ADMINISTRATIVE DECISION No. V

(October 31, 1924, pp. 175-194; Certificate of Disagreement by the Two National Commissioners, October 21, 1924, pp. 145-175.)

Certificate of disagreement by the two National Commissioners

On the question of the nationality of claims with reference to the jurisdiction of this Commission, the American Commissioner and the German Commissioner have agreed as to certain classes of claims, and have disagreed as to certain other classes of claims, as appears in their respective opinions, which are as follows:

OPINION OF MR. ANDERSON, THE AMERICAN COMMISSIONER

The Commission has been asked by the Agents of the two Governments to announce the principles and rules of decision which will be applied in determining the jurisdiction of the Commission in groups of cases in which the claimant did not acquire American citizenship until after the date of the loss or injury for which damages are claimed, or in which the claimant lost American citizenship subsequent to the date of such loss or injury, or in which the loss or injury for which the claim arose was sustained by an American citizen but the claim has since been transferred, in whole or in part, to foreign nationals, through assignment, succession, or otherwise.

The generally accepted basis for diplomatic intervention in presenting claims internationally is that the claims should be of the nationality of the government presenting them, and in order to establish such nationality it is, as a rule, necessary to show that the original claimants were at the time the claim accrued either citizens of the nationality of that government or were otherwise entitled to its protection, and that they, or their successors in interest, have had the same status continuously thereafter until the claims were espoused by their government.

It has been the custom of the Government of the United States to observe these requirements in dealing with claims through diplomatic channels, as will appear from the instructions issued by the Department of State for the information of American claimants. These instructions are understood to embody the general policy and position of the Government of the United States in regard to all such claims and are contained in a printed form which the Department of State prepared for the use of claimants in making application to the Department for its support for claims against foreign governments.

In many of the claims presented to this Commission an application made by the claimants on this State Department form constitutes part of the record. In this form of application, which was issued January 30, 1920, will be found the following "General Instructions for Claimants":

"5. Nationality of Claim.—The Government of the United States can interpose effectively through diplomatic channels only on behalf of itself, or of claimants (1) who have American nationality (such as citizens of the United States, including companies and corporations, Indians and members of other aboriginal tribes or native peoples of the United States or its territories or possessions, etc.), or (2) who are otherwise entitled to American protection in certain cases (such as certain classes of seamen on American vessels, members of the military or naval forces of the United States, etc.). Unless, therefore, the claimant can bring himself within one of these classes of claimants, the Government cannot undertake to present his claim to a foreign Government. For example, the declaration of intention to become a citizen of the United States is insufficient to establish the right to protection by the United States except in case of American seamen.

"6. Moreover, the Government of the United States, as a rule, declines to support claims that have not belonged to claimants of one of these classes from the date the claim arose to the date of its settlement. Consequently, claims of foreigners who, *after* the claims accrued, became Americans or became entitled to American protection, or claims of Americans or persons entitled to American protection who, *after* the claims accrued, assumed foreign nationality or protection and lost their American nationality or right to American protection, or claims which Americans or persons entitled to American protection have received from aliens by assignment, purchase, succession, or otherwise, or *vice versa*, can not be espoused by the United States. For example, a claim for a loss or injury which occurred *before* the claimant obtained final naturalization as a citizen of the United States (except in case of an American seaman who has made a declaration of intention) will not, by reason of his subsequent naturalization, be supported by the United States."

It is recognized that these Instructions are issued by the Department of State merely for the information of claimants and as a statement of its general policy with reference to the espousal of claims. It is, therefore, understood that the issuing of these Instructions by the Department of State does not preclude the United States Government from asserting any broader rights to which it may be entitled in respect to the claims before this Commission, unless, in negotiating the Treaty of Berlin, Germany relied on this statement as defining the character of claims covered by that Treaty, and it has been definitely stated on the part of Germany that this was not the case. Consequently, so far as concerns the definition of claims to be submitted under the Treaty of Berlin, these Instructions neither add to nor detract from the rights and obligations of either party in dealing with these claims.

It is also recognized that any of the requirements of international law with respect to the nationality status of claims may be changed by mutual agreement in a claims treaty between the governments concerned.

It follows from these considerations that in presenting claims before this Commission the requirements imposed by the general rule stated at the outset for establishing the American nationality of claims must be observed unless it can be shown that some modification thereof has resulted from the contractual obligations undertaken by Germany in the Treaty of Berlin, or unless exceptional circumstances justify exceptional treatment.

The effect of these requirements when applied to claims under the Treaty of Berlin remains to be considered.

It is contended by the United States that the Congressional Peace Resolution of July 2, 1921, has an important effect upon the determination of the date when the claim accrued, as of which date the American nationality of the claim must be established. The contention is that this resolution constitutes the real origin of all of these claims, and that its date is the date upon which they actually accrued, inasmuch as all claims defined in that resolution were established by the Treaty of Berlin, irrespective of whether or not they could be sustained by the law of nations independently of that Treaty.

The conclusion is accordingly drawn that if the American citizenship of the claimant, or his right to the protection of the United States Government, is established as of the date of that resolution, it is immaterial what the status of the claimant was, with respect to American nationality, at the date when the actual loss or injury occurred.

In support of this contention the American Agent calls attention to an extract from the report of the Secretary of State, dated March 2, 1921, to the President, which was transmitted by him to the Senate on March 3, 1921. This report was made by the Secretary of State in response to a resolution of the Senate, dated December 30, 1920, requesting that he transmit to the Senate "a full and complete statement of all claims, and the amount of each, filed with the State Department by American citizens against the German Government since August, 1914". The extract from this report to which the American Agent calls attention appears in the report under the heading "Diverse Nationality Cases" and reads as follows.

"* * * In some instances an American citizen has endeavored to claim for the death of British relatives; British subjects have endeavored to claim for the deaths of Americans; naturalized citizens have sought to claim for losses or damages suffered while declarants; declarants have undertaken to claim as such.

"These cases do not possess the element of continuous American nationality which is usually regarded as essential to the support of a diplomatic claim. Record has been made of these cases in the Department of State for use in the event that the department may be able to assist the claimants hereafter."

It is pointed out by the American Agent that Congress subsequently passed the joint resolution of July 2, 1921, sometimes called the Knox-Porter Resolution, which provides for the satisfaction of "all claims" against Germany "of all persons, wheresoever domiciled, who owe permanent allegiance to the United States of America and who have suffered", through the acts of Germany or its agents "since July 31, 1914, loss, damage, or injury to their persons or property", etc.

From these premises the American Brief argues—

"The Congress in passing the Joint Resolution of July 2, 1921, it is submitted, in using the particular and unusual phraseology it did in designating the class of persons whose claims were to be protected, must have had in mind the purpose of affording the Department of State as broad powers as consistent with the public interest in its duty of assisting American citizens in the presentation of their claims against Germany. Accordingly, the Resolution in effect served notice on Germany that the United States would expect her, as one of the prerequisites for the restoration of friendly relations, to satisfy all claims, of the character embraced in the treaty, of all persons who, on the second day of July, 1921, owed permanent allegiance to the United States. This, regardless of the fact that the claimants, in some instances, were not American citizens at the date of the commitment by Germany of the acts resulting in the loss, damage, or injury complained of."

It is undoubtedly true that, as here stated, the resolution, in effect, gave notice that Germany was expected to make compensation for all claims of the character embraced in the resolution. The real question to be determined, however, is what was the character of those claims, and the difficulty about adopting the American argument, as to the effect of the resolution with reference to claims for losses which occurred before the claimant became an American citizen or otherwise was entitled to the protection of the United States, is that it rests upon too many uncertainties.

The phrase upon which the argument turns is, "all claims * * * of all persons, wheresoever domiciled, who owe permanent allegiance to the United States". The primary effect of that phrase is to include claims of a certain class of persons who are not American citizens, as, for instance, Filipinos and Indians, [1] but who were entitled to the protection of the United States. As stated in the above-quoted extract from the Instructions to claimants, issued by the State Department, claims of this class are entitled to be treated as claims of American nationality.

On the other hand, the phrase "all claims * * * of all persons * * * who owe permanent allegiance to the United States" is wholly inadequate to express the intention that persons who did not owe permanent allegiance or were not otherwise entitled to the protection of the United States when the damage occurred should be entitled to present claims for such damages if they became nationals of the United States before the Congressional resolution was adopted.

It can not be presumed that if Congress had intended its resolution to cover claims which would not be presented under the usual policy of the Department of State and are not generally regarded as presentable under international law and practice it would have used words which did not make that purpose clear.

Moreover, in order to sustain the conclusions reached in the American Brief it is not sufficient to show that this resolution is susceptible of the meaning attributed to it, or even that Congress intended that it should have that

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[1] By the Act of June 2, 1924 (43 Statutes at Large 253), "all non-citizen Indians born within the territorial limits of the United States" were "declared to be citizens of the United States".

meaning. The present question is much more far-reaching than merely the interpretation of a Congressional resolution from the American point of view. What we are now called upon to determine is what contractual obligations Germany assumed by entering into the Treaty of Berlin. In other words, the question is not merely whether it is possible to find in the resolution the meaning and effect attributed to it in the argument for the United States, but whether this meaning and effect were understood and accepted by Germany in making the Treaty of Berlin.

Germany asserts that the meaning now attributed to this resolution is so obscure and uncertain that it could not be understood without explanation, and that this meaning was not even suggested in the negotiations resulting in the Treaty of Berlin. Germany also asserts that, although she accepted liability under the Treaty of Berlin for many claims for which, apart from that Treaty, she would not have been liable, nevertheless this liability is limited by the terms of the Treaty and obscure and uncertain meanings should not be read into the Treaty for the purpose of enlarging that liability.

In view of all these considerations the burden rests upon the United States of affirmatively establishing its contentions, which has not been done.

Inasmuch, therefore, as the United States has failed to show that Germany has agreed, under the Treaty of Berlin, to make compensation for claims presented on behalf of persons who were not American citizens, or otherwise entitled to the protection of the United States, at the time the damage complained of occurred, the Commission has no jurisdiction over claims of this character, unless exceptional circumstances justify exceptional treatment.

There remains to be considered the nationality of claims in which the loss or injury was suffered by an American national, but all or part of the interest in which has since been transferred to foreign nationals, through assignment, succession, or otherwise.

These claims are all of American nationality in their origin, so that there can be no question about the right of the United States to present them before this Commission, for consideration on their merits, unless some change has occurred since they originated which destroys that right.

The only change now under consideration, in this connection, is the introduction of a foreign interest in such claims, and the discussion of the effect of this change in interest upon the status of these claims will be simplified if the claims which had not been espoused by the United States before the change occurred are considered separately from those in which this change in interest occurred after such espousal.

The reason for this subdivision of these claims is because the espousal by the United States of claims against a foreign government has important legal consequences, which are discussed below under the second branch of this question. Claims of the Government of the United States on its own behalf are not under consideration here.

Taking up first the branch of this question which concerns the introduction of a foreign interest in claims of American nationals before the United States had assumed protection of them, it must be noted at the outset that governments generally are unwilling to espouse a claim if the claimant to whom the injury was done has become, or the claim itself has been transferred to, a foreign national.

The objections to espousing such a claim would seem to arise from considerations of policy or practical expediency, rather than from lack of legitimate authority, because the right of a government to espouse a claim arises on the general principle that the injury to a national is an injury to the nation and

the change of nationality of the claimant or the claim does not affect the original injury to the nation for which it is entitled to claim compensation.

In principle, therefore, the right to espouse a claim may continue notwithstanding the change of the nationality of the claim or of the claimant, but in practice, as above stated, governments do not as a rule espouse claims in those circumstances.

It may be that a distinction could properly be made in favor of claims in which the foreign interest was the result of death, or process of law, or other causes, through which the interest of the national was involuntarily transferred to a foreigner, in distinction from claims in which the foreign interest was introduced by voluntary act of the claimant.

This distinction is not generally drawn, however, and it will be noted that the above-quoted Instructions by the Department of State ignore any such distinction and state explicitly that—

". . . claims of Americans or persons entitled to American protection who, *after* the claims accrued, assumed foreign nationality or protection and lost their American nationality or right to American protection, or claims which Americans or persons entitled to American protection have received from aliens by assignment, purchase, succession, or otherwise, or *vice versa*, can not be espoused by the United States."

