advised that the stock of the Agency " company " has at all pertinent dates been completely owned by the Canadian Car & Foundry Co., Ltd., Inc., a corporation organized under the laws of Canada " and that accordingly it " has no standing as a claimant before this Commission ".

The American Agent on December 28, 1936, filed on behalf of the United States his Answer, and on January 22, 1937, his Brief in opposition to the Motion filed December 7, 1936.

On March 18, 1937, the German Agent filed a notice withdrawing his Motion filed December 7, 1936. On April 27, 1937, he filed a memorandum in which he " renews his request that the Commission dismiss the petitions for rehearing filed on May 4, 1933, as unfounded in fact and in law, and in so far as the claim of the Agency of Canadian Car & Foundry Company, Ltd, is concerned, also on the ground that it does not come within the jurisdiction of the Commission".

On January 12, 1939, the German Agent finally filed his Brief in reply to the Brief of the American Agent filed January 22, 1937.

When the German Commissioner, on March 1, 1939, announced his retirement, under the circumstances set out in the opinion rendered by the American Commissioner on June 15, 1939, and concurred in by the Umpire in his decision, the question raised by the Motion of the German Agent aforesaid was an issue supplementary to the main issues pending before the Commission, which issues included not only the question of the responsibility of Germany for the fires and explosions at Black Tom, New Jersey, but also for the fires and explosions at Kingsland, New Jersey. The action of the German Commissioner in retiring when he did is, in my opinion, tantamount to a disagreement between the two national Commissioners on all issues involved, including the jurisdictional issue raised with respect to the right of the United States to present as it did the claim of the Agency of Canadian Car & Foundry Company, Ltd.

I, therefore, certify to the Umpire that there was a disagreement between the American Commissioner and the German Commissioner on the issue raised by the German Agent in his Motion filed December 7, 1936, asking that the petition of May 4, 1933, be dismissed in so far as it relates to the claim of the Agency of Canadian Car & Foundry Company, Ltd., on the ground of lack of jurisdiction.

I am submitting with this Certificate my opinion on the question of jurisdiction raised by the Motion of the German Agent aforesaid:

Supplemental Opinion of American Commissioner

The Memorial in this case was filed on March 26, 1927. In said Memorial it was alleged in the preliminary statement as follows:

" 1. The claimant is and at all of the time hereinafter mentioned was, a corporation organized and existing under the laws of the State of New York (Ex. 392).

" 2. In January of the year 1917 the claimant was the owner of a large assembling plant at Kingsland in the State of New Jersey, known as the ' Kingsland Assembling Plant ', consisting of several acres of land on which were located buildings, machinery, warehouses, railroad tracks, sidings, railway cars, telephone lines, electric light wires, water system and other equipment which was used for the purpose of assembling and packing munitions and supplies which were being manufactured by various companies throughout the United States under contracts owned by the Claimant (Ex. 201).

" 3. On January 11, 1917 there had been accumulated at this assembling plant, one of the largest collections of munitions and supplies destined ultimately for the Allied Governments that had ever been there at any one time (Ex. 10).

" 4. On January 11, 1917 the entire Kingsland Assembling Plant including the buildings, machinery, warehouses, railway tracks, sidings, railway cars, telephone lines, electric light wires, water system and all of the said munitions and supplies, equipment and other property, was totally destroyed by a terrific series of fires and explosions, resulting in a large financial loss and damage to the claimant (Exs. 10, 11, 12, 13, 199, 204, 206), the details of which loss and damage will hereinafter be more fully set forth."

In the Answer of Germany, filed January 17, 1928, referring to the preliminary statement, the Answer states as follows:

" Claimant's allegations as set forth in paragraphs 1-4 of the Memorial are not contested."

There are certain facts upon which the claimant based its right to present its claim and its right to an award, to-wit:

1. Claimant has always had its offices in New York City.

2. Prior to the destruction of the Kingsland Plant claimant employed over one hundred and forty persons at its New York office alone.

3. Prior to the destruction of the Kingsland Plant, claimant had made subcontracts calling for preparation by subcontractors and purchase by claimant of materials in the amount of approximately $66,000,000. Of this total, approximately $60,000,000 was to be paid to American subcontractors and the balance to Canadian subcontractors.

