LEHIGH VALLEY RAILROAD COMPANY, AGENCY OF CANADIAN CAR AND FOUNDRY COMPANY, LIMITED, AND VARIOUS UNDERWRITERS (UNITED STATES) *v.* GERMANY

(Sabotage Cases, December 15, 1933, pp. 1115-1128; Certificate of Disagreement, October 31, 1933, pp. 1084-1106; Additional Opinion of German Commissioner, s.d., *pp. 1106-1108; Supplemental Opinion by the American Commissioner, November 27, 1933, pp. 1108-1115.)*

PROCEDURE: REHEARING AFTER FINAL JUDGMENT, FRAUD, COLLUSION, SUPPRESSION OF EVIDENCE; ROLE OF UMPIRE: CERTIFICATE OF DISAGREEMENT, SIGNIFICANCE OF RULES OF PROCEDURE. Request filed May 4, 1933, for rehearing after final judgment of October 16, 1930, on the ground that Commission was misled by fraud and collusion on the part of witnesses and suppression of evidence on the part of some of them. *Held* that no certificate of disagreement required for decision by Umpire of question as to which national Commissioners disagree: Rules prescribe certificate only for Commission's convenience and for guidance of Agents, the Umpire's duty to decide arising automatically, under Agreement of August 10, 1922, upon his being apprised of disagreement (rules cannot contravene basic Agreement).

JURISDICTION: COMMISSION'S POWER TO DECIDE ON OWN —, NATURE OF ITS FUNCTION. — PROCEDURE: FINAL AND BINDING CHARACTER OF DECISIONS. *Held* that Commission has power to pass upon extent of own jurisdiction by interpretation of Agreement: Commission would otherwise be advisory

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body, and its decisions not final and binding, as Agreement states they shall be.

JURISDICTION: ATTRIBUTES, FUNCTIONS OF COMMISSION, REHEARING. — INTERPRETATION OF TREATIES: TERMS, RELATED PROVISIONS, COMMISSION'S PRACTICE, MUNICIPAL LAW. — PROCEDURE: MEANING OF TERMS " DECISION " AND " FINAL "; REHEARING: CONFLICT WITH RECORD, MATERIAL ERROR OF LAW, AGREEMENT BETWEEN AGENTS, AFTER-DISCOVERED EVIDENCE, FRAUD. *Held* (1) that Commission has all attributes and functions of a continuing tribunal until close of work, and as such tries and adjudicates *large number of separate and individual cases:* word " amount " (singular) in preamble of Agreement of August 10, 1922, does not make Commission a tribunal to try *a single action divided into counts* (related provisions, Commission's practice, Settlement of War Claims Act of 1928); but that Commission is not therefore precluded from reopening case after decision: Agreement, not defining term " decision " used in art. VI (providing that decisions of Commission are final and binding), leaves it to Commission to determine when decision, whether executed or not, is " final "; and (2) that Commission (*a*) must grant request for reopening and correct decision when decision does not comport with record or involves material error of law: see Commission's practice, no need for agreement between Agents (powers otherwise absent could only be conferred upon Commission by formal agreement of two governments amending Agreement); and (*b*) may not reopen for presentation of " after-discovered " evidence: justification under municipal law (power of Court to close proofs and compel final submission of case) does not prevail before Commission (no closing without consent or over objection), while failure earlier to enact now existing legislation permitting American Government to summon witnesses etc. (Act of June 7, 1933) provides no excuse; but (*c*), still sitting as a Court, as every other tribunal has inherent power to reopen and to revise decisions induced by fraud.

Cross-reference: A.J.I.L., Vol. 34 (1940), pp. 154-164.

Bibliography: Witenberg, Vol. III, pp. 17-24; Woolsey, A.J.I.L., Vol. 33 (1939), p. 739, and Vol. 34 (1940), pp. 29-34; Annual Digest, 1935-37, pp. 480-487.

Certificate of Disagreement [1]

The American Agent, pursuant to instructions from the Government of the United States, has requested the Commission to render a decision on the question of its jurisdiction to reconsider its decisions in the so-called sabotage claims, which question the Government and the Agent of the United States consider is one to be decided by the Commission itself.