It is stated on the part of Germany that the practice of Germany with reference to such claims is entirely in accord with the practice of the Department of State as set forth in these Instructions.

It is sufficient for the purposes of the present discussion that at the time the Treaty of Berlin was entered into it was the common practice of both the United States and Germany to refuse to espouse claims after the claimant had become, or the claim itself had been transferred to, a foreign national. This having been their common practice at the time the Treaty was made, and the Treaty being silent on the subject, it must be assumed that in entering into that Treaty both Governments understood and expected that this practice would be applied with respect to claims under that Treaty.

It follows, therefore, that under the terms of the Treaty of Berlin, if the entire interest in a claim, which had not been espoused by the United States, has been completely transferred to foreigners, so that the sole beneficiaries of the claim are aliens, it has not the status of American nationality which is essential to bring it within the jurisdiction of this Commission.

It appears, however, that there are a number of claims pending before this Commission in which only a share or part interest in the claim has been transferred to foreign nationals, and some American interest therein remains, as for example in cases in which by the death of an American claimant a share or beneficial interest in the claim, or its proceeds, has passed by succession to a foreign national but the claim forms part of the decedent's estate held in trust or under the administration of American nationals, or in cases in which an American national has a beneficial interest in or lien upon a claim which has passed by assignment or otherwise to a foreigner.

In these or other cases in which aliens are not the sole beneficiaries of the claim there is nothing in the applicable rules and principles of international law which would prevent the espousal by the United States of whatever American interest remains in such claims.

Under the Treaty of Berlin, as already interpreted, therefore, claims of American nationality in their origin in which only a share or part interest has passed to foreign nationals before the claim is espoused by the United States come within the jurisdiction of this Commission to the extent of whatever American interest remains therein.

The question of what American interest remains in any of these cases, and the extent of such interest, is reserved for decision on the facts in each case.

Turning now to the other branch of this subject, it remains to consider whether a claim of American nationality which has been espoused by the Government will thereafter lose its American status because the interest of the private and subordinate claimant passes to a foreigner.

It is the settled law of the United States[2] that by espousing a claim of an American national, and seeking redress on his behalf against a foreign government, the United States makes the claim its own. The United States has thereafter complete possession and control of the claim, and in prosecuting the claim it acts in its own right and not as the agent or trustee of the subordinate claimant, and is not accountable to him for the proceeds of the claim, except as may be directed by Act of Congress of the United States.

Furthermore, a claim has no international status until it is espoused by the Government, and the right to present a claim internationally is the exclusive right of the Government, but when the Government espouses a claim all private interests therein are merged in the public claim, so far as the foreign Government is concerned, even though the claimant Government presents its claim on behalf of a private claimant.

As the use of the word "espousal" indicates, the espousal of a claim by the Government establishes somewhat the same legal relationship as marriage in the days when the property of the wife became the property of the husband and the wife took the name of the husband. So also if an alien interest enters into the claim after espousal it rests only with the Government to determine whether or not to abandon the claim.

These consequences of the espousal of a claim by the Government of the United States are in conformity with, and give practical application to, the principle of international law above mentioned, that the basis of the right of the Government to present a claim internationally is that the injury to the national is an injury to the nation, for which it is entitled to claim reparation. Accordingly, when the claim of an American national is espoused by the Government, it acquires internationally the same status as a claim by the nation for an injury to itself, and thereafter, so far as Germany is concerned, must be treated as a claim of American nationality.

Independently, however, of any laws of the United States governing the relationship between the Government and the claimants, but entirely in accordance with the effect of those laws, the Treaty of Berlin places the United States Government in exactly the same relationship to all American claims covered by that Treaty as the United States Government places itself in by espousing those claims. In either case, so far as Germany is concerned, the United States becomes the only claimant; no claims can be presented except by the United States Government; only the claims so presented have an international status against Germany, and at the same time the United States alone, and in its own right, to the exclusion of the private claimants, is entitled to demand compensation from Germany for these claims and Germany is not concerned with what disposition the Government of the United States makes of the proceeds.

In other words, not only has the United States espoused all these claims by including them in the Treaty of Berlin, but their inclusion in that Treaty has

[2] Great Western Insurance Company *v.* United States, 19 Ct. Claims 206. Boynton *v.* Blaine, 139 U. S. 306, 323. United States *v.* La Abra Silver Mining Company, 29 Ct. Claims 432. Opinion of Secretary of State Olney, Moore's International Law Digest, Vol. VI, pp. 1021, 1034. See also Opinion of J. R. Clark, American Journal of International Law, Vol. VII, pages 382-420.

the same effect as their espousal by the United States has upon their subsequent nationality status.

These consequences result from the Treaty because it establishes the liability of Germany to the United States for all the damages, therein defined, which were suffered by American nationals between August 1, 1914, and July 2, 1921, and if claims for such damages were claims of American nationality at the time the Treaty was made Germany has thereby admitted her liability to make compensation for them and they come within the jurisdiction of this Commission, irrespective of any subsequent changes in the subordinate private interests therein.

The jurisdiction of this Commission differs from that of claims commissions under other forms of claims conventions, because the terms of submission are different, and it must be noted that the terms of submission generally differ in each convention with respect to the jurisdiction conferred upon the commission thereby established.

It is because of these differences in the jurisdiction of claims commissions that their decisions as to their own jurisdiction over claims presented, or judicial decisions with reference thereto, are of little value as precedents in determining the jurisdiction of this Commission.

For the reasons above stated, and unless an earlier date can be established on the particular facts in any exceptional case, the date of the ratification of the Treaty of Berlin, November 11, 1921, is fixed as the date of the espousal by the United States Government of all claims under that Treaty. The date of the ratification of the Treaty, rather than the date of the Treaty itself, is adopted for this purpose because Article III of the Treaty provides that it "shall take effect immediately upon the exchange of ratifications", so that in this case ratification did not confirm the Treaty retroactively as of the date of its signature.

Since the ratification of the Treaty of Berlin, therefore, all private interests in these claims have disappeared from an international point of view. Accordingly, all claims, or interests in claims, under the Treaty of Berlin, which at the date of its ratification were of American nationality must be treated as having thereafter a continuing American nationality, because the Government of the United States thereupon became the sole owner thereof internationally and sole party in interest against Germany, and they must be so treated by this Commission so long as the United States elects to support them, regardless of any subsequent changes in the nationality of the contingent beneficial interest pertaining to the private subordinate claimant.

Doctor Kiesselbach, the German Commissioner, disagrees with the conclusion above stated that a claim of American nationality when the Treaty of Berlin became effective cannot thereafter lose that status. Although it may not affect his general conclusions, his argument seems to rest in part at least upon a misapprehension of the position of the American Commissioner as to the importance to be attached to paragraph 6 of the Instructions to Claimants issued by the Department of State.

He states in his conclusions that—

". . . *under the mutual and binding understanding* of both Governments with respect to the application of the rule under clause 6 of the General Instructions, the American nationality of the claimant must continue from the time the claim arose to the date of its settlement, as the last essential moment of the activities of this Commission."

This conclusion seems to be based on the assumption that both Governments have agreed that these Instructions would be applied to claims under the Treaty of Berlin. He says further on this point:

"Both Governments understood and expected, as I agree with the American Commissioner, that the practice of the Department of State as set forth in the Instructions '*would be applied with respect to claims under that Treaty*'. That means an *agreement* reached by *mutuo consensu* and making the practice of the Department of State as to the continuous ownership of American claims the *contractual* basis between the two Governments.

"Now, this practice provides, under clause 6 of the Instructions, that the 'Government of the United States, as a rule, *declines* to support claims that have not belonged to claimants of one of these classes from the date the claim arose *to the date of its settlement*'.

"So it is clear beyond doubt that the practice as set forth by the Instructions and as agreed upon by both Governments does *not* establish the date of espousal as decisive."

The American Commissioner does not concur in these statements. In the early part of this opinion it is explicitly stated that these Instructions of the Department of State were not intended to be, or understood as, a statement of a settled rule of international law, but merely as a statement of the policy which "as a rule" the Department would follow in dealing with international claims. The expression "as a rule" does not mean as a rule of international law but as the usual practice of the Department of State, which was subject to changes and exceptions in its discretion.

It was also pointed out in the same connection that inasmuch as it has been definitely stated on the part of Germany that in negotiating the Treaty of Berlin these Instructions were not relied upon as defining the character of claims covered by that Treaty they consequently do not either add to or detract from the rights and obligations of either party in dealing with these claims.

It cannot be said, therefore, that these Instructions form a "contractual basis" between the two Governments or had been "agreed upon by both Governments", or that both Governments had a "mutual and binding understanding * * * with respect to the application of the rule under clause 6 of the General Instructions". The two National Commissioners are in distinct disagreement on this point.

In so far as concerns the nationality of claims after the ratification of the Treaty of Berlin, the opinion of the American Commissioner is, as already stated, that in entering into that Treaty a contractual obligation was established on the part of Germany to make compensation to the Government of the United States for all the damages, therein defined, which were suffered by American nationals during the entire period of the war, namely, from August 1, 1914, to July 2, 1921, and that this obligation can not be affected by any change which has taken place in the private, subordinate, beneficial interest in those claims after the Treaty of Berlin became effective.

The German Commissioner also differs with the American Commissioner as to the use of the phrase "American nationals, or otherwise entitled to the protection of the United States at the time the claim accrued" in describing claimants of American nationality whose claims come within the jurisdiction of this Commission. In place of this phrase the German Commissioner proposes to substitute the phrase "all persons, wheresoever domiciled, who owe permanent allegiance to the United States of America", which phrase is found in Section 5 of the Knox-Porter Resolution.

The American Commissioner has not discussed this question in his Opinion and it is understood that the only claims pending before the Commission which might be included by the use of the one phrase and excluded by the use of the other are claims of alien seamen employed on American vessels at the time the damages claimed for occurred.

It seems advisable to the American Commissioner, in discussing the general principles to be adopted with reference to the American nationality of claims, to reserve the discussion of the nationality of claims presented on behalf of such seamen for consideration in connection with the facts in each particular case. The American Commissioner, therefore, does not at this time express any opinion on the question of which one of these phrases should be used in cases in which a different result would follow from the application of one or the other.

Conclusion:

It follows from the foregoing considerations that, in order to bring a claim within the jurisdiction of this Commission, the American nationality of the claim must be established by showing—

(1) That the original claimants who suffered the loss or injury, for which the damages are claimed, were American nationals, or otherwise entitled to the protection of the United States, at the time the claim accrued, which is the time when, or during which, the loss or injury occurred.

(2) That the original claimants, or their successors in interest, have been American nationals, or otherwise entitled to the protection of the United States, since the claim accrued and at the date of its espousal by the United States.

The question of the status of a claimant who was originally an American national when the claim arose and has since lost but subsequently regained American nationality is reserved for consideration on the facts of the case in which that question is presented.

(3) That in cases where only a share or part interest in a claim of American nationality has been transferred to foreign nationals, through assignment, purchase, succession, or otherwise, before the claim was espoused by the United States, the Commission has jurisdiction over such claim to the extent of whatever American interest therein remained at the time of its espousal by the United States.

The question of what American interest remained in any case, and the extent of such interest, will be determined by the facts in each case when presented for decision on the merits.

Unless an earlier date can be established on the particular facts in any case, the date of the ratification of the Treaty of Berlin, November 11, 1921, was the date of the espousal by the Government of the United States of all claims under that Treaty.

In the foregoing Opinion all questions of exceptional treatment of claims, where such treatment may be justified by exceptional circumstances, are reserved for consideration in dealing with the specific cases in which such questions are raised.

Chandler P. ANDERSON

OPINION OF DR. KIESSELBACH, THE GERMAN COMMISSIONER

I. Test of "nationality".

II. Continuity of "nationality".

I

Test of "nationality"

I agree with the American Commissioner that claims presented by one government to another for injuries done to persons must have a certain status with respect to the person on whose behalf the claim is being presented. There is no disagreement between us that such status must be that of the "nationality"

of the person in question ("claimant"). I disagree, however, with the American Commissioner as to the question of what constitutes "nationality" with reference to the jurisdiction of this Commission.