4. At the time of the destruction of the Kingsland Plant, claimant was directly employing American labor to the extent of approximately 2,000 men, and its subcontractors were employing many other laborers.

On December 7, 1936, the German Agent filed a motion, dated November 24, 1936, asking the Commission to dismiss, for lack of jurisdiction, the petition for rehearing dated May 4, 1933, filed on behalf of the Agency of Canadian Car & Foundry Company, Ltd. Prior to the filing of the German Agent's motion the claim had been pending before the Commission for over nine years.

In the " Application for the Support of Claims " executed by Agency of Canadian Car & Foundry Company, Ltd., by its president and secretary on November 22, 1920, and submitted to the Department of State with a letter dated December 1, 1920, from Coudert Brothers, of counsel for the claimant, the full facts respecting the stock ownership of Agency of Canadian Car & Foundry Company, Ltd., and also the stock ownership of Canadian Car & Foundry Company, Ltd., were set out as follows (Answer of American Agent filed December 28, 1936, to German Agent's Motion to Dismiss Petition for Rehearing, filed on behalf of Agency of Canadian Car & Foundry Company, Ltd., p. 5):

" 7. (a) At the time the claimant acquired the claim the shares of stock were held by Canadian Car and Foundry Company, Ltd., the proportion of the shares of stock in that company held by citizens of the United States was approximately 30%, and the proportion of stock held by citizens or subjects of any other country at that time was 30% in Canada, and 40% in England."

" 8. (a) At the present time the shares of stock of claimant are held by Canadian Car and Foundry Company, Ltd., and the proportion of the shares of stock in that company held by citizens of the United States is approximately 45% and 55% by aliens."

These facts were brought to the attention of the then German Agent.

The United States has espoused the claim of the Agency of Canadian Car & Foundry Company, Ltd. Protests have been made to the State Department in behalf of certain award holders against the further consideration of this claim.

Reduced to its final analysis, the question to be decided on the Motion of the German Agent may be stated as follows:

Where a corporation is chartered under the laws of the State of New York but all of its stock is owned by a parent corporation existing under the laws of Canada, and the New York corporation maintains an office with a large office force of over one hundred forty people in the city of New York, and organizes and operates in the State of New Jersey a plant for the assembling of munitions destined for the Allies, and in this plant it assembles property worth over $66,000,000 and employs 2,000 American workers, and such plant is destroyed by German agents, is the American corporation entitled to maintain its claim before the German-American Mixed Claims Commission under the Treaty of Berlin and the agreement between the United States and Germany for the property thus destroyed, when 30% of the stock in the parent company was owned by citizens of the United States, 30% in Canada and 40% in England?

Under the Knox-Porter Resolution (42 Stat. 105), which was made a part of the Treaty of Berlin, it was provided, in section 2, as follows:

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

Under section 5 of the resolution, it is provided that all the property of the German Government or its nationals which was on April 6, 1917, and thereafter in the possession and control of the United States should be retained by the United States until such time as Germany should have made suitable provision for the satisfaction of all claims against Germany

" * * of all persons, wheresoever domiciled, who owe permanent allegiance to the United States of America and who have suffered, through the acts of the Imperial German Government, or its agents, * * * since July 31, 1914, loss, damage, or injury to their persons or property, directly or indirectly, whether through the ownership of shares of stock in German, * * * American, or other corporations, or in consequence of hostilities or of any operations of war, or otherwise, * *."

Under the Treaty of Berlin, the Knox-Porter Resolution was made a part of said Treaty in Article I, which reads as follows:

" Article I

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

Part VIII, Annex I, of the Treaty of Versailles, which was also incorporated by reference in the Treaty of Berlin, provides that compensation may be claimed from Germany in respect of the following:

" (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." (Emphasis supplied.)

By the agreement dated August 10, 1922, between the United States and Germany, the German-American Mixed Claims Commission was created and authorized to settle certain categories of claims enumerated therein. The categories are as follows:

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

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

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

It will be observed, therefore, that the Commission is given jurisdiction to hear and determine the claims of *American nationals* or *American citizens*, in respect to the categories of claims defined by the treaties and by the agreement between the two governments.