The question is raised by the pending petition presented to the Commission by the Government of the United States, through the American Agent, on May 4, 1933, on behalf of the claimants in the so-called sabotage cases, Docket Nos. 8103, 8117, *et al.*

In support of this petition the American Agent has presented, and is continuing to present, the testimony of a number of witnesses, taken under the authority of and in accordance with an Act of Congress approved June 7, 1933, and certain other evidence, and may desire to present some additional

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[1] See Appendix for Minutes of the meeting of Commission of October 31, 1933 (pp. 1597-1612), outlining the action taken with respect to the Certificate of Disagreement dated October 31, 1933, signed only by the American Commissioner. (*Note by the Secretariat*, this volume, Appendix IV (A), p. 483.)

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evidence not yet available, if the Commission's right to reconsider these cases is upheld by the decision of the Umpire.

The national Commissioners are in disagreement on the questions thus raised, and have rendered their respective opinions setting forth the grounds of their disagreement.

The opinion of the American Commissioner is that, under the terms of the Agreement of August 10, 1922, between the two Governments, establishing the Commission, the Commission inherently has the juridical right to determine for itself its jurisdiction to entertain petitions for rehearing. The American Commissioner is further of the opinion that the Commission has in general the right in its discretion to reconsider a decision rendered by it, and that in the sabotage cases, inasmuch as the last decision of the Commission in those cases was made by the Umpire on a Certificate of Disagreement by the national Commissioners, the Umpire can continue to act for the Commission in dealing with this jurisdictional question as well as with all other questions arising under the pending petition in those cases.

The German Commissioner disagrees with the American Commissioner on all of the points above mentioned, and holds that the Commission has no jurisdictional right to reconsider a decision once made, unless both Governments consent.

The written opinions of the National Commissioners, which have been submitted by them to the Umpire, showing the points and grounds of disagreement between them, are as follows:

Opinion of the American Commissioner on the Question of Revision of Decisions

The Agreement of August 10, 1922, between the United States and Germany under which this Commission was established, recites in its preamble that the two Governments " 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, [Treaty of Berlin] * * * have resolved to submit the questions for decision to a mixed commission ", etc. The Agreement further provides, in Article I, that the commission shall pass upon specified categories of claims. The commission is to consist, as provided in Article II, of two national commissioners, one appointed by each Government, and an umpire selected by both Governments, but eventually, by request of the German Government, appointed by the President of the United States. The umpire was authorized " to decide upon any cases concerning which the commissioners may disagree, or upon any points of difference that may arise in the course of their proceedings ".

The Agreement also provides, in Article VI, that " The commission shall receive and consider all written statements or documents which may be presented to it by or on behalf of the respective Governments ", and that " The decisions of the commission and those of the umpire (in case there may be any) shall be accepted as final and binding upon the two Governments ".

There are no other provisions in the Agreement which have any bearing on the question under consideration. No specific provision is made in the Agreement for reconsidering or correcting any decisions rendered by the Commission. Whatever authority the Commission may have to reconsider and revise its decisions must be derived from the provisions above mentioned, taken in connection with the general powers discussed herein elsewhere, which were conferred on this Commission by the Agreement.

During the course of the proceedings of the Commission many occasions have arisen for taking action on correcting awards and reconsidering decisions.

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Although no specific decision in any case where the point was at issue has been made by the Commission on the question of its authority to take such action as a matter of principle, the Commission, in practice, has adopted a course of procedure which demonstrates that in its opinion it had discretionary power to reconsider and revise its decisions to fulfill the purposes for which it was organized and to serve the ends of justice. It has always assumed, and acted on that assumption, that it was fully empowered to correct any clerical or *pro forma* errors in its decisions or awards, and this has been done as a matter of routine procedure. It has also assumed, and acted on that assumption, that on any application for reopening and revising a decision on the merits the Commission should receive and consider any evidence offered in support of such application, reserving for decision, after the examination of such evidence, the question of whether or not the Commission, in its discretion, should grant the application based thereon. The procedure adopted by the Commission, in dealing with such applications, has been, to recite, in the first place, the receipt of the application and the additional evidence offered in support of it, and then to state, in substantially the following form, that —

> Although the rules of this Commission, conforming to the practice of international commissions, make no provision for a rehearing in any case in which a final decree has been made, nevertheless, the application and evidence submitted in support thereof have been carefully considered by the Commission.

It so happens that hitherto in all the cases, in which rehearing petitions have been filed, except those in which the two Agents agreed to a reopening, as hereinafter mentioned, the Commission has found that the grounds upon which they rested did not warrant reopening the case, or amending the terms of the decision, and the application in all such cases has been dismissed on that ground.

