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

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

Certificate of disagreement by the two National Commissioners

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

Opinion of Mr. Anderson, the American Commissioner

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

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

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

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

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

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

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

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

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

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

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

> The decedent was survived by his father, Henry W. Williamson, then 75 years of age, a sister, Ellen Williamson Hodges, a brother, Harry A. Williamson, then 50 and 35 years of age respectively, and a nephew, John Baseman Williamson, son of a deceased brother (Eugene L. Williamson). In 1901 the father, at the instance of the decedent, retired from the office of Clerk of the Circuit Court of Allegany County, Maryland, and has since that time engaged in no employment, the decedent making regular contributions amounting to about $700 per annum, sufficient to meet the father's modest needs.
>
> The decedent had been unusually devoted to his sister, Ellen Williamson Hodges, whose husband had long been ill and died in 1916. The decedent not only contributed from time to time substantial amounts to his sister's maintenance but promised her that in the event of her husband's death he would take care of and support her. The care of her aged father now rests principally on Mrs. Hodges, who in order to support herself and father is employed in a Government department at Washington. There is no evidence that the other claimants were to any extent dependent upon the decedent or that he made any contributions to them.

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

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

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

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

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

No claim is made for property lost.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

> The financial obligations of Germany to the United States arising under the Treaty of Berlin on claims other than excepted claims, put forward by the United States on behalf of its nationals, embrace :
>
> (A) All losses, damages, or injuries to them, including losses, damages, or injuries to their property wherever situated, suffered directly or indirectly during the war period, caused by acts of Germany or her agents in the prosecution of the war, etc.

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

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

Chandler P. ANDERSON

Opinion of Dr. Kiesselbach, the German Commissioner

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

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

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

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

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

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

I

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

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

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

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

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

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

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

II

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

And as said in Simeon, "Recht und Rechtsgang", 1901, Bd. I, p. 573:

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

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

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

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

III

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

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

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

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

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

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

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

Dr. Wilhelm KIESSELBACH

Summary of German Commissioner's opinion

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

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

(1) Either under international law;

(2) Or under the Berlin Treaty incorporating the Knox-Porter Resolution.

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

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

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

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

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

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

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

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

(a) Interpretation on the basis of the antecedents of the Treaty.

(b) Interpretation on the basis of the wording of § 9 of the Annex.

(c) Interpretation on the basis of the application of § 9 by the Allied Powers.

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

D. Such construction is confirmed by the German text.

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

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

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

Done at Washington April 17, 1924.

Chandler P. ANDERSON
American Commissioner

W. KIESSELBACH
German Commissioner

Decision

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

This decision results from the application of Administrative Decisions Nos. I and II of this Commission [7] to the facts in these cases. In view of the opinions of the National Commissioners embraced in their certificate of disagreement herein, the provisions of the Treaty of Berlin upon which these Administrative Decisions and the Opinion in the Lusitania Cases [8] rest. in so far as they directly affect the decision in this case, will be briefly examined.

The Treaty of Berlin is by its express terms based upon the provisions of sections 2 and 5 of the joint resolution of the Congress of the United States approved by the President July 2, 1921, [9] declaring, with stipulated reservations and conditions, the war between Germany and the United States at an end. These *ex parte* reservations were by Article I of the Treaty of Berlin adopted by Germany as its own. By virtue of this article Germany accords and the United States has and enjoys all of the rights, privileges, indemnities, reparations, and advantages specified in the resolution of Congress.

Looking to section 2 of that resolution to ascertain what rights, etc., are therein "specified," we find that there is "expressly reserved" to the United States and its nationals all of the then existing rights, privileges, indemnities, reparations, or advantages of whatsoever nature, together with the right to enforce the same, and that the United States and its nationals shall have and enjoy all of the rights stipulated for its and their benefit under the Treaty of Versailles.

Looking to section 5 of the resolution to ascertain what rights, etc., are therein "specified", we find it stipulated in substance that the United States shall retain (unless otherwise theretofore or thereafter expressly provided by law) all property of Germany or its nationals or the proceeds thereof held by the United States until such time as Germany shall make "suitable provision for the satisfaction of all claims" against Germany of American nationals who have suffered through the acts of Germany or its agents losses, damages, or injuries to their persons or property, directly or indirectly, whether through the ownership of stock in any domestic or foreign corporation, or in consequence of hostilities or of any operations of war, or otherwise.