Whether a claimant is an American national or not must be determined under the laws of the United States.

As to the meaning of the terms " American national ", Parker, Umpire, has defined it thus (Decs. and Ops., p. 189):

" The term ' American national ' has been defined by this Commission in its Administrative Decision No. I as ' a person wheresoever domiciled owing permanent allegiance to the United States of America '. ' National ' and ' nationality ' are broader and apter terms than their accepted synonyms ' citizen ' and ' citizenship'. Nationality is the status of a person in relation to the tie binding such person to a particular sovereign nation. That status is fixed by the municipal law of that nation. *Hence the existence or nonexistence of American nationality at a particular time must be determined by the law of the United States.* As pointed out by the German Commissioner in his opinion, the use in the Treaty of Berlin of the broad term 'nationals ' and of the phrase ' all persons, wheresoever domiciled, who owe permanent allegiance to the United States ' was clearly intended to embrace and does embrace, not only citizens of the United States but Indians and members of other aboriginal tribes or native peoples of the United States and of its territories and possessions. The use of the words ' permanent allegiance ' as part of the phrase ' all persons, wheresoever domiciled, who owe permanent allegiance to the United States ', far

from limiting or restricting the meaning of the term 'nationals' as used elsewhere in the Treaty, makes it clear that that term is used in its broadest possible sense." (Emphasis supplied.)

On the same subject Dr. Kiesselbach, former German Commissioner, includes corporations within the term "citizens" and "nationals" (Decs. and Ops., p. 160):

"One class — those 'who have American nationality (such as citizens of the United States, including companies and *corporations*, [1] Indians and members of other aboriginal tribes or native peoples of the United States or its territories or possessions, etc.)' — and the other — those 'who are otherwise entitled to American protection in *certain* [1] cases (such as certain classes of seamen on American vessels, members of the military or naval forces of the United States, etc.)'. It is obvious that the circumscription of the first class squares with the term used in the Treaty of Berlin, 'claims . . . of all persons, wheresoever domiciled, who owe permanent allegiance to the United States', and that class two comprises claimants who manifestly do *not* owe *permanent* allegiance to the United States — not being *nationals* of the United States."

It is clear, therefore, that the term "national" being broader than "citizen", and being used "in its broadest possible sense" includes corporations.

This is in accord with the decisions of the Supreme Court of the United States in *Society for the Propagation of the Gospel* v. *New Haven*, 8 Wheat. 464; *United States* v. *Northwestern Express Company*, 164 U. S. 686.

The next question to be decided is, whether the corporation claimant in this case is an American national, or, to put the question in another form, whether the fact that its stock was all owned by a Canadian corporation caused it to be an alien corporation and therefore made it impossible to present a claim to this Commission for the injury inflicted to its property in New Jersey.

The decision of the Supreme Court of the United States in the case of *Hamburg-American Co.* v. *U. S.*, 277 U. S. 138, would seem decisive of this question.

In that case it was held that under the Trading with the Enemy Act of October 6, 1917, sec. 2, property in this country owned by a domestic corporation was non-enemy property, even though an enemy owned all of its stock.

In that case the Court of Claims sustained a demurrer to the petition of the Hamburg-American Line Terminal & Navigation Company seeking to recover compensation for its property, which was taken by the United States at the beginning of the war. Claimant was incorporated under the laws of New Jersey, but its entire capital stock had long been owned by the Hamburg-American Line, a German corporation. In reversing the Court of Claims, Mr. Justice McReynolds said (p. 140):

"The court below evidently proceeded upon the view that the property of appellant corporations should be treated as owned by an enemy because their entire capital stock belonged to a German corporation. And as the property was seized during the war with Germany it held there could be no recovery. Without doubt Congress might have accepted and acted upon that theory. * * * But Congress did not do so; it definitely adopted the policy of disregarding stock ownership as a test of enemy character and permitted property of domestic corporations to be dealt with as non-enemy. * * *

"In Behn, Meyer & Co. *v.* Miller, Alien Property Custodian, 266 U. S. 457, we held the status of the corporation was not fixed by the stockholders' nationality, and said —

"'Before its passage the original Trading with the Enemy Act was considered in the light of difficulties certain to follow disregard of corporate identity and

[1] Emphasis supplied.

efforts to fix the status of corporations as enemy or not according to the nationality of stockholders. These had been plainly indicated by the diverse opinions in *Daimler Co.* v. *Continental Tyre & Rubber Co.*, 2. A. C. (1916) 307 . . ."