The first case in which this question was presented was decided by the Umpire on August 31, 1926. In that decision the procedure above stated was adopted, and has thereafter invariably been followed both by the Umpire and by the national Commissioners in dealing with similar cases.

It seems clear that if the Commission had been of the opinion that under no circumstances was it at liberty or empowered to reopen and reconsider a decision already made it would not have entertained, even tentatively, a petition for reconsideration, but would have dismissed it as a matter of course without examining or considering the grounds upon which it was made.

No question or objection to this mode of procedure was ever raised by either Agent until the question of reconsidering the Commission's decision in the so-called sabotage cases arose in January, 1931. The German Agent, in opposition to the American Agent's petition for a rehearing in those cases on newly-discovered evidence, objected on the jurisdictional ground that the Commission was without authority to admit the further evidence then offered, or to grant a rehearing on the basis of such evidence or any other evidence, after the claims had been dismissed by the Commission.

The German Agent based his objection primarily on the ground that under the Agreement establishing the Commission it had no inherent jurisdictional powers which would justify a revision of a decison once made, and that, apart from any question of inherent powers, the Commission's jurisdiction on this point was restricted by the above-quoted provision of Article VI that " The decisions of the commission and those of the umpire (in case there may be any) shall be accepted as final and binding upon the two Governments ". He also asserted, in support of his contention, that in all cases in which any revisions or corrections of decisions had been made this action had been taken

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with the consent of both Agents, acting for their respective Governments, and, therefore, did not contravene his contention.

The American Agent, on the other hand, contended that, considering the purpose for which the Commission was established and the character of the duties imposed upon it, all authority necessary or appropriate to carry out its work must be regarded as having been conferred upon it. On this basis, he insisted that, inasmuch as the fundamental purpose of its creation was, as recited in the preamble to the Agreement, to determine " the amount to be paid by Germany in satisfaction of Germany's financial obligations " under the Treaty of Berlin, the individual and separate claims were each a part of Germany's entire financial obligation to be determined by the Commission, and until the total obligation was established no award or decision as to the component items could be regarded as final, but meanwhile was always subject to revision. [1]

The American Agent also contended that the Commission had inherent power to organize its work and procedure in any appropriate way which seemed to it advisable for the purpose of aiding in efficiently and expeditiously performing its duties, and that unless the Commission had rendered decisions as rapidly as they could agree on them it would have been utterly impossible to make any headway in dealing with the gigantic task of disposing of 20,000 claims. Nevertheless, in adopting this plan of procedure, the Commission necessarily had to hold in reserve the right to reconsider and revise any decision which, as the Commission proceeded through the mass of claims, seemed to be inconsistent with information later acquired or with more mature views later adopted in other cases. He, therefore, concluded that no decision was unalterably final until the work of the Commission was finally completed.

It so happened that before this issue arose the Commission had undertaken to lay down a series of rules for the guidance of the Agents on its attitude in regard to accepting new evidence as a basis for reconsidering decisions. These rules were set out in the Commission's decision dismissing a petition for rehearing in the case of the Philadelphia-Girard National Bank claim (Commission's Decisions, page 939). [a]

Only two of these rules have any bearing on the present question, and they were:

" Where it appears that manifestly the Commission committed an error in its findings of fact on the evidence produced by the Agents at the time the claim was submitted for decision, or in applying the principles of law and the rules of the Commission as established and applied in its previous decisions, the Commission will take under consideration the question of reopening or changing the award.

" On the other hand where a rehearing is demanded *merely* on the ground that by reason of newly submitted evidence the underlying facts were different

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[1] The decision of the Commission as announced by the Umpire with the concurrence of both national Commissioners in *The Lusitania Cases* said (printed Decisions and Opinions, page 30):

" The United States is in effect making one demand against Germany on some 12,500 counts. That demand is for compensation and reparation for certain losses sustained by the United States and its nationals. While in determining the amount which Germany is to pay each claim must be considered separately, no one of them can be disposed of as an isolated claim or suit but must be considered in relation to all others presented in this one demand. In all of the claims the parties are the same. They must all be determined and disposed of under the same Treaty and by the same tribunal. * * * "

(*Note by the Secretariat*, Vol. VII, p. 42.)

[a] *Note by the Secretariat*, this volume, p. 69.

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from those appearing in the record as submitted at the time of the decision, the Commission will not grant a reopening or a reconsideration of the award."

