

ADMINISTRATIVE DECISION No. II

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(Footnote continued from page 25.)

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(Footnote continued from page 27.)

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

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

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

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

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

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

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

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

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

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

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

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

But Article 232 provides that:

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

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

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

¹⁰ Lord Bacon's Maxims of the Law.

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

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

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

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

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

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

Done at Washington November 1, 1923.

Edwin B. PARKER
Umpire

Concurring in the conclusions:

Chandler P. ANDERSON
American Commissioner

W. KIESSELBACH
German Commissioner
