

UNITED STATES/GERMANY
ADMINISTRATIVE DECISION No. III
(December 11, 1923, pp. 61-70.)

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

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

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

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

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

Consideration will first be given to

Claims for property losses arising during the period of neutrality

These in turn divide into

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

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

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

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

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

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

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

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

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

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

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

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

The value of property taken by Germany in German territory

(a) During the period of American neutrality,

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

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

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

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

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

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

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

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

There remain for consideration.

Claims for property losses arising during the period of belligerency

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

From the foregoing the Commission deduces the following

Rules governing damages in the nature of interest

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

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

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

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

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

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

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

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

Done at Washington December 11, 1923.

Edwin B. PARKER
Umpire

Concurring:
Chandler P. ANDERSON
American Commissioner

Concurring, save as dissent is indicated in the opinion:

W. KIESSELBACH
German Commissioner