This decision, in which these rules were announced, was dated April 21, 1930, and at that time the Commission thought it had practically finished its work, and this set of rules was intended to serve as an aid to the Agents in bringing the work of the Commission to a conclusion by discouraging petitions for rehearings, rather than as an administrative decision dealing with a jurisdictional question. This question had not, at that time, been presented and argued by the Agents, nor had the Commission had occasion to pass upon it in any submitted claim. This situation accounts for the rather incidental way in which these rules were announced. As the decision itself shows, the rules stated therein did not control or influence the conclusions reached by the Commission in dismissing the petition in that case. Accordingly, they did not have the authority of a decision by the Commission on an issue argued and submitted by the Agents, and did not establish a precedent which the Commissioners would have felt called upon to follow in latter cases if they had applied it in the decision of an earlier case.

At this point it will be convenient to examine the principle on which these rules rested and some of the implications arising from them.

Basically they assume an authority on the part of the Commission to determine, in its discretion, whether or not it will reconsider a decision, which implies jurisdictional power in the Commission to do so, if in its judgment that should be done. That consideration would seem to establish that in the opinion of the Commission, at least, it had jurisdictional power to reconsider its earlier decisions.

In further support of that view, it will be noted that the rule against reconsideration deals only with cases where the " rehearing is demanded *merely* on the ground " that the newly-submitted evidence changes the underlying facts on which the decision was made. Nothing is said by the Commission about what its attitude would be if the new evidence disclosed misrepresentation or fraud as to the facts, or the suppression of material evidence. No case presenting such considerations was under consideration by the Commission at that time, and it did not have such a situation in mind in announcing that rule, which applied more particularly to the consequences arising from delay or neglect on the part of the claimants in presenting their claim, rather than to the more serious question which would arise under the other circumstances above suggested. By announcing that rule the Commission certainly did not intend to preclude itself from taking different action if a different set of circumstances demanded different treatment in the interest of justice and equity, or if the Commission had been imposed upon.

The implication of those rules was not that the Commission was without authority to reconsider, but that there were certain circumstances in which it might exercise its authority, and other cases in which it would not be disposed to exercise that authority, which clearly indicated that, in its opinion, the exercise of that authority rested in the discretion of the Commission.

It may also be noted, in passing, that those rules did not apply to the so-called " late claims " submitted to the Commission by the Agreement of December 31, 1928, between the two Governments. This is shown by the statement introducing those rules in the decision, that they had " general application to petitions and requests for rehearings as to the *claims originally* listed ". This exclusion of " late claims " from the application of those rules calls attention to a significant difference between the jurisdiction of the Commission under the earlier Agreement and under the later Agreement.

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Under the later Agreement the Governments expressly stipulated that " late claims " must be presented to the Commission " *with the supporting evidence* within six calendar months from the first day of February, 1929 ". The Commission ruled that this provision precluded it from receiving any *supporting evidence* for any purpose after the period thus fixed.

Under the earlier Agreement of August 10, 1922, which applied to the sabotage claims, no time limit was set for the presentation of evidence or the final submission of claims to the Commission for decision. It merely provided, in Article VI, that " The commission shall receive and consider all written statements or documents which may be presented ", etc. In applying this provision, the Commission ruled that it was not at liberty to fix a time limit within which a claim must be submitted, and could not refuse to receive new documents or written statements offered by either side even after a claim had been formally submitted for decision. Under the authority of this provision, such new evidence was actually received by the Commission on application by the German Agent after the first oral argument and submission of the sabotage cases at the session in Washington in April, 1929. It must be observed, however, that this ruling did not deal with the question of the introduction of new evidence after the Commission had actually rendered a decision, which question, as herein elsewhere stated, was always reserved for special consideration.

The chief significance of this difference in the two Agreements is that it shows that when the Government desired to place a limitation on the jurisdiction of the Commission they put it in the Agreement.

At the time those rules were announced there was no case pending to which they applied, and neither Agent discussed them with the Commission.

Later on, after the rehearing petitions in the sabotage cases came up in January, 1931, both Agents argued about those rules at some length, seeking to interpret them in support of their respective contentions. The Commission, desiring to determine this question on a basis of principle, rather than on an interpretation of those rules so casually announced, addressed a letter to the Agents, under date of March 30, 1931, indicating that, whatever purpose those rules were intended to serve at the time they were announced, they were " not irrevocable " and should be disregarded in discussing the question of revision then under consideration. [1] They added, " it is desirable that argument addressed to the question should be devoted not to the interpretation of that language but to the principle itself ".