Since this jurisdiction rests on an Agreement of Arbitration between two Governments it is evident that the first and principal source for determining the meaning of "nationality" must be the recognized rules of international law as applied in proceedings of this kind. I agree, however, with the American Commissioner that "the requirements of international law with respect to the nationality status of claims may be changed by mutual agreement . . . between the governments concerned".

The Government of the United States has laid down its conception of the general rules of international law covering this subject in the "General Instructions for Claimants" as cited by the American Commissioner. I agree with him that these "Instructions" are not "binding upon Germany"; but this does not say that they are meaningless "and may be disregarded" here. On the contrary, they are of considerable value as showing not only the principles and requirements of international law elaborated by the responsible authorities of the claimant government and applied by it in general, but as also showing that the American Government, having revised its rules January 30, *1920*, did intend to apply and applied them especially for the preparation of the claims against Germany. It may be fairly assumed that the rules laid down in these "General Instructions" were in the mind of the Government when negotiating with Germany one year later, and that while continuing to use the same formula after the Treaty of Berlin the Government did not intend to inform its nationals of principles which had in the meantime become meaningless because changed through Treaty.

Now the "Instructions", which cannot therefore be disregarded, show that they distinguish between two classes of possible claimants. One class—those "who have American nationality (such as citizens of the United States, including companies and corporations, Indians and members of other aboriginal tribes or native peoples of the United States or its territories or possessions, etc.)"—and the other—those "who are otherwise entitled to American protection in *certain* cases (such as certain classes of seamen on American vessels, members of the military or naval forces of the United States, etc.)". It is obvious that the circumscription of the first class squares with the term used in the Treaty of Berlin, "claims . . . of all persons, wheresoever domiciled, who owe permanent allegiance to the United States" and that class two comprises claimants who manifestly do *not* owe *permanent* allegiance to the United States—not being *nationals* of the United States.

In framing the Treaty of Berlin the United States followed the principle laid down in the Treaty of Versailles providing for the indemnification of the *nationals* of the Powers concerned, and has restricted the scope of its possible protection to class one, using instead of the term "nationals" the broader phrase—persons "who owe permanent allegiance to the United States"—to cover the rights of the "native peoples" of its territories and possessions.

The contractual basis between the two Governments comprises therefore class one of the "General Instructions" as defined more accurately in the Knox-Porter Resolution incorporated in the Treaty of Berlin, and this class only.

The status of claims essential to secure their standing before this Commission once being established—either in accordance with the conception of the American Commissioner or with my conception—there is no disagreement between the National Commissioners that this status must have existed at the time when the damage complained of occurred. In this respect I fully agree

with the opinion of the American Commissioner rejecting the contention of the American Agent according to which not the date of the injury but the date of the enactment of the Knox-Porter Resolution should be decisive.

Therefore in concurring in principle with the American Commissioner on point one of the decision proposed by him I disagree in so far as he applies the words "American nationals, or otherwise entitled to the protection of the United States" instead of the phrase "all persons, wheresoever domiciled, who owe permanent allegiance to the United States of America".

Point one should read, therefore, as follows:

(1) That the original claimants who suffered the loss or injury, for which damages are claimed, were persons, wheresoever domiciled, who owed permanent allegiance to the United States of America at the time the claim accrued, which is the time when, or during which, the loss or injury occurred.

II

Continuity of "nationality"

For the reason pointed out in part one, I think that point two of the decision as proposed by the American Commissioner should read "persons, wheresoever domiciled, who owed permanent allegiance to the United States of America since the time the claim accrued" instead of "American nationals, or otherwise entitled to the protection of the United States", etc.

In the second part of his opinion the American Commissioner does not approve of the principle of continuity of American ownership of a claim, stating that "the right of a government to espouse a claim arises on the general principle that the injury to a national is an injury to the nation and the change of nationality of the claimant or the claim does not affect the original injury to the nation for which it is entitled to claim compensation".

Though I do not agree therein, the question may be left in abeyance *here* as I agree that "It is sufficient for the purposes of the present discussion that at the time the Treaty of Berlin was entered into it was the common practice of both the United States and Germany to refuse to espouse claims after the claimant had become, or the claim itself had been transferred to, a foreign national." So both National Commissioners agree "that in entering into that Treaty both Governments understood and expected that this practice would be applied with respect to claims under that Treaty".

The American Commissioner is, however, of the opinion that this *original test* must only continue until it is replaced by the "national ownership" resulting from the "espousal" of the claim by the Government of the United States.

He is furthermore of the opinion that such "espousal" was effected by the conclusion of the Treaty of Berlin.

From these conclusions I differ in two points:

(a) I cannot agree that the original test of American nationality in the person who suffered the loss or injury becomes immaterial by reason of the "espousal" of the claim by the United States Government.

(b) Assuming for argument's sake that the "espousal" by the United States has such an effect, I cannot agree that the conclusion of the Treaty of Berlin can be called such an "espousal" of the claims now before this Commission.

(a) In using the term "espousal" the American Commissioner does not apply—so far as I am aware—a legal term of a common and recognized meaning. As I take it, he means by that term the act of a government in taking the complaint of one of its nationals against a foreign government into its own

hands with the purpose of seeking satisfaction on behalf of such national. To make my position clear at the outset, I do not deny that an action of this description is well known and recognized in the intercourse of nations and that it has certain effects of an internal and also of an external nature if it is *communicated* in the proper way to the foreign government concerned, by way of "*presentation*" of the claim (the term commonly used for such action in international law: see Borchard, section 139, page 356).

The contention of the American Commissioner, however, is that the act of espousal, under the law of nations as well as under the provisions of the Treaty of Berlin, makes a claim which originally arose in the person of a national a government-owned claim and that from that time on such claim must be treated as having a continuing American nationality.

The consequence of this theory would be, for instance, that claims arising out of injuries to persons who lost their American citizenship after the date of the injury, by naturalization in a foreign country or by marriage to a foreigner, would be within the jurisdiction of this Commission if the change of nationality occurred after the time of "espousal" or "presentation". Thus the Commission would under its rules be obliged to render awards on behalf of aliens, even of former alien enemies. The same would be true if an American citizen in whose person a claim arose had died after the espousal, leaving only German nationals as his heirs (a case which is actually before the Commission).

I am of the opinion that such a result is neither justified by international law nor by the provisions of the Treaty of Berlin.

So far as international law is concerned the opinion of the American Commissioner is based on the legal effect such "espousal" has under the "law of the United States" on the claim of the national. I am not sure, however, whether this effect is really so sweeping as claimed by the American Commissioner, and whether really "all private interests in these claims have disappeared from an international point of view". At least such consequence would be surprising in the case of claims growing out of debts owing to American creditors as well as in the case of all claims of American nationals growing out of exceptional war measures, which claims can be settled—at least to a certain extent—between the parties concerned even while pending before this Commission.

At all events the effect of merging the claim of a national into a claim of the nation would be derived, as justly said, from the "law of the United States" and could therefore be altered by altering such law.

An international claim accrues through the wrong done to a *nation* through the wrong to its national. Its international character is based only on the wrong caused to the *nation*. Therefore, it is not feasible to make this legal character of an *international* claim dependent on how the claimant government regulates at its discretion its own relation toward its national. Even if "Germany is not concerned with what disposition the Government of the United States makes of the proceeds"—the correctness of which opinion I rather doubt so far as the payment of German private debts and of claims against the Treuhaender are concerned—I do not see how this can affect the legal requirements of claims made against Germany before this Commission.

So the argument taken from the legal domestic relation between the United States and its nationals does not seem convincing.

But even assuming that the statement of the American Commissioner as to the internal effect of an "espousal" is correct, it has, in my opinion, no bearing on the question at issue. As pointed out by the American Commissioner himself, the purpose of espousing (and presenting) the claim of an American national is to seek redress on his behalf. The United States in doing this does

not seek revenge for an injury inflicted upon the nation as such; it seeks financial compensation for the individual who has suffered the loss or damage. The result to be achieved thereby is not to satisfy the nation but to indemnify a specific person. It follows from the very nature of the proceedings before this Commission that, to secure continuous American nationality of a claim, it is not sufficient that this claim was "American-owned" at the time it arose and at the time it was presented but that—so to speak—the redress to be awarded must also be and remain "American-owned". In other words, up to the last moment of its activities the Commission remains concerned with the question on whose behalf the claim is prosecuted and to whom the proceeds of an award will flow. If the facts, whenever they arose or became known to the Commission before rendering judgment, show that the beneficiary of the award is not an American national but a foreigner, the claim would not, in my opinion, be within the jurisdiction of the Commission.

That this conclusion conforms with the general principles of international law is evidenced by various rulings of international tribunals.

Before the French-American Commission of 1880 in the case of Wiltz, [1] public administrator of the parish of Orleans, Louisiana, acting for the estate of one Delrieu, citizen of France, the American Agent demurred upon the ground that the memorial did not aver that the beneficial owners were citizens of France. That commission dealt with claims under the convention of 1880 concluded between the United States and France, whereby "all claims on the part of . . . citizens of France, upon the Government of the United States, arising out of acts committed against the persons or property of citizens of France" between the 13th day of April, 1861, and the 20th day of August, 1866, should "be referred to three Commissioners". The commission dismissed the claim, saying *inter alia*:

"We think it was not enough that the deceased was a French citizen when he suffered the loss and when he died, and that his administrator presents the claim. It should further appear that the *real* and *beneficial claimants*, WHO WILL ULTIMATELY RECEIVE THE AMOUNT that may be allowed, are French citizens; and *they* must *appear* and *present* their claims."

Another ruling of that commission, incidentally disclosed in the decision of a United States Court in Bodemueller *v.* United States, 39 Federal Reporter 437 (digested in II Moore's Arbitrations at page 1150), is based on the same principle. In that case the plaintiff, Mrs. Bodemueller, was the American daughter of the French citizen Prevot. She, together with the other heirs who were French citizens, under the American-French Convention of 1880 claimed for a loss suffered by the decedent. The commission deducted from the sum claimed one-sixth (the share of Mrs. Bodemueller) on the ground that Mrs. Bodemueller was an American citizen. The decision does not state when Mr. Prevot died, but apparently his death occurred after the signing of the convention (1880), his widow being appointed administratrix in 1884. But though at all events the claim had been "espoused and presented" by that time, the Commission nevertheless regarded the change of nationality in the person of the claimant as material.

In the case of Burthe *v.* Denis, 133 U. S. 514 (1890), concerning another claim before the same commission, the Supreme Court of the United States accepted the same theory. Said the court: "*It matters not by whom the claim may have been presented to the Commission.* That body possessed no authority to consider any claims against the government of either the United States or of France, except as held, both at the time of their *presentation* and *of judgment* thereon, by

[1] Wiltz *v.* U. S. (1882), III Moore's Arbitrations, page 2243.

citizens of the other country." So well founded was this rule, in the opinion of the court, that it expressly stated that "Any award to their co-legatees [i. e., French heirs] would have been *invalid and void.*"

In my opinion it follows from these decisions of international courts as quoted above and maintained by the Supreme Court that the doctrine of continuity of the national ownership of a claim is more than a question of expediency left to the discretion of the claimant state but that it is a recognized and binding principle of international law, against which "*no authority*" exists, as the Supreme Court of the United States expresses it, "to consider any claims . . . except as held, both at the time of their presentation and of judgment thereon, by citizens of the other country".

This rule is acknowledged under Administrative Decision No. II, page 8, where it is said, "the claim for such loss must have since *continued* in American ownership", and it is maintained by the Agent of the American Government not only before this Commission [2] but also before the American-French Claims Commission [3] and before the American-British Claims Commission. [4]

And the same principle is stated by Ralston, International Arbitral Law and Procedure, section 220, saying: "With extremely rare exceptions, and such exceptions based upon the particular language of treaties . . . the language of commissions has been . . . that the title to such claim must have *remained continuously* in the hands of citizens of such government until the time of its presentation for filing before the commission." See also Borchard, section 134, page 352.