Through the adoption as her own of the provisions of this resolution of Congress and according that the United States shall have and enjoy all of the rights, privileges, indemnities, reparations, or advantages specified in the said resolution, Germany obligated herself to pay to the United States claims falling within categories embraced within the resolution, including those defined by such of the provisions of the Treaty of Versailles as are incorporated by reference in the Treaty of Berlin. [10] The financial obligations of Germany are

(Footnote continued from page 107.)
Germany's act resulted in the premature payment of money from one group of American nationals to another group of American nationals in pursuance of intercontractual relations between them,

[7] Decisions and Opinions, pages 1-15 inclusive. (*Note by the Secretariat*, this volume pp. 21-32 *supra.*)

[8] Decisions and Opinions, pages 17-32 inclusive. (*Note by the Secretariat*, this volume, pp. 32-44 *supra.*)

[9] 42 United States Statutes at Large 105; this joint resolution will hereinafter be designated "resolution of Congress".

[10] This construction of the Treaty of Berlin has been expressly adopted by Germany in a formal declaration presented to this Commission by the German Agent on May 15, 1923, in which it was declared that "Germany is primarily liable with respect to

limited to claims falling within such categories, the amounts of which are to be judicially ascertained and determined by this Commission.

Looking to so much of the Treaty of Versailles as by reference has been carried into the Treaty of Berlin, to ascertain what rights are there stipulated for the benefit of the United States and its nationals with which we are here concerned, and paraphrasing the language to make it applicable to the Treaty of Berlin, we find that in Part VIII, dealing with "Reparation" (Article 232), Germany undertakes to "make compensation for all damage done to the civilian population of the United States and to their property during the period of belligerency, * * * and in general all damage as defined in Annex I hereto." [11] The use of the phrase "*and* in general *all* damage as defined in Annex I hereto" is significant. By it Germany's undertaking is extended beyond the scope of "damage done to the civilian population" to embrace *all* "damage as defined in Annex I." In Article 232 and Annex I is found the basis for Germany's financial obligations to the United States arising under the Treaty of Berlin on claims for all damages suffered by American nationals *during the period of American belligerency*, which obligations are enumerated in the major section (B) and subsections of this Commission's Administrative Decision No. I. [12]

Germany's obligations to pay claims put forward by the United States on behalf of its nationals *during the period of American neutrality* are based (1) on the provisions of section 5 of the resolution of Congress hereinbefore examined and (2) on that provision of the Treaty of Versailles wherein Germany in substance undertakes to pay "claims growing out of acts committed by the German Government or by any German authorities" during such neutrality period. [13]

This provision of the Treaty does not define the "claims" referred to, which are obviously in the nature of reparation claims. But other provisions of this

(Footnote continued from page 108)

all claims and debts coming within the jurisdiction of the Mixed Claims Commission under the Agreement of August 10, 1922." Minutes of Commission, May 15, 1923.

Article I of the Agreement of August 10, 1922, establishing this Commission and defining its powers and jurisdiction provides that:

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

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

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

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

See also paragraph *(e)*, subdivision (2) of paragraph *(h)*, and paragraph *(i)* of Article 297 and Article 243 of the Treaty of Versailles.

[11] It will be noted that the language of Article 232 is practically identical with that in the Pre-Armistice Memorandum prepared by the Allied Powers and on November 5, 1918, presented by President Wilson to, and accepted by, Germany which provided that "compensation will be made by Germany for all damage done to the civilian population of the Allies and their property by the aggression of Germany by land, by sea, and from the air".

[12] Decisions and Opinions, pages 2 and 3, (*Note by the Secretariat*, this volume, p. 22).