Subsequently, at the session held by the Commission in Boston in July-August, 1931, to consider the reopening petition in the sabotage cases, the Commission permitted the submission, provisionally, of a quantity of new evidence, and heard extensive oral argument of both sides on the question of the merits of the claims as well as on the question of jurisdiction to reopen.

No decision on this question was announced by the Commission at that time, and since that hearing the Commission has not only received, but has expressly invited the submission of, new evidence in the sabotage claims, produced at considerable expense by both sides, and at a session in Washington in November, 1932, heard oral argument on the issues presented, involving not only the jurisdictional question of its right to reconsider the original decision but also the merits of the claims as affected by the new evidence.

[1] On this point attention is called to the fact that the Rules as originally adopted on November 15, 1922, contained at the end of Rule VIII the provision that " The decisions in writing (1) of the two Commissioners, where they are in agreement, otherwise (2) of the Umpire, shall be final ", but this Rule was revised on February 14, 1924, and this provision was stricken out.

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Throughout the proceedings of the Commission, while the question of reconsidering its decision in the sabotage cases was pending, the Commission carefully refrained from any formal announcement of its opinion on the jurisdictional question. The German Agent's position was noted in the record, and the proceedings of the Commission were explicitly stated to be without prejudice on this question, which was specifically reserved for decision at the close of the proceedings.

The foregoing is a full and impartial exposition of the attitude and record of the Commission on the question of its jurisdictional power to reconsider a decision, as the record stood, down to the time of the argument and the submission of that question to the Commission at its session in Washington in November, 1932.

In the argument at that Washington session both Agents again discussed this jurisdictional question, and the Umpire, in the course of the argument (transcript, page 787 [printed, transcript, page 244]), clarified that issue in the following dialogue with the German Agent:

"THE UMPIRE. What I understood and what we all understood the German Agent to suggest was that he presents to this Commission the proposition that its construction of the *treaty* should be that it has no power now to rehear this case. I did not understand him to take the position that the Commission could not consider the question of its own jurisdiction. If he desires to clear that question, he may do so.

"THE GERMAN AGENT. The understanding of the Commission is entirely correct.

"THE UMPIRE. In other words, that is a justiciable question here.

"THE GERMAN AGENT. Yes."

The American Agent agreed with the German Agent on this point. Accordingly, the Commission had an authoritative statement from the official representatives of both Governments that the question of the power of the Commission to receive new evidence and reconsider a decision already rendered was a justiciable question, the decision of which was within the jurisdiction of the Commission.

It will be recalled that the Agreement establishing this Commission was made between the Executive branches of the two Governments, and did not have the status of a treaty. It could, therefore, be interpreted or amended by similar agreements between the Executive branch of the Governments, and it was that branch of their respective Governments for which the two Agents were the spokesmen in stating their understanding of the jurisdiction of the Commission to determine its own jurisdiction on this point.

The German Commissioner apparently disagreed with his Government on this point, as appears from his reservation of it from submission to the Umpire in the national Commissioners' certificate of disagreement. He there stated that "the German Commissioner takes the position that the question of the jurisdiction of the Commission to re-examine any case after a final decision has been rendered is not a proper question to be certified to the Umpire on disagreement of the National Commissioners and reserves that question from this certificate".

Just what the German Commissioner meant by this reservation is not clear, and is subject to explanation, but, in the opinion of the American Commissioner, neither of the national Commissioners has the authority to overrule or disregard an agreement made by the two Governments as to the jurisdiction of the Commission, and the two Governments certainly have agreed in this point, as evidenced by the above-quoted statement of the German Agent in oral argument, concurred in by the American Agent.

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There is one more point to be noted in support of the position that the Commission has the right to reconsider a decision as a matter of jurisdictional authority. This point arises from the fact that there is no provision in the Agreement of August 10, 1922, which limits or prohibits that right. The Commission was established by that Agreement without limitation or condition as to its authority to carry out the duties assigned to it, except the conditions which were embodied in the provisions quoted at the outset of this discussion. In none of those provisions will be found any condition or even a suggestion that the method and procedure, or the basis of judgment, to be adopted by the Commission in performing its duties did not rest wholly in its own discretion. It is true that the German Agent contends, as above indicated, that the stipulation in the Agreement as to the finality of the Commission's decisions precludes the reconsideration by the Commission of any decision rendered by it. In the opinion of the American Commissioner this stipulation is addressed to the two Governments, rather than to the Commission, and applies only to decisions which the Commission itself, after the exercise of its judicial and discretionary powers, regards as no longer subject to revision, or by reason of its final termination is no longer in a position to deal with. [1]