The same principle seems to me to be accepted by the Government of the United States declaring that "claims of foreigners who, *after* the claims accrued, became Americans . . . or *vice versa*, can *not* be espoused by the United States".

But the question remains whether this rule is altered by the Treaty of Berlin.

Although I fully agree with the American Commissioner that even independently of any laws of the United States governing the relationship between the Government and the claimants the United States under that Treaty becomes the only claimant and that no claims can be presented except by the United States Government. I cannot follow his conclusion that a change of nationality after the "espousal" has been made immaterial by the terms of the Treaty. There is nothing therein to indicate such a departure from the general principles of international law. The opposite is true. The Treaty distinguishes clearly between claims of the Government of the United States and claims of persons who owe permanent allegiance to the United States. Nowhere is it even suggested that the United States were from a certain time to prosecute claims practically owned by aliens not entitled in any way to protection by the United States.

That the United States in fact never took such a position appears from the wording of the "General Instructions" quoted above. When that Government states that "as a rule" it "declines to support claims that have not belonged

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[2] See Claim 8, American Brief, page 125: "the rule that claims presented against one Government by another Government . . . must in point of origin be owned by nationals of the latter Government and *continue* in such ownership".

[3] See pages 164-165 *supra. (Note by the Secretariat,* this volume, p. 133 *supra.)*

[4] See American and British Claims Arbitration, Claim No. 32 (Adolph G. Studer), Memorandum of the Oral Argument of the United States, page 3: "In construing the language of general claims conventions of the ordinary type . . . several claims commissions have laid down a rule restricting recovery to claims . . . belonging at the time of their origin, to nationals of the claimant country, and *remaining* the property of nationals of the claimant country *until the time of their presentation* to the commission."

to claimants of one of these classes from the date the claim arose to the *date of its settlement*" such language is irreconcilable with the contention that the act of the espousal could be considered as essential in connection with the nationality of the claimant.

If, under these circumstances and under further consideration of the fact that the decisions of the highest American court as well as of international tribunals were in absolute opposition to such a position, the United States had intended to change these rules to the detriment of Germany, they most certainly would have said so in plain and clear words.

And the United States would have had the more reason for so doing as the argument now urged fails to have a logical foundation in the wording of the Treaty; which, though not dealing directly with the question at issue here, touches it indirectly in Section 5 of the Knox-Porter Resolution, and for this reason:

The Treaty speaks of claims of "all persons . . . who *owe* permanent allegiance". Nevertheless both Commissioners as well as the Umpire in Administrative Decision No. II, page 8, agree that, contrary to the contention of American counsel, such clause does *not* constitute the real origin of these claims, but either intentionally or through lack of sufficient clearness leaves the question of the origin of the claims to the general rule that the claim must in its origin be national at the time the wrong was suffered. Now, how can the same clause at the same time be nevertheless construed as establishing a special date as regards the element of continuity? There can be no logical evasion; either the clause has constitutional force—in which case Administrative Decision No. II and the opinions of both Commissioners are wrong—or the clause has no constitutional force at all—in which case it cannot be used to justify the acceptance of the date of the Treaty as decisive for American ownership of the claims presented.

I reach, therefore, the conclusion that the American nationality of a claim must continue beyond the time of the espousal. [5]

(b) The American Commissioner is of the opinion that the date of the "espousal", the effect of which according to his theory has been pointed out above, is the date of the Treaty of Berlin.

Even assuming, for argument's sake, that the act of "espousal" has the effect of rendering loss of American nationality immaterial, I cannot agree with the American Commissioner as to this date. His standpoint is that the Treaty of Berlin places the United States Government in exactly the same relationship to all American claims covered by that Treaty as the United States Government places itself in by espousing these claims, and that the United States has espoused all these claims by including them in the Treaty.

This conception is, so far as I can see, not sustained by any precedent in international law.

The decisions quoted above show that neither the French-American Commission nor the Supreme Court attributed to the conclusion of a treaty regarding the adjudication and settlement of claims the effect of an "espousal" as construed by the American Commissioner. The reason for this attitude undoubtedly is that the conclusion of a treaty establishing the legal basis for certain general categories of claims cannot be identified with the act of espousing a special claim by the government. A government cannot "espouse" categories of claims the underlying facts of which are wholly unknown to it, but only individual claims as submitted to it by the national and after examination as to its merits.

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[5] The time up to which this requirement is necessary is dealt with under the division *(c)*, *post*.

Even the decisions of the Mexican Claims Commissions as cited by Borchard, pages 665-666, do not bear out the proposition of the American Commissioner.

They concern Mexican claims which were not decided by an international tribunal but by a domestic commission established by the United States to distribute a certain fund received from Mexico among the respective nationals under the *peculiar provisions* of a treaty made with Mexico which provided for the assumption by the United States of "all claims of citizens of the United States * * * which may have arisen *previously to the date* of the signature of this treaty". Therefore all that the cases stand for on their facts is that the claim must have been both American in origin and American at the time of the signature of the treaty. The decisions are based on the wording of the treaty the language of which was considered as explicit. But the controversy in all cases was whether the American citizenship *at the time of the loss* was *sufficient* or *not*, and did not deal at all with the question at issue here, whether the American ownership has to continue up to the time of the signing of a treaty or to what other date. So it was not a general principle but a special agreement which caused that commission to lay stress on the date of the treaty, and the commission did do so only with regard to a question wholly different from that at issue here.

I do not dispute the possibility of embodying as decisive in a treaty between two governments *expressis verbis* the act of "espousal" of claims the adjudication and settlement of which form the object of that treaty. This has not been done, however, as between the United States and Germany. The opposite is true, and for three reasons:

(1) The Treaty is admittedly "silent" on this question.

(2) Both Governments understood and expected, as I agree with the American Commissioner, that the practice of the Department of State as set forth in the Instructions "*would be applied with respect to claims under that Treaty*". That means an *agreement* reached by *mutuo consensu* and making the practice of the Department of State as to the continuous ownership of American claims the *contractual* basis between the two Governments.

Now, this practice provides, under clause 6 of the Instructions, that the "Government of the United States, as a rule, *declines* to support claims that have not belonged to claimants of one of these classes from the date the claim arose *to the date of its settlement*".

So it is clear beyond doubt that the practice as set forth by the Instructions and as agreed upon by both Governments does *not* establish the date of espousal as decisive.

(3) The Treaty of Berlin states in very general terms the financial obligations of Germany in consequence of the war. In doing this it distinguishes, as already said above, clearly between claims of the United States and claims of American nationals. No indication is given that the United States by concluding the Treaty are "espousing" the claims of the latter class. On the contrary, it appears from the wording of Article II that the question of "espousal" was left open intentionally and deliberately. For this article provides that *if* the United States should avail itself of the rights and advantages (as contained in the Treaty of Versailles and "reserved" by the Knox-Porter Resolution) it would do it in a certain manner. If the English text should be considered doubtful in this respect such doubts are wholly removed by the German text, which is entitled to equal force and which reads as follows: "*Wenn* die Vereinigten Staaten die * * * Rechte und Vorteile für sich in Anspruch nehmen" ("*If* the United States avails itself of the rights and advantages"). Article II, far from "espousing" for the United States all claims which might possibly be

raised under the Treaty, leaves it to the discretion of the American Government whether and how far it will make use of the rights reserved by the Treaty. The United States may avail itself of such rights, or it may not—as for instance, in the case of pensions. But if it does avail itself of them it must do so in such a manner as to make it clear to the other party. This can only be done by a special act or declaration addressed to that party through the proper channels specifying the claims which the United States chooses to take up against Germany. Only such action, not the legal basis on which it is founded, could be considered as an "espousal". It is a requirement indispensable to the dignity and comity of intercourse between nations that a respondent nation must have full knowledge of the essential facts of a claim which another nation deems sufficiently important to raise against the respondent state.

Therefore, if any action of a government can be considered as important enough to have a bearing on another government, it can only be the act of a formal presentation.

Only such presentation of a claim could be considered as its espousal. [6]

As already pointed out the presentation of a claim must comprise a sufficient statement of its facts and merits in order to enable the respondent government to take its position and if necessary to formulate its defense.

The question remains as to what constitutes the presentation of a claim in the present proceeding.

The only acts which come into question after the conclusion of the Treaty itself are the conclusion of the Agreement of August 10, 1922, the delivery of the list of claims transmitted pursuant to Rule IV by the American Agent to the German Agent, and the filing with the Commission of a claim by the American Agent or of an agreed statement by both Agents.

The Agreement of August 10, 1922, is limited to the creation of a tribunal for the adjudication of claims arising under the Treaty. In defining these claims it does not go beyond the terms of the Treaty itself. No indication is given as to which claims in particular the United States intended to submit to the tribunal or in what manner. Nothing is said in the Agreement or in the Notes accompanying it regarding an "espousal" of claims by the United States Government. On the contrary, the Agreement again clearly distinguishes between claims of the United States and claims of American nationals, showing thereby that no act of espousing the latter class was contemplated in framing the Agreement.

The delivery of the Claim List might under ordinary circumstances be considered as a notification sufficiently distinct to be called an espousal and presentation of the claims enumerated therein.

It seems to me, however, to be a rule well established in international law that if two governments create an arbitral tribunal for the adjustment of claims raised by one against the other the act of presentation of such claims is their filing with the tribunal itself. Ralston (International Arbitral Law and Procedure, page 105) holds that the "claim must have remained continuously in the hands of citizens of such government until the time of its *presentation for filing* before the commission", which was also the viewpoint of the American Agent in the American and British Claims Arbitration in Claim 32 (Adolph G. Studer, Memorandum of the Oral Argument of the United States, page 3): "remaining the property of nationals of the claimant country until the time of their

[6] See Borchard, section 139, page 356: The claim "becomes international in character when the government espouses it *and presents it* diplomatically to the debtor government".

presentation to the commission". And it also seems to be the opinion of Hyde (Volume I, page 475) and Borchard (page 664, section 308). [7]

If in addition to the date of the presentation of a claim Borchard mentions the time of the signature of the protocol as an alternative such time is obviously not the time of the signature of a treaty *creating* the rights to be pursued afterwards, such as the American Commissioner has in mind, but a date *later* than the presentation of the claims to the respondent *government* though earlier than the date of presenting it to the *commission* itself. The "protocol" is not a treaty—as for instance the Treaty of Berlin—but an agreement for the arbitration of claims already "presented previously to the other government", that is, presented with all details necessary to enable the respondent government to examine each claim on its *particular merits*.

That this is the meaning of the term "protocol" as used by Borchard in the instance cited is shown by his phraseology in speaking of a treaty as "providing for the adjudication of claims".

But even in the few cases cited by Borchard in support of this rule the decisions *nowhere* deal with the question at issue here, but—exactly as in the decision already mentioned of the Mexican Claims Commission—only with the question whether the American citizenship *at the time of the loss* is sufficient or not. The decisions do *not* pass upon the question at issue here and do not state that the ownership is *not* required to continue beyond the date of the signing of the protocol.

My conclusion, therefore, is that the act by which the United States could "espouse" a claim before this Commission could only be the act of filing such claim (by way of petition, memorial, or agreed statement) with the Commission.

As the American Commissioner considers the date of the Treaty of Berlin only in so far as the date of "espousal" at "an earlier date" cannot "be established on the particular facts in any case", I may fairly assume that it is meant thereby to reserve those cases in which the Government of the United States had already presented a claim before the date of the Treaty of Berlin. I frankly admit that either under international law or under the provisions of a treaty the date of the signing or of the coming into force of such treaty could be established as decisive as to the question of continuity of ownership. But I cannot think of a "rule" and especially not of a treaty agreement which would restrict the rights of the defendant state as to the date of such continuity but at the same time give the claimant state full power to recur to another and earlier date if more favorable. Is it possible to assume that such could have been the meaning of an "agreement" except where expressly and plainly provided for?