[13] Paragraph 4 of the Annex to Section IV of Part X of the Treaty of Versailles. See also declaration of German Government through German Agent, note 10 *supra*.

same Treaty do enumerate the categories of reparation claims arising during belligerency which Germany undertakes to pay as a condition of peace, and these may be looked to in determining the nature of the reparation "claims" here dealt with arising during neutrality, which Germany likewise undertakes to pay as a condition of peace. The position of the United States as one of the principal victorious participants in the war [14]—a position it has at every step carefully preserved—entitled it to demand that, notwithstanding it might decline to press government claims for reimbursement of the cost of pensions and separation allowances, [15] its nationals should not be penalized for its neutrality, but should, with respect to all damages caused during the period of American neutrality by the acts of Germany, be placed on a parity with the nationals of its Associated Powers suffering damages during that period. This was the purpose of the provision last quoted, [16] the effect of which is to bind Germany to pay reparation "claims" of American nationals for losses suffered by them growing out of Germany's acts during the period of American neutrality and falling within the categories defined in Article 232 and Annex I supplemental thereto, just as Germany is bound to pay all other Allied and Associated Powers for similar losses suffered by their nationals under similar circumstances during the same period and in some instances caused by the same act.

Under the provisions of Article 232 of the Treaty of Versailles Germany is obligated to make compensation for damage done to American civilian nationals and to their property during the period of American belligerency. The annex supplementary to Article 232, and referred to therein, expressly obligated Germany to make compensation (*a*) for damages suffered by the American surviving dependents of civilians whose deaths were caused by acts of war, [17] and also (*b*) for damages caused by Germany or her allies in respect of all property wherever situated belonging to the United States or its nationals. [18] These and other obligations embraced in the Treaty of Versailles are by the provision last quoted [19] extended to damage caused to American nationals by Germany's act during the period of American neutrality. [20] Under section 5 of the resolution of Congress Germany is obligated to pay all claims against Germany of American nationals who have since July 31, 1914, "suffered, through the acts of the Imperial German Government, or its agents, * * * loss, damage, or injury to their persons or property, directly or indirectly." All of these provisions constitute a part of the Treaty of Berlin. From them this

---

[14] Section 2, resolution of Congress.

[15] See note 11, Decisions and Opinions, pages 14 and 15. (*Note by the Secretariat*, this volume, p. 31)

[16] See note 13 and concluding clause of next preceding paragraph.

[17] The first category of this Annex I (to Section I of Part VIII, Reparation) reads:

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

[18] The ninth category of this Annex I reads:

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

[19] See note 13.

[20] Paragraph 4 of the Annex to Section IV of Part X, Treaty of Versailles.

Commission deduced the rules embraced in its Administrative Decision No. I [21] which, in so far as they apply to the cases here under consideration, read:

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

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

This brings us to the enquiry, What claims for damages suffered growing out of losses of life on the *Lusitania* are within the Treaty of Berlin?

As heretofore pointed out that Treaty expressly obligates Germany to make compensation for damages suffered by the American surviving dependents of civilians whose deaths were caused by acts of war occurring at any time during the war period. [22]

Nowhere else in the Treaty is express reference made to compensation for damages sustained by American nationals through injuries resulting in death. Looking, therefore, to the only provision in the Treaty of Berlin which expressly obligates Germany to make compensation in death cases, we find that such obligation is limited to damage suffered by American surviving dependents resulting from deaths to civilians caused by acts of war. Under familiar rules of construction this express mention of surviving dependents who through their respective governments are entitled to be compensated in death cases excludes all other classes, including insurers of life. The maxim *expressio unius est exclusio alterius* is a rule of both law and logic and applicable to the construction of treaties as well as municipal statutes and contracts. [23]

This was the construction placed upon this provision of the Treaty of Versailles by the Allied Powers in presenting their reparation claims against Germany, and all claims of life-insurance companies similar to those here presented were excluded by them. [24]

The Commission experienced no difficulty in holding that Germany is financially obligated to pay to the United States all losses suffered by American nationals as surviving dependents resulting from deaths of civilians caused by acts of war. Such claims for losses are embraced in the phrase "all losses, damages, or injuries to them" found in the rule above quoted from Administrative Decision No. I. Germany's obligation to pay claims of this class was considered by the Commission so clear that it was not deemed necessary to do more than announce it. [25]

---

[21] While the German Commissioner did not concur in Administrative Decision No. I, he and the German Government have nevertheless accepted it as the law of this case binding both Governments.