In *Daimler Co.* v. *Continental Tyre & Rubber Co.*, 2 A. C. (1916) 307, cited by Mr. Justice McReynolds, the House of Lords reversed the holding of that case by the court below (s. c. [1915] 1K. B. 893).

In that case Lord Parker put forward for determining the character of a corporation the test of " control " and had imputed to a corporation the character of an enemy if the " control " was in the hands of alien enemies. On entering the war the United States deliberately refused to adopt the test of " control ".

In *Hamburg-American Co.* v. *U. S.*, cited and quoted above, Solicitor General Mitchell (afterwards Attorney General of the United States), in confessing error in the decision of the Court of Claims, used the following language (277 U. S. 138, 139):

" Congress has adopted the policy of determining the status of corporations as enemy or not without regard to nationality of their stockholders, and the United States admits error in the decision of the Court of Claims insofar as it held that the property of New Jersey corporations was enemy-owned because all their stock was enemy-owned.

" As the appellant in each case is to be dealt with as a citizen of the United States, notwithstanding its stock was enemy-owned, then upon the taking of the use of its property a contract to pay just compensation for use was implied.

* * * * * * *

" The United States concedes that the judgment should be reversed and compensation awarded for the value of the use."

It is a settled general rule in America that regardless of the place of residence or citizenship of the incorporators or shareholders, the sovereignty by which a corporation was created, or under whose laws it was organized, determines its national character. *Philippine Sugar Estates Development Co.* v. *United States*, 39 U. S. Court of Claims, 225; *Fritz Schultz, Jr., Co.* v. *Raimes & Co.*, 99 Misc. 626; *Princeton Min. Co.* v. *First Nat. Bank*, 7 Mont. 530, 19 Pac. 210; 17 Fletcher Cyc. Corp., Permanent Edition, sec. 8298, p. 29; 14a C. J. 1213. See, also, *Janson* v. *Driefontein Consol. Mines*, (1902) A. C. 484.

In 49 Law Quarterly Review (1933), 334-349, there is a very instructive article on " The Nationality of Corporations ", by R. E. L. Vaughan Williams, K. C., British Member of Anglo-German Mixed Arbitral Trubinal under Treaty of Versailles (1920-1928). In arguing against what is known as the " control " test, the author says (p. 342):

" Logically it seems impossible to reconcile such a view with the notion of the separate legal entity of a corporation, as distinct from its incorporators, while the practical difficulties in the way of applying the ' control ' test of nationality are obvious. Shares in modern companies constantly pass from nationals of one country to nationals of another and with them participation in control. Is a company to change its nationality with fluctuations in the distribution of its shares among holders of different nationalities? Moreover, with the growing popularity of bearer shares, how is this distribution to be ascertained at any given moment? As a French writer has pointed out, the application of the ' control ' test during the War was only possible because the outbreak of hostilities, crystalized ' the then existing state of things."

The author argues in favor of the theory that the nationality or effective domicile of a corporation is at its *siège social effectif*, and this is defined as the place at which the corporation has made the center of its affairs; where are found

concentrated its activities and its juridical life, and where its essential organs function. Measured by this test, the claimant in this case had its principal office from which its affairs were managed, in the United States, at New York City, and its activity and juridical life were concentrated either in New York City or in Kingsland, New Jersey. In order to sue that corporation, a creditor would have to seek either the courts and laws of the State of New York or the courts and laws of the State of New Jersey, and not the courts and laws of Canada. In case of insolvency, the bankruptcy laws of the United States would apply and the rights of the various classes of creditors would be determined thereby. Its tangible and intangible property were taxable either in New York City or in Kingsland, New Jersey, and it was required to pay to the United States a federal income tax. Therefore, even if the doctrine contended for by the learned author be applied, the claimant in this case is not an alien corporation and is entitled here to present its claim.