And how can any "espousal" or even any presentation of a claim *before* the date of the Treaty have a bearing on this Commission which has to pass upon the claims based only on the *special* provisions of such *Treaty?*

(c) After having tried to show under *(a)* that the "espousal" of a claim is not decisive as to the time up to which the American ownership of the claim must continue, and under *(b)* that assuming that the espousal of claims should be material the date of it would be the time of filing a claim before this Commission, I reach the conclusion that, under the principle of continuous ownership and moreover *under the mutual and binding understanding* of both Governments with respect to the application of the rule under clause 6 of the General Instructions, the American nationality of the claimant must continue from

[7] In accordance herewith Administrative Decision No. II of this Commission speaks of claims "*presented* to this Commission . . . on behalf of one or more of its nationals".

the time the claim arose to the date of judgment, as the last essential moment of the activities of this Commission.

This conclusion is in accordance with the principle laid down by the Supreme Court of the United States (the date of "judgment" being, in a legal sense and for the purpose of this Commission, the date of settlement).

(d) As regards claims, whether "espoused" by the United States or not, in which only a share or part interest of a claim which had accrued under American ownership has been transferred to foreign nationals, and in which therefore "some American interest therein remains", I concur with the American Commissioner that such claims have in so far a standing before this Commission and should be reserved for special consideration.

Summary

To summarize, my conclusions are:

I *agree* with the American Commissioner

(1) That the original claimants who suffered the loss must have been American nationals at the time of the loss and

(2) That the claim must have since continued in American ownership.

I *disagree* with the American Commissioner

(1) As to the definition of who is entitled to the protection of the American Government under the Treaty of Berlin, substituting for the words "American nationals, or otherwise entitled to the protection of the United States" as applied by the American Commissioner the phrase "all persons, wheresoever domiciled, who owe permanent allegiance to the United States of America"; and

(2) As to the time to which the American ownership must continue, substituting for the time of "espousal", as proposed by the American Commissioner, the date of judgment passed by this Commission, and defining as the time of "espousal", if material, the time of the filing of a claim before this Commission, contrary to the opinion of the American Commissioner, who defines the date of the taking effect of the Treaty of Berlin (November 11, 1921) as in principle the time of espousal, leaving the particular facts of a special case to establish an earlier date.

I agree further

That where a share or a part interest of a claim which had accrued under American ownership has been transferred to foreign nationals such claim may have a standing before this Commission so far as an American interest remains therein and that such cases may be reserved for special consideration by the Commission.

Dr. W. KIESSELBACH

The two National Commissioners accordingly certify to the Umpire of the Commission for decision the points of difference which have arisen between them as shown by their respective opinions above set forth.

Done at Washington October 21, 1924.

Chandler P. ANDERSON
American Commissioner

W. KIESSELBACH
German Commissioner

Decision

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

No government-owned claims are dealt with in this opinion but only those put forward by the United States on behalf of private owners. It is in this sense that the term "claim" or "claims" is used, unless it otherwise appears from the context. [1]

The answer to the basic question presented by the Certificate of Disagreement of the Two National Commissioners calls for a definition of the jurisdiction of this Commission as determined by the nationality of claims. But the rule invoked by the German Agent and the application sought to be made of it, when analyzed, strike deeper than a mere question of jurisdiction. The jurisdictional form of presentation but serves to obscure the real issue, which is, Shall the property rights which have vested under the Treaty of Berlin be preserved, or shall they be destroyed through a change in their nationality? It is in this latter aspect that the question assumes its true importance.

It is contended by the German Agent that it is an established rule of international law that no nation will assert a claim of a private nature against another nation unless such claim possesses the nationality of the nation asserting it continuously from its origin to the time of its presentation and even of its final adjudication by the authorized tribunal. This is but another way of saying that a change in the nationality of a right, through its voluntary or involuntary transfer, deprives it of the remedy of enforcement through diplomatic intervention. He further contends that this rule must be read into and constitutes a part of the Treaty of Berlin, so that a right once vested in an American national under that Treaty will be destroyed, and Germany released from her obligation thereunder, upon the transfer of that right, by succession, assignment, or otherwise, to alien ownership. That the reasons underlying the Umpire's decision on the points of difference certified by the National Commissioners may be clearly understood, it is necessary to examine these contentions put forward by the German Agent to ascertain whether or not such an established rule of international practice as he invokes exists, and if it exists, its applicability, if any, to the Treaty of Berlin.

Statements will be found in some decisions of international tribunals and in some treatises dealing with international law and international arbitral procedure supporting the contention of the German Agent with respect to the existence of the rule as stated. But it may well be doubted whether the alleged rule has received such universal recognition as to justify the broad statement that it is an established rule of international law. It is no doubt the general practice of nations not to espouse a private claim against another nation unless in point of origin it possesses the nationality of the claimant nation. The reason of the rule is that the nation is injured through injury to its national and it alone may demand reparation as no other nation is injured. [2] As between nations the one inflicting the injury will ordinarily listen to the complaint only

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[1] Reference is made to Administrative Decision No. I for the definition of other terms used herein.

[2] This proposition was formulated by Vattel (Book II, Chapter VI, Section 71, translation of edition of 1758 published by the Carnegie Institution of Washington, 1916):

"* * * Whoever ill-treats a citizen indirectly injures the State, which must protect that citizen. The sovereign of the injured citizen must avenge the deed and, if possible, force the aggressor to give full satisfaction or punish him, since otherwise the citizen will not obtain the chief end of civil society, which is protection."

of the nation injured. A third nation is not injured through the assignment of the claim to one of its nationals or through the claimant becoming its national by naturalization. While naturalization transfers allegiance, it does not carry with it existing state obligations. Only the injured nation will be heard to assert a claim against another nation. Any other rule would open wide the door for abuses and might result in converting a strong nation into a claim agency in behalf of those who after suffering injuries should assign their claims to its nationals or avail themselves of its naturalization laws for the purpose of procuring its espousal of their claims.

But even this practice of nations may be changed by mutual agreement between the two governments parties to a particular protocol creating a tribunal for the adjudication of claims and defining its jurisdiction. The National Commissioners are in agreement on this point. Such jurisdiction is purely a matter of agreement between the interested nations. It is not one of general concern to all members of the family of nations. It does not declare any international *principle* but is only a rule of *practice*, to be followed or not as may be stipulated between the interested nations. It pertains to the course and form of the procedure agreed upon between the two nations to enforce rights but not to the rights themselves. In other words, it pertains to the *remedy*, not to the *right*. It affects only the question of the jurisdiction of an international arbitral tribunal, which in turn is fixed and defined by the particular agreement creating it. Where the meaning of such an agreement is obscure, custom and established practice may be looked to in arriving at the intention of the parties. But where the agreement creating the tribunal and defining its jurisdiction is clear it is not competent to look beyond the terms of the agreement in determining its jurisdiction. Such an agreement creating the forum to adjudicate claims and defining its jurisdiction in no wise affects the existing rights and obligations which are to be adjudicated by it.

The general practice of nations not to espouse a private claim against another nation that does not in point of origin possess the nationality of the claimant nation has not always been followed. [3] And that phase of the alleged rule invoked by the German Agent which requires the claim to possess continuously the nationality of the nation asserting it, from its origin to the time of its presentation or even to the time of its final adjudication by the authorized tribunal, is by no means so clearly established as that which deals with its original nationality. Some tribunals have declined to follow it. [4] Others, while following it, have challenged its soundness. [5] The application in all of its parts of the rule invoked by the German Agent to a privately-owned claim in which

[3] See opinion of Barge, Umpire, American-Venezuelan Commission, in Orinoco Steamship Company case, Ralston's Venezuelan Arbitrations of 1903 (hereinafter cited as "Venezuelan Arbitrations 1903"), at pages 84-85.

[4] See case of Phelps, Assignee, *v.* McDonald, cited in note 23 *post*, where under the convention of 1871 Great Britain espoused a claim against the United States and a substantial award was rendered against the United States on a claim which in point of origin was British but which, prior to the making of the convention and to the presentation of the claim and to the making of the award, had lost its British nationality and vested in the assignee in bankruptcy for the benefit of American creditors.

The rule contended for by the German Agent was invoked by Chile in challenging the right of the arbitrator to make an award in the well-known Alsop Case espoused by the United States. Chile's contention was summarily rejected by King George V of Great Britain as "Amiable Compositeur" in an award handed down July 5, 1911 (V American Journal of International Law 1085). The original partners of Alsop & Co. were all American nationals. But at the time this arbitral convention was entered into, when the claim was presented to the arbitrator, and

the nationality has changed by voluntary or involuntary transfer since the right accrued would deprive the claimant of all remedy for its enforcement through diplomatic intervention. The practical effect would frequently be to

(Footnote continued from page 141.)
when the award was made, all of the original partners were dead and the claim was being prosecuted by the United States on behalf of their heirs and creditors. It was made to appear that at least some of these heirs and creditors were citizens of Chile but the arbitrator treated the claim as a unit and as possessing complete American nationality and made the award accordingly.

In the Daniel (or Piton) Case (Venezuelan Arbitrations 1903, page 507; also Ralston and Doyle's Report of French-Venezuelan Mixed Claims Commission of 1902, page 462) under the French-Venezuelan Convention of 1902 an award was made against Venezuela to the Venezuelan heirs of a deceased Frenchman (as stated in the additional opinion of the French Commissioner in the Massiani Case at page 234 of the volume last cited), where it appeared that the claim possessed original French nationality and was espoused by France.

The Petit Case (No. 255, French and American Claims Commission of 1880, Boutwell's Report, page 84) was espoused by France against the United States and an award made in claimant's favor. It was made to appear that after Petit's property was wrongfully seized by the United States he became a naturalized citizen of the United States and so remained for a period of 13 years, when he was formally reinstated as a citizen of France.

The Estate of William E. Willet *v.* Venezuela (No. 21, United States and Venezuela Claims Commission, Convention of December 5, 1885, III Moore's International Arbitrations (hereinafter cited as "Moore's Arbitrations") 2254 and IV *ibid.* 3743) involved a claim against the Government of Venezuela originally owned by Willet, an American citizen, which he held until his death. The claim was first presented to a commission by his widow as administratrix. The Government of Venezuela claimed that Mrs. Willet and her children were Venezuelan citizens and that as they were the beneficial owners of this claim the commission had no jurisdiction over it. An award was made in favor of the estate, the commission holding that the claim, being American in its origin, could be presented by the administratrix "whatever may have been her own personal status". The fact that the beneficial owners of the claim were of Venezuelan nationality does not appear to have given the commission any concern.

[5] Ralston, Umpire of the Italian-Venezuelan Mixed Claims Commission, in the Corvaia Case (Venezuelan Arbitrations 1903, at page 809) reluctantly adopted the rule contended for here by the German Agent but protested that its effect was to "perpetrate an injustice" and added that "If the proposition now presented were one of first impression" the umpire would probably have reached a different conclusion.

Here it will be observed that the umpire was careful in dismissing the claims in question for want of jurisdiction of the commission over them to provide that the dismissal was "*without prejudice to the rights* of any of the claimants to claim against Venezuela before any court or commission which may have suitable jurisdiction, or to take such other action as they may be advised". The *rights* continued to exist notwithstanding the lack of jurisdiction of the commission to enforce them.