[22] Paragraph 1 of Annex I to Section I of Part VIII read in connection with paragraph 4 of the Annex to Section IV of Part X of the Treaty of Versailles and also in connection with the declaration of the German Government set out in note 10 *supra*.

[23] Broom's Legal Maxims, 8th American (1882) edition, page 650, 7th English (1900) edition page 491. Matter of Connor, 1 N.Y. St. 144 at 148. Opinion of Umpire Ralston in Sambiaggio Case, Venezuelan Arbitrations 1903, pages 666, 679. Van Bokkelen Case, II Moore's Arbitrations 1807.

[24] Exhibits H and I in claim Docket No. 19.

[25] As pointed out in the *Opinion in the Lusitania Cases* (page 17) "liability for losses sustained by American nationals was assumed by the Government of Germany

It is contended that the language of Administrative Decision No. I construing all of the provisions of the Treaty of Berlin as applied to the categories of claims there dealt with includes all pecuniary losses, damages, or injuries suffered directly or indirectly by American nationals during the war period caused by acts of Germany or her agents in the prosecution of the war and that the claimants herein have suffered such losses in the nature of property losses and are entitled to be compensated therefor.

But the general language of the definition of Administrative Decision No. I must, of course, be read in connection with fundamental rules of decision announced by this Commission in Administrative Decision No. II and elsewhere. When the scope and limitations of that definition were under consideration by this Commission to ascertain what claims are embraced within its terms it was said: [26]

"The proximate *cause* of the loss must have been in legal contemplation the act of Germany. The proximate *result* or *consequence* of *that act* must have been the loss, damage, or injury suffered. * * * This is but an application of the familiar rule of proximate cause—a rule of general application both in private and public law—which clearly the parties to the Treaty had no intention of abrogating. * * * The simple test to be applied in all cases is: has an American national proven a loss suffered by him, susceptible of being measured with reasonable exactness by pecuniary standards, and is that loss attributable to Germany's act as a proximate cause?"

Applying this test, it is obvious that the members of the families of those who lost their lives on the *Lusitania*, and who were accustomed to receive and could reasonably expect to continue to receive pecuniary contributions from the decedents, suffered losses which, because of the natural relations between the decedents and the members of their families, flowed from Germany's act as a normal consequence thereof, and hence attributable to Germany's act as a proximate cause. The usages, customs, and laws of civilized countries have long recognized losses of this character as proximate results of injuries causing death. Had there been any doubt with respect to such losses being proximately attributable to Germany's act, that doubt would have been removed by their express recognition in the Treaty of Versailles. [27]

But the claims for losses here asserted on behalf of life-insurance companies rest on an entirely different basis. Although the act of Germany was the

(Footnote continued from page 111.)
through its note of February 4, 1916" *(note by the Secretariat*, this volume, p. 33 *supra)*, and this assumption of liability was reiterated before this Commission by the German Agent.

[23] Administrative Decision No. II, Decisions and Opinions, pages 12 and 13 *(Note by the Secretariat*, this volume, pp. 29 and 30 *supra)*, all three members of the Commission concurring in the conclusions.

[27] Paragraph 1 of Annex I to Section I of Part VIII (Reparation), Treaty of Versailles. Great Britain's reparation claims contain an item of £32,436,256 for damages suffered through the loss of life of civilians. It is interesting to note that in estimating these damages Great Britain applied substantially the same rules as are laid down by this Commission in its *Opinion in the Lusitania Cases*. Another item of £3,054,607 in Great Britain's reparation claims covered injuries to persons or to health of civilians. France pursued a somewhat different method, probably producing approximately the same result. Prior to the coming into effect of the Versailles Treaty, France had by statute provided for the pensioning of the surviving dependents of civilians whose lives had been lost through acts of war and also the pensioning of civilians invalided in consequence of acts of war. The aggregate cost—past and prospective—to France of such pensions, when reduced to its present value, amounts to 514,465,000 francs, which was carried into and formed a part of her reparation claim.

immediate cause of maturing the contracts of insurance by which the insurers were bound, *thus effect* so produced was a circumstance incidental to, but not flowing from, such act as the normal consequence thereof, and was, therefore, in legal contemplation remote—not in time—but in natural and normal sequence. The payments made by the insurers to other American nationals, beneficiaries under such policies, were based on, required, and caused, not by Germany, but by their contract obligations. To these contracts Germany was not a party, of them she had no notice, and with them she was in no wise connected. These contract obligations formed no part of any life that was taken. They did not inhere in it. They were quite outside and apart from it. They did not operate on or affect it. In striking down the natural man, Germany is not in legal contemplation held to have struck every artificial contract obligation, of which she had no notice, directly or remotely connected with that man. The accelerated maturity of the insurance contracts was not a natural and normal consequence of Germany's act in taking the lives, and hence not attributable to that act as a proximate cause.