In the Brief of the Agent of Germany, filed January 12, 1939, there are a great many allegations, many of them taken from secondary sources, from which it is claimed that this case has a Canadian aspect, and from which it is argued that the claimant is not an American national or American citizen within the meaning of the Treaty of Berlin, the Treaty of Versailles and the Agreement of August 10, 1922, between America and Germany. The whole basis of the German Agent's argument is that the claimant here was entirely owned and controlled by the Canadian parent concern and, therefore, that the claim is not impressed with American nationality.

The authorities relied on by the German Agent, so far as they sustain his argument, are based upon the proposition that the *control* of the corporation was in alien hands.

Even under the facts as alleged by the German Agent in his brief, it would seem clear, as held by the New York courts, that, while there may be said to be some form of *remote* control in the parent company, the *direct effective* control of the claimant company was in the New York corporation and not in the Canadian corporation (see *Dollar Co.* v. *Canadian C. & F. Co., Ltd.*, 100 Misc. N. Y. 564; aff'd 180 App. Div. N. Y. 895). Certainly the activities and property of the claimant company were fully impressed with American nationality.

If we were to adopt the rule contended for by the German Agent, we would be applying in this case a doctrine and principle exactly opposite to that adopted by Congress at the outbreak of the War and applied by the Supreme Court of the United States in the cases of *Hamburg-American Company* v. *U. S.* 277 U. S. 138, and *Behn, Meyer & Co.* v. *Miller* 266 U. S. 457, and we would be reversing the general rule as laid down by the state and federal courts of the United States.

If we were to adopt the rule contended for by the German Agent, the effect would be that, under the two cases last cited, an American corporation, in which the stock is entirely held by a German corporation, would have a valid claim against the United States for property seized and taken during the war; but an American corporation, with property and large activities in the United States, whose stock is owned by a Canadian corporation, would have no valid claim against Germany for property destroyed in this country by German saboteurs before this country entered the War. Such a rule would result in the tacit recognition of the proposition that a foreign nation may, in anticipation of war, send its saboteurs to this country and destroy valuable property therein, and escape any claim for such destroyed property, if perchance such a corporation has stockholders who are alien to the country of the saboteurs.

I am, accordingly, of the opinion that the Motion of the German Agent filed December 7, 1936, should be dismissed and that an award should be entered in

favor of the claimant company pursuant to the Order of this Commission of June 15, 1939.

Respectfully submitted,

Christopher B. GARNETT,
American Commissioner

Oct. 30, 1939.

DECISION OF THE UMPIRE

The American Commissioner has submitted to me a certificate of disagreement respecting the standing of the claimant and the jurisdiction of the Commission to make an award to the claimant. This matter is involved in the submission which was before the Commission as part of the proceedings for the reopening of the decision dismissing the claim on the merits. The American Commissioner's certificate and opinion are supplementary to his certificate and opinion upon the American Agent's motions for rehearing and for awards in the Sabotage Cases.

I concur in the views expressed by the American Commissioner and hold that the claimant has standing before the Commission; that the Commission has jurisdiction of the claim; that the motion of the German Agent filed December 7, 1936, should be dismissed; and that the claimant is entitled to an award.

Done at Washington the 30th day of October, A. D. 1939.

Owen J. ROBERTS,
Umpire

The Commission on October 30, 1939, pursuant to its decision of June 15, 1939, and its Order entered the same day, handed down 153 awards in the sabotage claims in the total amount of $21,157,227.01, together with interest thereon at the rate of 5 per cent. a year from varying dates, plus interest at 5 per cent. on $850,412.51 from July 30, 1916, to May 28, 1920. This implies a total value of these awards as of January 1, 1928, of approximately $31,400,000.00, which amount, in accordance with the provisions of the Settlement of War Claims Act of 1928, draws interest at the rate of 5 per cent. a year until paid.