In discussing this rule Borchard in his "Diplomatic Protection of Citizens Abroad" (1915) uses this language (section 285, at page 630, and section 310, at page 666):

"* * * If it is the injury to the state in the person of its citizen which justifies diplomatic interposition, the mere fact that the claim subsequently by operation of law passes into the hands of alien heirs would not seem to modify the injury to the state. * * *"

"* * * It is not so clear in theory why a claim, which, having originally accrued in favor of a citizen, has passed into the hands of an alien, should necessarily forfeit the protection of its original government, especially where it passes not by voluntary assignment but by operation of law. If the state has been injured by the original wrong done to its citizen, the mere transfer of the claim hardly seems to purge the national injury to the state. * * *"

deprive the owner of his property. As the rule in its application necessarily works injustice, it may well be doubted whether it has or should have a place among the established rules of international law. Those decisions which have adopted it as a whole have recognized it as a mere rule of practice. Usually they have been rendered by divided commissions, with one member vigorously dissenting. [6] When the majority decisions in these cases come to be analyzed, it is clear that they were in each case controlled by the language of the particular protocol governing the tribunal deciding them, which language limited their jurisdiction to claims possessing the nationality of the nation asserting them not only in origin but continuously—in some instances to the date of the *filing* of the claim, in others to the date of its *presentation* to the tribunal, in others to the date of the *judgment* rendered, and in still others to the date of the *settlement*. [7] This lack of uniformity with respect to the period of continuity of nationality required for jurisdictional purposes results from each case being controlled by the language of the particular convention governing. In each case it is clear that the question presented was purely one of *jurisdiction* and did not touch an existing *right* further than to deny the jurisdiction of the tribunal to enforce it. They do no more than decide that the tribunal in question has not, under the protocol creating it, the jurisdiction to consider and adjudicate the rights of the claimants. The very cases cited by the German Commissioner aptly illustrate this. [8] Numerous other cases could be cited in further illustration, a

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[6] Miliani Case (decided by umpire), Italian-Venezuelan Commission (Venezuelan Arbitrations 1903, pages 754-762), see additional opinion of Italian Commissioner Agnoli at page 758. See also opinion of Commissioner Agnoli in the Brignone Case (decided by umpire) at pages 710-712 *ibid.*; dissenting opinion of French Commissioner L. de Geofroy in the Wiltz Case as reported in III Moore's Arbitrations at pages 2250-2253. See also contention of British agent in Stevenson Case, British-Venezuelan Commission, Venezuelan Arbitration 1903, at page 439.

[7] The Stevenson Case (British-Venezuelan Commission, Venezuelan Arbitrations, 1903, at pages 451-455) is cited as one of the leading cases sustaining the rule invoked by the German Agent. It is clear from the opinion of Umpire Plumley that his decision denying jurisdiction of the commission to decide a portion of the claim espoused by Great Britain against Venezuela was controlled by the language of the protocol creating the commission (see pages 446 and 451). It is interesting to note that in that opinion two different periods were fixed for determining the nationality of a claim for jurisdictional purposes in addition to its original nationality, viz:

(1) Its nationality "up to and *at the time of the treaty* authorizing and providing for the international tribunal before which the claim is to appear" (page 451) and

(2) Its nationality "at the time of the *presentation* of the claim before the Commission" (page 455).

It was held by the Supreme Court of the United States that under the convention between the United States and France of January 15, 1880, the nationality of the espousing government must exist both at the time the claim was *presented* and at the time *judgment* was rendered thereon (Burthe *v.* Denis (1890), 133 United States Supreme Court Reports (hereinafter cited as "U. S.") 514).

[8] The decision of the Supreme Court of the United States in Burthe *v.* Denis (1890) 133 U. S. 514, is cited by the German Commissioner. A claim, French in origin, was presented by France on behalf of the executor of the estate of a French national for the value of property damaged through occupation by the military authorities of the United States. Some of the heirs of the French national who had a beneficial interest in the claim were French citizens, others American citizens. Without undertaking to adjudicate the *rights* of the American heirs, the court held that the commission, under the express terms of the convention of January 15, 1880, between the United States and France creating it, was without jurisdiction to consider their claims and make an award in their favor. This is made clear by the following excerpt from the opinion:

"* * * the *express language* of the Treaty here limits the jurisdiction of the

few of which are noted in the margin. [9] Many of them recognized the existence, and the continued existence, of the right but either held that the claimant had mistaken his forum or that no remedy had been provided for the enforcement of the right. In some instances the commissions have been at pains, in dismissing a case for want of jurisdiction, expressly to declare that the dismissal was

(Footnote continued from page 143.)
Commission to claims by citizens of one country against the government of the other. It matters not by whom the claim may have been presented to the Commission. That body possessed no authority to consider any claims against the government of either the United States or of France, except as held, both at the time of their presentation and of judgment thereon, by citizens of the other country."

The Wiltz Case (III Moore's Arbitrations 2243), also cited by the German Commissioner, also arose under the convention between the United States and France of January 15, 1880. Here, as above pointed out, the *express language* of the convention limited the jurisdiction of the commission to claims possessing the nationality of the espousing nation at the time of their presentation and judgment thereon. The presiding commissioner in his opinion (page 2246) expressly states that "This is a question of jurisdiction. In deciding it we must be governed by the language and meaning of the convention." After deciding that the real and beneficial ownership of the claims espoused by France must be in French citizens to give the commission jurisdiction, he added "This appears to us to be the plain meaning of the first and second articles of the convention. They do not, in our judgment, admit of any other construction."

The third and only other case cited in this connection by the German Commissioner is that of the administratrix of the estate of Jean Prevot, which was also decided by the commission created under the convention of January 15, 1880, between the United States and France. As already noted, the *express terms* of this convention precluded the commission from rendering an award against the United States in a claim or any part of a claim espoused by France where the beneficial ownership was not in a French citizen. The commission therefore found that, while Jean Prevot had at the time of his death a valid claim against the United States for the sum of $2,425.15, Mrs. Bodemüller, one of the children of Prevot, was an American citizen, and as she would receive one-sixth of her father's estate and therefore had a one-sixth interest in this claim the commission deducted from the amount which it found was due Prevot by the United States at the time of his death one-sixth thereof and allowed the claim for the balance, $2,020.94. Thereupon Mrs. Bodemüller filed suit against the United States in the United States District Court for the Western District of Louisiana to recover $404.18, the amount *which the commission found was due her* but which it was without jurisdiction to award to her (Bodemüller *v.* United States (1899), 39 Federal Reporter 437). The district judge held that the court had jurisdiction but that the suit should have been brought by the administratrix of the succession of Prevot. Later such a suit was brought against the United States by the administratrix but was defeated on a plea of the statute of limitations (II Moore's Arbitrations 1152). This case expressly recognized the existence of the *right* of the American heir of the French citizen Prevot but denied the *jurisdiction* of the commission created under the convention of January 15, 1880, to declare that right.

[9] Hargous *v.* Mexico, III Moore's Arbitrations 2327-2331, where Thornton, Umpire, under the convention of July 4, 1868, between the United States and Mexico held that the claim put forward by the United States was in *origin a German claim; that it was not divested of the quality of German nationality by its transfer to an American citizen;* that the claim constituted a valid indebtedness of the Mexican Government and that Germany (the nation injured through injury of her national) "might remonstrate against the refusal of the Mexican Government to pay the claim" but *under the terms of the convention* between the United States and Mexico creating the commission it was without *jurisdiction* to hear the claim.

Wm. Dudley Foulke, Administrator, *v.* Spain, No. 105, United States and Spanish Claims Commission of 1871, also reported in III Moore's Arbitrations 2334, where Baron Lederer, Umpire, held that *under the terms of the convention* constituting the commission a claim of a deceased Spanish citizen (Eduardo Cisneros) against Spain

without prejudice to the *rights* of the claimants. [10] This was in recognition of the established rule that a right may exist internationally where a remedy is lacking. [11] The rights dealt with in the cases cited in support of the alleged rule

(Footnote continued from page 144.)

which had passed by succession to his American heir was not within the jurisdiction of the commission, notwithstanding Spain might be indebted to the claimant. The umpire while conceding the existence of the right held that the commission lacked jurisdiction to declare it. At the same time he held that if the father of the heir on whose behalf the administrator was asserting the claim had been a citizen of the United States instead of a Spanish subject and if he "by a last will had conferred his property on a Spanish subject, the claim of this Spanish subject, being an heir of a United States citizen, would have been within the jurisdiction of the American-Spanish commission". This holding is significant, clearly indicating that the umpire found no obstacle in the form of any rule of international law which would prevent the United States from asserting against Spain a claim American in origin, even though by will or otherwise it had vested in a Spanish subject and was owned by a Spanish subject at the time of its espousal and presentation by the United States.

The Sandoval, Francisco and Clement Saracina, and Jarrero cases (III Moore's Arbitrations 2323-2325) all arose under the Treaty of Guadalupe Hidalgo between the United States and Mexico of February 2, 1848, and the Act of the Congress of the United States approved March 3, 1849, passed in pursuance of the provisions of Article XV of that treaty. The Board of Commissioners, constituted as provided by the treaty and act of Congress, held that *under the express language of the treaty* it was not sufficient in order to confer *jurisdiction* on the commission that the claim was American in its origin but that it must have been American-owned *at the time the treaty was signed.* These decisions were controlled by the express language of the treaty. The commission, however, took pains to say in the first three of these cases that "The treaty does not discharge the Mexican republic from claims of this character" and in the fourth case the commission held that "There can be no doubt of the validity of the claim against the Government of Mexico". In all of these cases it is clear that the commission, while recognizing the continued existence of *rights* in the claimants with a corresponding obligation on the part of the Government of Mexico, simply held that these rights and obligations were not within the terms of the treaty.

[10] See opinion of Ralston, Umpire of the Italian-Venezuelan Mixed Claims Commission, in the Corvaia Case, Venezuelan Arbitrations 1903, at page 810.

The claim of the heirs of Massiani submitted to the French-Venezuelan Mixed Claims Commission of 1902 (Report of Ralston and Doyle, Senate Document No. 533, 59th Congress 1st Session, at pages 211 and 242, 243) was one in which the Government of Venezuela became indebted to Thomas Massiani, a citizen of France. After this indebtedness accrued Massiani died leaving a widow and children surviving him. Thereafter the claims convention of February 19, 1902, between France and Venezuela was entered into. The claim, which was French in origin, was put forward by France in behalf of the widow and children. It appeared that Thomas Massiani, the original claimant, had for years been domiciled in Venezuela. There he married a Venezuelan woman and there his children had been born. There death overtook him. There he was buried, and there his widow and children continued to reside. Umpire Plumley held that the widow and children were "*under the terms of the protocol*" nationals of Venezuela. In a headnote prepared by the umpire it was held:

"*The indebtedness of Venezuela to the estate of Thomas Massiani may still remain*, but the forum is certainly changed. The present forum is the one constituted for Venezuelans. This forum is the result of the selection of their paternal ancestor and their own selection after attaining majority."

The umpire concludes his opinion thus:

"This claim is to be therefore entered dismissed for want of jurisdiction, but clearly and distinctly *without prejudice to the rights* of the claimants elsewhere, to whom is *especially reserved every right* which would have been theirs had this claim not been presented before this mixed commission."

[11] As was said by Mr. Justice Story of the Supreme Court of the United States in Comegys *v.* Vasse (1828), 1 Peters 183, at page 216, in dealing with the nature of the claim of an American citizen against a foreign nation:

were not created by, but existed quite independent of, the protocols governing the tribunals in determining their respective jurisdictions.

But even if the rule invoked by the German Agent be conceded to exist as a rule of international practice, it remains to consider what, if any, application it has to the questions presented by the certificate of disagreement of the National Commissioners.

The Agreement of August 10, 1922, between the United States and Germany establishing this Commission clothes it with the jurisdiction and power of "determining the amount to be paid by Germany in satisfaction of Germany's financial obligations under the Treaty" of Berlin. [12] All claims put forward by the United States falling within the provisions of that Treaty, based on rights and obligations fixed and defined by that Treaty, are within the jurisdiction of this Commission. The language of the Agreement defining that jurisdiction is definite and clear. It is not admissible to look beyond that language for its meaning or to have resort to custom and practice to determine the extent of that jurisdiction. A fundamental rule governing the interpretation of treaties and international conventions that "it is not permissible to interpret what has no need of interpretation" applies. [13] If a claim is one for which Germany is liable under the Treaty, the jurisdiction of this Commission attaches. Therefore the basic question presented by the certificate of disagreement of the National Commissioners is, What are "Germany's financial obligations under the Treaty" as that liability is determined by the nationality of claims put forward by the United States? When that liability is determined the jurisdictional problem, which is purely incidental thereto, is solved.