The *Lusitania* was freighted with persons and with personal property. Germany's act in destroying her caused the loss of the ship, some of the lives, and practically all of the property that formed her cargo. The lives that were lost and the property that was destroyed entailed economic losses to the world, to the nations to which they belonged, and to the individuals owning or having an interest in the property or dependent for contributions upon the physical or mental efforts of those whose producing power was destroyed by death.

The aggregate amount of the *property loss* became fixed when the ship sank and is neither increased nor diminished nor in any wise influenced by the amount of the insurance or re-insurance thereon. The insurance becomes material only in determining who really suffered the loss. This is because a contract of marine or war-risk insurance is a contract of indemnity ingrafted on and inhering in the property insured. The extent of the liability thereunder is limited by the economic loss suffered. The insured suffers no loss to the extent of payments made him by the insurer, who is the real loser to the extent of such payments not reimbursed by re-insurance.

But in a contract for life insurance the obligation of the insurer to pay, far from being one of indemnity, has no relation whatsoever to any economic loss which the beneficiary, the nation, or the world may or may not have sustained. It is a contract absolute in its terms for the payment of an amount certain on the happening of an event certain—death—at a time uncertain. The amount of insurance on the life of the insured has no relation to the economic value of that life or to the pecuniary losses resulting from the death. An individual who produces nothing, who earns nothing, who contributes nothing to any other individual or through mental or physical effort or otherwise toward adding to the wealth of the world, may carry insurance for a very large amount. On the happening of his death, the insurers are required to pay the amounts specified in the contracts of insurance to the beneficiaries entitled under such contracts to receive it, not because the latter have suffered any loss or because any loss has resulted from the death, but solely because they have bound themselves by contract to make such payments upon the occurrence of that death. Such losses as the insurers may sustain by reason of such payments are not substituted for and do not stand in the place of losses which would otherwise be suffered by the payee whose losses are reduced to the extent of the payment made, as in fire, marine, and war-risk insurance losses.

The insurers through subrogation or otherwise are not entitled to stand in the shoes of the representatives of the estate of the insured or of the beneficiaries and pursue their rights, if any exist, against the author of the death of the

insured. This Commission in its *Opinion in the Lusitania Cases* [28] sustained the contention of the Government of the United States that the amount of losses suffered by American nationals resulting from the death of a *Lusitania* victim who during life contributed to them was not subject to any deduction on account of insurance moneys paid them as beneficiaries under policies of insurance on the life of such victim. In so holding this Commission said that "Such payment of insurance, far from springing from Germany's act, is entirely foreign to it". The fact that Germany's act may have incidentally accelerated the maturity of absolute obligations to the advantage of the beneficiaries in the policies of insurance is not a circumstance of which Germany can take advantage, because she was not a party to, was in no wise interested in, or entitled to claim under, such contracts. Neither can Germany, on the other hand, be held liable for the losses resulting from such acceleration of maturity, because there is in legal contemplation no causal connection between her act and the obligations arising under the insurance contracts, of which she had no notice, and with which she was not even remotely connected.