On the other hand, the rules adopted by the Commission pertain to remedies, rather than rights, and were addressed by the Commission to the Agents and claimants as an expression of its attitude on matters wholly within its jurisdictional powers. [2]

As showing the wide discretionary powers conferred upon the Commission, it will be noted that the members of the Commission were not required to take an oath of office, as usually is exacted in international arbitrations, that they would render their decisions in accordance with the principles of international law, or justice, or equity. It is true that treaty interpretation, rather than international law, ruled the greater part of the decisions of the Commission on the claims submitted, but the fact remains that the Commissioners were entrusted with the interpretation of the Treaty without any limitations whatsoever, and treaty interpretation involves many important questions of international law. The two Governments recognized that the Commission must necessarily be a law unto itself in this unexplored area, and relied wholly on the sound judgment and sense of justice of the Commissioners in establishing what might be called the " law of the Commission ".

In this respect the Commission is unique among international claims commissions, and, for that reason, must be regarded as standing in a class by itself. Arguments as to its powers drawn from the proceedings of other claims commissions differently conditioned and organized are of no value here, and those advanced by the Agent of Germany based on precedents found in the procedure of other commissions, accordingly, do not require consideration.

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[1] See footnote 5.

[2] As said in Administrative Decision No. V (printed Decisions and Opinions, pages 186-187):

" * * * 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 therunder. * * * " (*Note by the Secretariat*, Vol. VII, p. 149.)

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The American Commissioner finds, accordingly, that the Commission has, and was intended by the two Governments to have, extraordinary and extensive powers far beyond those specifically mentioned in the Agreement establishing it. These extraordinary powers are inherent in the entity thus established, and comprise any and all authority necessary and appropriate for carrying out its duties, and the Commission may determine in its own discretion the extent of these powers and how they shall be exercised, subject always to whatever limitation or control the two Governments may impose by joint agreement between themselves.

As yet, the two Governments have not agreed to any limitation of the Commission's power to reconsider decisions, but, on the contrary, have, through their official representatives before the Commission, affirmed that this question is a " justiciable question " within the jurisdiction of the Commission to determine for itself. In other words, it rests in the discretion of the Commission to decide whether or not any decision should be reconsidered on new evidence or argument submitted on a petition for rehearing, or on its own motion if it finds that it has been imposed upon.

The American Government has already expressed its opinion on this point through Secretary of State Stimson, who stated, in a letter to the Secretary of the Treasury dated February 16, 1933, " In my opinion, it is solely within the competency of the Commission to decide as to the reopening of cases which have been heard and adjudicated by it."

In conclusion, the American Commissioner is of the opinion that the rules announced in the Philadelphia-Girard National Bank case decision do not apply to the question under consideration, and also that, as already stated by the Commission, they, like any other rules adopted by the Commission, were subject to revision and were not irrevocable. Furthermore, it should be made clear that the Commission will consider new evidence in support of a rehearing petition showing misrepresentation or fraud as to the facts or the suppression of material evidence, or that the Commission has otherwise been imposed upon, or that new evidence not previously available has been discovered which would justify a different decision.

In such cases the Commission has the power, and will exercise it in its discretion, to reconsider a previous decision. This right to reconsider should be applied only to a limited and special class of cases. It may be noted, however, that the Commission, by its previous careful and well-considered action in dealing with matters entrusted to its discretion in these proceedings, has abundantly demonstrated that it will not abuse its discretionary powers in dealing with reopening petitions. It will be recalled that it has not as yet granted any such petition. It may also be noted that the American Agent has effectively cooperated with the Commission in its efforts to complete the work of the Commission as promptly as possible, by refusing, on his own responsibility, to present several hundred applications for rehearings which he considered were not well-founded.

The Commission cannot announce in advange any general rule as to how this right will be exercised because that would depend in each case on whether or not the facts presented satisfied the Commission that in its discretion the right should be exercised.