Claims for damages accruing during the entire war period as defined in this Commission's Administrative Decision No. I [14] are embraced within the Treaty. Neutrality claims as well as belligerency claims are covered. All of these claims were in the contemplation of the Congress of the United States when it enacted the joint resolution approved by the President July 2, 1921, [15] declaring, with

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(Footnote continued from page 145)

"* * * With reference to mere municipal law he may be without remedy; but with reference to principles of international law *he has a right both to the justice of his own and the foreign sovereign.* * * *"

Again, the Supreme Court of the United States in Williams *v.* Heard (1891), 140 U. S. 529, in holding that a claim of an American national against Great Britain was "property," used this significant language (pages 540-541 and 545):

"* * * while the claimant was remediless with respect to any proceedings by which he might be able to retrench his losses, nevertheless there was at all times a *moral obligation* on the part of the government to do justice to those who had suffered in property. * * * But the Act of Congress did not create the rights. They had existed at all times since the losses occurred. They were created by reason of losses having been suffered. * * * the claim must be regarded as growing out of the Act [of Congress] of 1882, because that Act furnished the *remedy* by which the *rights* of the claimant might be enforced * * *."

See also note 23 *post*.

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[12] See Agreement between the United States and Germany signed at Berlin August 10, 1922, the preamble of which recites that

"The United States of America and Germany, being desirous of *determining the amount to be paid by Germany in satisfaction of Germany's financial obligations under the Treaty* concluded by the two Governments on August 25, 1921, which secures to the United States and its nationals *rights* specified under a resolution of the Congress of the United States of July 2, 1921, including rights under the Treaty of Versailles, *have resolved to submit the questions for decisions to a mixed commission*", etc.

[13] Vattel, Book II, Chapter XVII, Section 263.

[14] Decisions and Opinions, pages 1-3.

[15] 42 United States Statutes at Large 105; this joint resolution will hereafter be designated "resolution of Congress".

stipulated reservations and conditions, the war between Germany and the United States at an end.

The contention is made by the American Agent that this resolution was notice to Germany of the espousal by the United States of all claims embraced within its terms, and that "the United States would expect her, as one of the prerequisites for the restoration of friendly relations, to satisfy all claims, of the character embraced in the treaty, of all persons who, on the second day of July, 1921, owed permanent allegiance to the United States" although some of such claims were not American in origin. But this *ex parte* notice and espousal, or any other notice or espousal, could not have the effect of creating and fastening on Germany an obligation to pay the claims espoused. Not until the coming into effect, on November 11, 1921, [16] of the Treaty of Berlin, wherein by Article I Germany adopted as her own sections 2 and 5 of that resolution of the Congress and agreed that the United States should have and enjoy all of the rights, privileges, indemnities, reparations, and advantages specified therein, was Germany obligated to pay these claims. [17] Then and not until then was she bound. The "rights and advantages which the United States is entitled to have and enjoy under this Treaty embrace the rights and advantages of *nationals of the United States* specified in the Joint Resolution or in the provisions of the Treaty of Versailles to which this Treaty refers". [18] The Treaty embodies in its terms a contract by which Germany accorded to the United States, as one of the conditions of peace, rights in behalf of American nationals which

[16] Article III of the Treaty of Berlin provides that "The present Treaty shall be ratified in accordance with the constitutional forms of the High Contracting Parties *and shall take effect immediately on the exchange of ratifications* which shall take place as soon as possible at Berlin." The proclamation of President Harding which bears date of November 14, 1921, recites that "the said treaty has been duly ratified on both parts, and the ratifications of the two countries were exchanged at Berlin on November 11, 1921". See also subdivision 5 of Article II of the Treaty of Berlin in connection with Article 440 of the Treaty of Versailles.

[17] 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 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.

[18] The quotation is from the resolution of the Senate of the United States of October 18, 1921, embodied in the ratification of the Treaty by President Harding of October 21, 1921, and made a part of the Treaty through the exchange of ratifications at Berlin on November 11, 1921.

had no prior existence but which were created by the Treaty. While these treaty terms doubtless include obligations of Germany arising from the violation of rules of international law or otherwise and existing prior to and independent of the Treaty, they also include obligations of Germany which were created and fixed by the terms of the Treaty.[19] All of these obligations, whatever their nature, are merged in and fixed by the Treaty. The Commission's inquiry is confined solely to determining whether or not Germany by the terms of the Treaty accepted responsibility for the act causing the damage claimed and it is not concerned with the quality of that act or whether it was legal or illegal as measured by rules of international law.[20] Germany has agreed to make compensation for losses, damages, or injuries *suffered by American nationals* embraced within the categories of claims enumerated in this Commission's Administrative Decision No. I.[21] It results that no claim belonging to any of the classes dealt with in that decision falls within the Treaty unless it is based on a loss, damage, or injury *suffered by* an American national—that is, it must be American in its origin. The National Commissioners agree that under the terms of the Treaty Germany's contractual obligations are limited to such claims as are American in their origin. The contention of the American Agent that the Treaty embraces all claims possessing American nationality on the second day of July, 1921, when the resolution of Congress became effective, whether or not they were American in origin, must be rejected.

The Treaty speaks as of November 11, 1921,[22] the date on which it became effective. Through it the United States acquired rights, American in origin, on behalf of its nationals—not those who had been or those who might become its nationals, but those who were *then* its nationals—and Germany assumed corresponding obligations. These contractual obligations, which are in no sense conditional or contingent, became absolute when, but not until, the Treaty became effective. They embrace all claims which were impressed with American nationality both on the date when the loss, damage, or injury occurred and at the time the Treaty became effective and also possessed the other prerequisites to bring them within the Treaty provisions. By this agreement Germany is bound. The rights thus fixed constitute property the title whereof passes by

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[19] A large proportion of the financial obligations fixed by paragraph 9 of Annex I to Section I of Part VIII of the Treaty of Versailles as carried by reference into the Treaty of Berlin did not arise under the rules of international law but are terms imposed by the victor as one of the conditions of peace.

[20] Decisions and Opinions, page 76. (*Note by the Secretariat*, this volume, p. 75).

[21] Article 232 of the Treaty of Versailles, which is read into and forms a part of the Treaty of Berlin, provides that Germany "will make compensation for all damage *done* to the civilian population of the United States", etc.

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 * * *;

"(2) Other claims for loss or damage to which the United States *or its nationals have been subjected* * * *".

This language clearly indicates that the parties to the Agreement construed the Treaty of Berlin as embracing only such private claims as are American in their origin.

[22] See note 16 *supra*.

succession, assignment, or other form of transfer.[23] They were expressly accorded by Germany to the United States[24] and to its nationals.[25] They may be asserted against Germany by the United States and by *no other nation*, for they are contract rights, American in their origin, arising under a Treaty to which Germany and the United States are the only parties. The American nationals who acquired *rights* under this Treaty are without a *remedy* to enforce them save through the United States. As a part of the means of supplying that remedy this Commission was by Agreement created as the forum for determining the amount of Germany's obligations under the Treaty. That Agreement neither added to nor subtracted from the rights or the obligations fixed by the Treaty but clothed this Commission with jurisdiction over all claims based on such rights and obligations. The Treaty does not attempt to deal with rules of procedure or of practice or with the forum for determining or the remedy to be pursued in enforcing the rights and obligations arising thereunder. Into this Treaty, under and by virtue of which exist the rights of the United States and its nationals and the correlative obligations of Germany, the German Agent would read a rule which is at most a rule of practice affecting the remedy and the jurisdiction to adjudicate those rights. While admitting that the Commission has jurisdiction over all claims falling within the terms of the Treaty, he would so apply that rule as to take out of the Treaty and destroy substantive rights called into being by it. He contends that the transfer of American rights to alien ownership, by whatever means, subsequent to the Treaty becoming effective destroys those rights. So long as the right and the correlative obligation of Germany exist under the Treaty of Berlin the jurisdiction of the Commission unquestionably attaches, but he would use the rule of practice, affecting merely

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[23] The case of Phelps, Assignee, *v.* McDonald *et al.* (1879), 99 U. S. (9 Otto) 298, was one in which McDonald, a British subject, had a valid claim against the Government of the United States for wrongful seizure of his property in 1865. McDonald became bankrupt in 1869, and the title to his claim passed to his American assignee in bankruptcy, who brought suit against him in a court of the United States and procured personal service on him. The Supreme Court of the United States held that the title to the claim passed to the assignee in bankruptcy and that he and not McDonald was entitled to receive payment from the United States. Mr. Justice Swayne in delivering the opinion of the Supreme Court of the United States said:

"* * * Nor is it material that the claim cannot be enforced by a suit under municipal law which authorizes such a proceeding. In most instances the payment of the simplest debt of the sovereign depends wholly upon his will and pleasure. The theory of the rule is that the government is always ready and willing to pay promptly whatever is due to the creditor. * * * It is enough that the *right* exists when the transfer is made, no matter how *remote or uncertain the time of payment.* * * *

"If the thing be assigned, the right to collect the proceeds adheres to it, and travels with it whithersoever the property may go. They are inseparable. *Vested rights ad rem and in re*—possibilities coupled with an interest and claims growing out of property—pass to the assignee. The *right to indemnity* for the unjust capture or destruction of property, whether the wrongdoer be a government or an individual, is clearly within this category."

See also note 11 *supra*.

[24] Article I of the Treaty of Berlin provides that

"Germany *undertakes to accord* to the United States, and the United States shall have and enjoy, all the rights, privileges, indemnities, reparations or advantages specified in the aforesaid Joint Resolution of the Congress of the United States of July 2, 1921, including all the rights and advantages stipulated for the benefit of the United States in the Treaty of Versailles which the United States shall fully enjoy", etc.

[25] See note 18 *supra* and the quotation from the resolution of the Senate of the United States of October 18, 1921.

the jurisdiction, to strike down the right, that there may be nothing left over which to exercise jurisdiction. The Umpire has no hesitancy in holding that there is no warrant for reading into this Treaty the rule of practice invoked and so applying it as to destroy substantive rights which have vested thereunder.

Claims to fall within the Treaty must have possessed the status of American nationality both in origin and at the time the Treaty became effective. Claims possessing such status on both those dates are under the contract American claims and the contract right of the United States to demand their payment inheres in them. Upon Germany's contract obligations attaching they become, so far as Germany is concerned, indelibly impressed with American nationality. A subsequent change in their nationality, through succession, assignment, or otherwise, can not operate to discharge those obligations. The rule invoked, if applicable, would make the continued existence of a right which had vested under the Treaty dependent upon such uncertain factors as the life, death, or marriage or the business success or failure of the private owner of the claim, any one of which factors might result in its devolution in whole or in part to alien private ownership pending the setting up by the two nations parties to the Treaty of machinery to adjudicate the claims arising thereunder, or pending the time consumed in hearing them and in rendering judgment thereon, or pending the discharge by Germany of the awards made. Under the rule propounded and its proposed application, and notwithstanding the greatest diligence on the part of both Governments in finally disposing of all claims, unavoidable delays might well result in releasing Germany from obligations which she has solemnly bound herself to pay.

The United States in its discretion may decline to press a claim in favor of one who has voluntarily transferred his allegiance from it to another nation, or in favor of an alien who has acquired a claim by purchase. This, however, involves a question of political policy rather than the exercise of a legal right. The fact that under the Treaty the United States alone has a contract right to demand payment of Germany, and that American nationals may realize on their property in American claims through sale and assignment to aliens relying on the United States making such demand, may well influence its action. As already noted, it has in the past asserted and received payment for American claims which had passed into alien ownership.[26] But certainly it does not lie with Germany to challenge the right of the United States to assert a claim which Germany has contracted to pay, and which under the Treaty may be asserted by the United States and by no other nation.

The Umpire decides that the devolution of claims from American nationals to aliens subsequent to the coming into effect of the Treaty on November 11, 1921, can not affect (1) the contract obligation of Germany to pay them, (2) the right of the United States at its election to demand their payment, or (3) the jurisdiction of this Commission to determine the amount of the obligation.

It follows that with respect to all private claims asserted by the United States this Commission has the power, and it is its duty, to determine their ownership (1) on the date when the loss, damage, or injury occurred and (2) on November 11, 1921, when the Treaty of Berlin became effective. If it finds that such claims, or a fixed and definite interest therein, asserted by the United States before this Commission were impressed with American nationality on both of these dates, then so far as concerns the nationality of such claims, or the fixed and definite American interest therein, they fall within the terms of the Treaty of Berlin and this Commission's jurisdiction attaches. It need not concern itself with any subsequent devolution of interest either voluntary or involuntary.