The rights of the beneficiaries under the insurance contracts existed prior to the commission of Germany's act complained of and prior to the deaths of the insured. Under the terms of the insurance contracts these rights were to be exercised by the beneficiaries upon the happening of a certain event. There was no uncertainty as to the happening of the event but only as to the time of its happening. Sooner or later full payment must be made by the insurers, conditioned on the timely payment of such unpaid premiums, if any, stipulated for in the policies, the present value of which is embraced in these claims. They also embrace losses sustained by the insurers due to the enforced acceleration in the payments caused by the premature death of the insured. But it is obvious that precisely to the extent that the American insurers have sustained losses by reason of being prematurely deprived of the use of funds paid by them to American beneficiaries such American beneficiaries have been correspondingly benefited through the acceleration in the time of such payments to them. The losses here claimed are not economic losses to the American nation but only losses sustained by one group of American nationals to the corresponding benefit of another group of American nationals, growing out of their inter-contractual relations, rather than out of any economic injury inflicted by Germany's act. To hold, as this Commission did in the *Lusitania* cases, [29] that in arriving at the net losses suffered by American surviving dependents of *Lusitania* victims no part of the payments received by such survivors as beneficiaries under insurance contracts should be deducted from the present value of contributions which such victims, had they lived, would probably have made to such survivors, and at the same time to hold Germany bound to pay the insurers for all losses sustained by them due to the acceleration in time of payment, would obviously result in Germany's being held liable to the United States for losses which neither the United States as a nation nor its nationals as a whole had suffered but which one group of its nationals had lost to another group of its nationals.

The great diligence and research of American counsel have pointed this Commission to no case decided by any municipal or international tribunal awarding damages to one party to a contract claiming a loss as a result of the killing of the second party to such contract by a third party without any

---

[28] Decisions and Opinions, pages 17-32, inclusive *(note by the Secretariat,* this volume, pp. 32-44 *supra)*, all three members concurring in the conclusions.

[29] Decisions and Opinions, pages 22-23. *(Note by the Secretariat,* this volume, pp. 37-38 *supra.)*

intent of disturbing or destroying such contractual relations. The ever-increasing complexity of human relations resulting from the tangled network of inter-contractual rights and obligations are such that no one could possibly foresee all the far-reaching consequences, springing solely from contractual relations, of the negligent or wilful taking of a life. There are few deaths caused by human agency that do not pecuniarily affect those with whom the deceased had entered into contractual relations; yet through all the ages no system of jurisprudence has essayed the task, no international tribunal or municipal court has essayed the task, and law, which is always practical, will hesitate to essay the task, of tracing the consequences of the death of a human being through all of the ramifications and the tangled web of contractual relations of modern business.

But it is urged that no sound distinction in principle can be drawn between the awards made by this Commission in claims put forward on behalf of surviving dependents of *Lusitania* victims for pecuniary losses sustained by them and these claims of insurers for pecuniary losses sustained by them resulting from the premature payment of insurance on the lives of such victims. The distinction is this:

As this Commission has repeatedly held, the terms of the Treaty of Berlin fix and limit Germany's obligation to pay. That Treaty expressly obligates Germany to make compensation for damages suffered by the surviving dependents of civilians whose deaths were caused by acts of war, and by clear implication negatives any obligation on Germany's part to make compensation in death cases to life insurers or any class other than surviving dependents. But apart from this clearly implied limitation of liability, the losses on which these claims are based are not in legal contemplation attributable to Germany's act as a proximate cause.

There are few classes of losses which have been more generally recognized by all civilized nations as a basis for the recovery of pecuniary damages than that of losses sustained by surviving dependents for injuries resulting in death. The draftsmen of the Treaty of Versailles in putting claims of this class first on the list of ten categories in enumerating those for which compensation may be claimed from Germany [30] adopted a rule long recognized by civilized nations. International arbitral tribunals, independent of any express provision in the governing treaties or protocols, have never hesitated to recognize this rule. The statement is frequently encountered in judicial decisions and in the writings of publicists that the civil law permitted such recovery in a civil suit. [31] Grotius recognized such right. [32] For many years past this rule has been recognized by the nations of western Europe. [33] The German Code since 1900 expressly confers a cause of action for the taking of life, which, however, was merely declaratory of the liability as previously established by the German Imperial Court of Civil Jurisdiction. Forty years prior to the annexation of Hawaii to the United States its supreme court held that the natural law and the usages, customs, and laws of civilized countries quite independent of statute permitted a recovery by surviving dependents for injuries resulting in

---

[30] Paragraph 1 of Annex I to Section I of Part VIII, Treaty of Versailles.

[31] This statement has been challenged: Hubgh *v.* New Orleans & Carrollton Railroad Co., 1851, 6 Louisiana Annual 495; Hermann *v.* same, 1856, 11 Louisiana Annual 5.