This procedure is consistent with the course hitherto followed by the Commission in dealing with rehearing petitions. Any other course would amount to criticism and repudiation of its previous action. Unless the Commission had the right to reconsider a decision, it was absolutely without justification for hearing two extensive and very expensive re-arguments in the sabotage cases, which have prolonged the life of the Commission for upwards of two

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years, at considerable expense to both Governments and, incidentally, great additional expense to the American claimants in procuring the new evidence submitted. In the opinion of the American Commissioner the Commission would not, and should not, have adopted that course unless the Commission believed it is authorized to revise its decision in these cases if the new evidence and arguments presented justified that action.

Chandler P. ANDERSON
American Commissioner

Washington, June 21, 1933.

Opinion of the German Commissioner on the Question of Reopening

The question whether this Commission has the power to reopen a case has fully and thoroughly been dealt with by the two Agents in some of their briefs in the so-called sabotage cases and in the oral argument held in Boston July 30, August 1, 1931.

After carefully having examined the arguments proffered from both sides I wish to state my opinion as follows:

In dealing with the issue now before the Commission it must be kept in mind, that this Commission is an *International* Commission, an International Court. Therefore as to its rules undoubtedly no principles specifically American apply.

Even if from reasons unknown to me every court in the United States — Federal as well as State Court — would be considered as having the " inherent power " to reopen a case, such power would have no bearing whatever on the question whether an *international* Court would have the same right. There is no doubt that in Europe at least no continental Court of the leading nations and certainly no Court in Germany has such power except when and where it is transferred to it by a special legislative act or provision. But even as to the power said to be " inherent " in the courts of the United States, the convincing force of the argument offered by the American Agent is strangely weakened by an instance so much relied upon by himself: the instance has been taken from the law of California and the Report by the Law Enforcement Commission.

The reason that in the wellknown Mooney and Billing case the Californian Court declined a petition for reopening and that said Commission took exception to this result, was not because the Commission thought the Court had violated the law by denying its right to reopen, but because it thought the legislation of the State California *should have provided* for a law transferring such power to the court.

Hardly a better illustration of the nature of the American Agent's error can be found: the right to reopen is not a power inherent in the court, but a power inherent in the sovereignty *of a State* to establish such right and to authorise a court to do so under the conditions and modalities the sovereign thinks fit.

Without such authorization no court neither in the United States nor anywhere else has a right to reopen.

And no international court can claim such right but by the authority from those powers which called it into life.

Here again the American Agent erred when from the fact that some of the Mixed Tribunals created by the Treaty of Versailles have provisions dealing with a possibility to reopen he concluded that such power must have been inherent in those courts, and he committed a further error when he reached the conclusion that *therefore* such power was also vested in this Commission.

The German Agent has already pointed out, that those tribunals had especially *transferred* to them the *power* to make their own rules by the Treaty of

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Versailles and that under the authority of the power thus transferred the court by *unanimous* decision adopted such rules which thereupon *were approved* by the Powers concerned and published in the official Journals destined to promulgate the legislative acts of said Powers.

Moreover the instances as cited by the American Agent show that the courts considered it necessary to make a special provision in order to establish the right of reopening and that f.i. the Anglo-German Tribunal, making such provision in the year 1925, was far from making it retroactive, thus clearly showing that it did not consider such right to reopen as an inherent right applicable therefore to all cases brought before it, but as a right which could only be brought into effect by a specific provision (under the authority of the provisions of the Treaty of Versailles) and which therefore could be applied only to cases not yet decided by the tribunal and therefore *not* being " *res judicatae* ". Moreover a more thorough examination of the nature of the alleged " inherent power " of a court and especially of this Commission will show that the question so generally formulated and so broadly dealt with by the American Agent comprises a rather considerable number of " sub-questions " — which it will be necessary to examine separately.

1. The theory of an " inherent power " of a court to reopen a case is not borne out by the instances offered by the American Agent even as far as American domestic courts are concerned. As already pointed out, courts are *created*. Created by an act of legislation, deriving their authority from the sovereign power of a nation, represented in a written or unwritten constitution. Thus it is a *derivative* power exclusively depending on the volition and intention of its sovereign.

To show that a court has a certain power means therefore the obligation to show that such power was transferred to it (thus f.i. power and scope of its jurisdiction etc.). Such transfer could be made either by the act creating the courts, transferring thereby a specific right to a court as such or by a special act of legislation.

In either case it needs a specific provision. Therefore it would need a clear and unambiguous proof that a right, as f.i. a right to reopen, had been transferred to it. But this is exactly the opposite to what the American Agent considers to be an " inherent " power of a court.