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[26] See Alsop Case and Willet Case cited in note 4 *supra*.

These are matters to be dealt with by the United States in making distribution of such amounts as may be paid by Germany in pursuance of this Commission's awards. [27]

The term "American national" has been defined by this Commission in its Administrative Decision No. I [28] as "a person wheresoever domiciled owing permanent allegiance to the United States of America". "National" and "nationality" are broader and apter terms than their accepted synonyms "citizen" and "citizenship." Nationality is the status of a person in relation to the tie binding such person to a particular sovereign nation. That status is fixed by the municipal law of that nation. Hence the existence or nonexistence of American nationality at a particular time must be determined by the law of the United States. As pointed out by the German Commissioner in his opinion, the use in the Treaty of Berlin of the broad term "nationals" and of the phrase "all persons, wheresoever domiciled, who owe permanent allegiance to the United States" was clearly intended to embrace, and does embrace, not only citizens of the United States but Indians [29] and members of other aboriginal tribes or native peoples of the United States and of its territories and possessions. The use of the words "permanent allegiance" as part of the phrase "all persons, wheresoever domiciled, who owe permanent allegiance to the United States", far from limiting or restricting the meaning of the term "nationals" as used elsewhere in the Treaty, makes it clear that that term is used in its broadest possible sense.

The decision already announced on the questions certified renders unnecessary any expression of opinion by the Umpire on the points of difference between the National Commissioners with respect to what constitutes an "espousal" by a nation of the existing rights and claims of its nationals and the effect of such an "espousal". But it may be profitable briefly to refer to one further point of difference as reflected by the opinions of the National Commissioners, to guard against a possible misunderstanding in the future presentation of claims.

The American Commissioner, after announcing the sound rule that "the right to present a claim internationally is the exclusive right of the Government", adds *inter alia:* "when the Government espouses a claim all private interests therein are merged in the public claim, so far as the foreign Government is concerned", and "it acquires internationally the same status as a claim by the nation for an injury to itself"; "the United States makes the claim its own. * * * in prosecuting the claim it * * * is not accountable to him [the claimant] for the proceeds of the claim, except as may be directed by Act of Congress of the United States"; "the United States alone, and *in its own right*, to the exclusion of the private claimants, is entitled to demand com-

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[27] It would seem that under the *existing statute*, enacted February 26, 1896 (29 United States Statutes at Large 28, 32), the duty devolves upon the Secretary of State in the first instance to distribute such fund as may be paid by Germany to the United States in satisfaction of the awards of this Commission, but in the event of a contest as to ownership to refer contesting parties to the municipal tribunals where the contest will be determined according to local jurisprudence.

See also Part of Opinion by the Hon. Joshua Reuben Clark, Jr., Solicitor for the Department of State, August 14, 1912, *in re* Distribution of Alsop Award, VII (1913) American Journal of International Law 382.

[28] While the German Commissioner did not concur in Administrative Decision No. 1, he and the German Government have nevertheless accepted it as the law of this case, binding both Governments.

[29] Not until June 2, 1924 (43 Statutes at Large 253), were all non-citizen Indians born within its territorial limits made citizens of the United States.

pensation from Germany for these claims"; "Since the ratification of the Treaty of Berlin, therefore, all private interests in these claims *have disappeared* from an international point of view."

The German Commissioner denies that the espousal of a claim by the United States makes it government-owned and that thenceforward no inquiry can be made with respect to its private ownership.

Ordinarily a nation will not espouse a claim on behalf of its national against another nation unless requested so to do by such national. When on such request a claim is espoused, the nation's absolute right to control it is necessarily exclusive. In exercising such control it is governed not only by the interest of the particular claimant but by the larger interests of the whole people of the nation and must exercise an untrammeled discretion in determining when and how the claim will be presented and pressed, or withdrawn or compromised, and the private owner will be bound by the action taken. Even if payment is made to the espousing nation in pursuance of an award, it has complete control over the fund so paid to and held by it and may, to prevent fraud, correct a mistake, or protect the national honor, at its election return the fund to the nation paying it or otherwise dispose of it. [30] But where a demand is made on behalf of a designated national, and an award and payment is made on that specific demand, the fund so paid is not a national fund in the sense that the title vests in the nation receiving it entirely free from any obligation to account to the private claimant, on whose behalf the claim was asserted and paid and who is the real owner thereof. Broad and misleading statements susceptible of this construction are found in cases where lump-sum awards and payments have been made to the demanding nation covering numerous claims put forward by it and where the tribunal making the award did not undertake to adjudicate each claim or to allocate any specified amount to any designated claim. [31] It is not believed that any case can be cited in which an award has been made by an international tribunal in favor of the demanding nation on behalf of its designated national in which the nation receiving payment of such award has, in the absence of fraud or mistake, hesitated to account to the national designated, or those claiming under him, for the full amount of the award received. So far as the United States is concerned it would seem that the Congress has treated funds paid the nation in satisfaction of specific claims as held "in trust for citizens of the United States or others". [32]

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[30] Frelinghuysen *v.* United States *ex rel.* Key (1884), 110 U. S. 63 *et seq.* United States *ex rel.* Boynton *v.* Blaine (1891), 139 U. S. 306.

[31] This distinction between lump-sum awards made in favor of the demanding government *as such*, in which the fund paid must be distributed by the nation receiving it, and awards made on specific claims put forward on behalf of designated claimants is clearly drawn in the case of the United States *v.* Weld (1888), 127 U. S. at pages 55-56. A case frequently cited in support of the contention that the fund paid *belongs* to the nation receiving it is that of The Great Western Insurance Company *v.* United States (1884), 19 Court of Claims Reports 206 *et seq.*, where the court was dealing with the Geneva lump-sum award made in favor of the Government of the United States *as such* without any attempt on the part of the arbitral tribunal to make an award in favor of any specified claim. But this case can have no weight as a precedent inasmuch as the Supreme Court of the United States held that the Court of Claims was without jurisdiction, and expressly declined to consider the capacity in which the United States acted in presenting claims on behalf of its nationals and its right to deal with and dispose of this fund when paid (112 U. S. 193).

[32] The provision in the Act of February 26, 1896, 29 United States Statutes at Large 28, 32, reads as follows:

"Hereafter all moneys received by the Secretary of State from foreign govern-

The Umpire agrees with the American Commissioner that the *control* of the United States over claims espoused by it before this Commission is complete. But the generally accepted theory formulated by Vattel, which makes the injury to the national an injury to the nation and internationally therefore the claim a national claim which may and should be espoused by the nation injured, must not be permitted to obscure the realities or blind us to the fact that the ultimate object of asserting the claim is to provide reparation for the private claimant, whose rights have at every step been zealously safeguarded by the United States [33] and who under the Treaty of Berlin is entitled through his Government to receive compensation. Both that Treaty and the Agreement constituting this Commission clearly distinguish throughout between government-owned claims and privately-owned claims. Internationally the distinction is important in determining Germany's obligations under the Treaty of Berlin as illustrated by the decision of this Commission in its opinion construing the phrase "naval and military works or materials" where it was held that "So long as a ship is privately operated for private profit she cannot be impressed with a military character, for only the Government can lawfully engage in direct warlike activities". [34] While, as pointed out by the American Commissioner, Germany recognizes only the United States, which has complete control over these claims, for the purpose of presenting them internationally and collecting the awards made, and while the private claimant is in all things bound by the action taken by his Government, still, such a claim is not a national claim, nor the fund collected a national fund, in the sense that its private nature no longer inheres in it but is lost and merged into its national character and becomes the property of the nation.

Cases may be presented where the American nationality of a claim in its origin, or on November 11, 1921, may be challenged as merely nominal or colorable. In such cases the circumstances connected with the transfer of such claim subsequent to November 11, 1921, and the conditions under which it is thereafter held may have important evidentiary value in determining its true ownership on either of the dates requisite to bring it within the Treaty of

(Footnote continued from page 152.)
ments and other sources, *in trust for citizens of the United States or others*, shall be deposited and covered into the Treasury.

"The Secretary of State shall determine the *amounts due claimants*, respectively, from each of such *trust funds*, and certify the same to the Secretary of the Treasury, who shall, upon the presentation of the certificates of the Secretary of State, pay the amounts so found to be due.

"Each of the *trust funds* covered into the Treasury as aforesaid is hereby appropriated for the payment to the *ascertained beneficiaries* thereof of the certificates herein provided for."

The Chairman of the Appropriations Committee of the House of Representatives in reporting this measure to the House said (Congressional Record, Volume 28, Part 2, page 1058; VII (1913) American Journal of International Law 420):

"* * * The *trust funds* in the custody of the State Department have heretofore, by the officer having them in charge, been deposited where he pleased, deposited generally in banks. The Secretary of State has suggested, and the Committee on Expenditures in the State Department of the House of Representatives have presented to the Committee on Foreign Affairs, the draft of an amendment to the existing law. By it we have provided that these funds shall be deposited and covered into the Treasury and paid out on certificates of the Secretary of State; a reform which I think will meet the approval of every member of the House."

[33] See note 18 *supra* and the quotation from the resolution of the Senate of the United States of October 18, 1921.

[34] See Decisions and Opinions, page 99. *(Note by the Secretariat*, this volume, p. 90 *supra.)*

Berlin. In such a case not only would Germany have a direct interest in exposing all the facts pertaining to the nationality *at any time* of the private interest in the claim, but the Government of the United States, on the honor and good faith of which Germany relies and has a right to rely for protection against frauds and impositions by individual claimants, [35] should not permit any technical rules or juristical theories to prevent a full disclosure of all of the facts in each case and the impartial application of the Treaty terms thereto. This Commission will not hesitate at any stage of a proceeding to examine the facts with respect to the nationality of the private interest in any claim subsequent to November 11, 1921, should it be made to appear that such evidence is material to an issue made with respect to Germany's obligations and the jurisdiction of this Commission as determined by the true nationality of the claim in its origin, or on November 11, 1921; or material to any other issue presented to the Commission in the exercise of its jurisdiction.

From the foregoing and from the points of agreement as expressed in the opinions of the National Commissioners, the Umpire deduces the following rules with respect to Germany's obligations and the jurisdiction of this Commission as determined by the nationality of claims:

I. The term "American national" means a person wheresoever domiciled owing permanent allegiance to the United States of America, and embraces not only citizens of the United States but Indians and members of other aboriginal tribes or native peoples of the United States and of its territories and possessions.

II. Such claims, or a fixed and definite interest therein, as are asserted by the United States before this Commission and which were impressed with American nationality both *(a)* on the date when the loss, damage, or injury occurred and *(b)* on November 11, 1921, when the Treaty of Berlin became effective, are, so far as concerns the nationality of such claims or the fixed and definite American interest therein, within the terms of the Treaty of Berlin and within the jurisdiction of this Commission.

III. In any case where a fixed and definite interest less than the whole amount of the loss or damage complained of is so impressed with American nationality as to fall within the terms of the Treaty of Berlin and this Commission's jurisdiction as defined in the preceding paragraph, all the facts with respect to the nationality of each interest in the claim will be fully developed by the Agents and called to the attention of the Commission when that case is presented for decision on its merits.

IV. It is competent for Germany or for this Commission to develop or cause to be developed all facts relating to the nationality at any time of the private interest in any claim, should it be made to appear that such evidence is material to an issue made with respect to Germany's obligations and the jurisdiction of this Commission as determined by the true nationality of the claim in its origin, or on November 11, 1921; or material to any other issue presented to the Commission in the exercise of its jurisdiction.

This decision, in so far as applicable, will control the preparation, presentation, and decision of all claims submitted to the Commission falling within its scope. Whenever either Agent is of the opinion that the peculiar facts of any case take it out of the rules here announced, such facts, with the differen-

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[35] Frelinghuysen *v.* United States *ex rel.* Key (1884), 110 U. S. 63 *et seq.* United States *ex rel.* Boynton *v.* Blaine (1891), 139 U. S. 306.

tiation believed to exist, will be called to the attention of the Commission in the presentation of that case.

Done at Washington October 31, 1924.

Edwin B. PARKER
Umpire
