

ROSA VOLLWEILER (UNITED STATES) *v.* GERMANY

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

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

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

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

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

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

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

“ZIMMERMANN & FORSHAY

Members of the New York Stock Exchange

170 Broadway

New York

No.

Dated

19

THIS IS TO CERTIFY THAT

Mr.
has paid \$.....

..... Dollars

for

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

ZIMMERMANN & FORSHAY.”

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

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

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

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

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

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

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

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

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

¹ IX Lloyd's Reports of Prize Cases 232.

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

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

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

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

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

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

To this the Deutsche Bank replied by cable:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Done at Washington March 8, 1928.

Edwin B. PARKER

Umpire

Chandler P. ANDERSON

American Commissioner

W. KIESSELBACH

German Commissioner