[32] Grotius, Book II, Chapter XVII, Sec. 1, 12, and 13.

[33] Borrero *v.* Compania Anonyma de la Luz Electrica de Ponce, 1903, 1 Porto Rico Federal Reporter 144. Ravary et al. *v.* Grand Trunk Railway Co., 1860, 6 Lower Canada Jurist 49.

death.[34] This decision has been followed by the Federal courts since the annexation of Hawaii to the United States.[35] England established by statute enacted in 1846 such right of recovery, and her example has long been generally followed throughout the world in common-law jurisdictions.

On the other hand, there is no reported case, international or municipal, in which a claim of a life insurer has been sustained against an individual, a private corporation, or a nation causing death resulting in loss to such insurer. Such claims have been made[36] but uniformly denied. History records no instance of any payment by one nation to another based on claims of this nature. There is nothing in the Treaty of Berlin or in the records of these cases before this Commission to indicate that claims of this class could have been within the contemplation of those who negotiated, drafted, and executed that Treaty. The American courts, including the Supreme Court of the United States, have rejected similar claims of insurers as remote consequences of wrongful acts complained of, and hence not cognizable by them, as often as such claims have been presented to them by insurers against American nationals.[37] The United States cannot now be heard to assert such claims on behalf of American insurers against Germany.

The American Agent contends that the claims here asserted on behalf of insurers constitute damage to "their property" within the meaning of those words found in the Treaty of Berlin. This is denied by the German Agent and also by the German Commissioner in his opinion herein. The disposition made of these claims renders it unnecessary to consider and decide this issue.

To the extent that the insured had they lived would, through their mental or physical efforts, have contributed to the production of wealth or have accumulated pecuniary gains which they would have passed on to American nationals dependent on them, such nationals have suffered losses flowing as a natural and normal consequence of Germany's act, and attributable to it as a proximate cause, for which Germany is obligated to pay. But the act of Germany in striking down an individual did not in legal contemplation proximately result in damage to all of those who had contract relations, direct or remote, with that individual, which may have been affected by his death. In this latter class the ten claims here under consideration fall. They are not embraced within the terms of the Treaty of Berlin and are therefore ordered dismissed.

Done at Washington September 18, 1924.

Edwin B. PARKER
Umpire

---

[34] Kake *v.* Horton, 1860, 2 Hawaiian Reports 209.

[35] The Schooner *Robert Lewers Co. v.* Kekauoha, 114 Federal Reporter 849, decided by the Circuit Court of Appeals in 1902.

[36] Connecticut Mutual Life Insurance Co. *v.* New York & New Haven R. R. Co., 1856, 25 Connecticut 265; Mobile Life Insurance Co. *v.* Brame, 1878, 95 U.S. 754. See also Sedgwick on Damages, 9th (1912) edition, vol. I, sec. 120; Anthony *v.* Slaid, 1846, 11 Metcalf (52 Massachusetts) 290; Rockingham Mutual Fire Insurance Co. *v.* Bosher, 1855, 39 Maine 253; Dale et al. *v.* Grant et al., 1870, 34 New Jersey Law 142; Ashley *v.* Dixon, 1872, 48 New York 430; Brink *v.* Wabash R. R. Co., 1901, 160 Missouri 87; Rinneman *v.* Fox, 1906, 43 Washington 43; Thompson *v.* Seaboard Airline Ry. Co., 1914, 165 North Carolina 377; Taylor *v.* Neri, 1795, 1 Espinasse Nisi Prius Cases 386; Cattle *v.* Stockton Waterworks Co., 10 Law Reports Q.B.D. (1874-1875) 453; Simpson & Co. et al. *v.* Thomson, Burrell et al., 1877, Law Reports 3 Appeals Cases 279, opinion of Lord Penzance; Anglo-Algerian Steamship Co., Ltd., *v.* The Houlder Line, Ltd., 1907, I (1908) Law Reports K.B.D. 659, 24 Times Law Reports 235; La Société Anonyme, etc., *v.* Bennetts, 1910, I (1911) Law Reports K.B.D. 243, 27 Times Law Reports 77.

[37] See authorities cited in note 36.