Obviously the legislative policy as to the scope of the powers to be transferred to a court will vary in several nations and actually differ very much. No reason whatever therefore exists to conclude from the fact that one state provides by its legislation for a reopening measure, that *therefore* other nations did the same.

Moreover even if two nations should have made similar provisions in that regard for their domestic courts that would never justify the conclusion that *therefore* an international court created by those two nations must necessarily have the same power. Here again it needs a specific creative act, to wit the clear and unambiguous volition and intention of the two sovereign Powers concerned to vest in an international court created by them such power.

No argument is necessary to state that in the Agreement of August 1922 no provision exists authorising the Commission to reopen a case. Yet the Agreement of August 1922 is the only charter of this Commission as to its rights to proceed.

The right to reopen is therefore not transferred upon this Commission. (This does not mean that the Commission or the *two national* Commissioners might not *unanimously* agree to *correct* a decision, as I will discuss under No. 7.)

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2. But even if the authority to reopen would have been transferred to the Commission it still would be within the volition of the Commission whether it would be willing to *use* such authority or not.

In that case the Commission had to say so, which means that it had to make the right to reopen a specific part of its rules.

But no such provision has been made.

Instead the Commission has already and unambiguously expressed its will to the contrary.

It has done so in its decision on the Petition to Reconsider an Award in the case United States of America on behalf of Philadelphia-Girard National Bank, Claimant *v.* Germany and Direktion der Diskonto-Gesellschaft, Impleaded. Docket No. 7531, List No. 2729.

The Decision reads as follows:

" In this case a final award was entered by the Commission on April 3, 1929. A Petition for the Reconsideration of this award, signed by the claimant and presented through its attorneys to the American Agent, has been submitted to the Commission together with certain additional evidence and a printed Memorandum in support thereof, dated August 7, 1929, and prepared by the private counsel for the claimant.

" Although the rules of this Commission, *conforming to the practice of international Commissions*, make no provision for a rehearing in any case in which a final decree has been made, this Petition and the supporting Memorandum and evidence have been carefully considered by the Commission.

" Before taking up the questions raised by this Petition, the Commission desires to announce certain principles having general application to petitions and requests for rehearings as to the claims originally listed, by which the Commission will be guided in dealing with this and other similar applications.

" Where it appears that manifestly the Commission committed an *error* in its findings of fact on the evidence produced by the Agents *at the time the claim was submitted for decision,* or in applying the principles of law and the rules of the Commission as established and applied in its previous decisions, the Commission will take under consideration the question of reopening or changing the award.

" On the other hand, where a rehearing is demanded merely on the ground that by reason of newly submitted evidence the underlying facts were different from those appearing in the record as submitted at the time of the decision, the Commission *will not grant a reopening or a reconsideration of the award.*

" The reconsideration of a claim after a final decision has been rendered would mean that the whole case would have to be dealt with anew. The new evidence submitted would have to be brought to the attention of the opposing party, which would have to be given a reasonable time to investigate and file additional or rebuttal evidence on its side, and also an amended answer or a reply, if that was found to be necessary, and then the whole case would have to be reexamined and decided again. All of these consequences would result from the failure or neglect of the moving party to produce the additional evidence before the claim was originally submitted for the decision of the Commission.

" Moreover, if the production of new evidence by a party would give the right to have the whole case reopened, such right would necessarily attach not only to every claimant whose claim had been submitted and decided, but also to the respondent in each case as well.

" If such a right were granted and exercised at this advanced stage of the proceedings of the Commission, it would affect awards which have already been paid, and, apart from the confusion resulting from such procedure, it would be clearly contrary to the express wording and manifest purpose of the Agreement of August 10, 1922, between the United States and Germany. According to that Agreement the decisions of the Commission are accepted *as final and binding upon both Governments*, and, inasmuch as the governments are primarily the parties in interest, the private claimant, on whose behalf the Government of the United States has finally submitted a claim for decision, cannot be given the right to alter

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or nullify this situation by producing new evidence changing the status of the claim as submitted and decided.

" It is also pertinent to consider that most of the applications which have been made for rehearing have arisen in cases in which the Commission has pointed out wherein the claimant has failed to furnish evidence sufficient to establish the liability of Germany under the Treaty of Berlin, as interpreted by this Commission, and to grant a rehearing in those cases would mean a great injustice to the great majority of the claimants whose claims were dismissed by the Commission without indicating wherein the evidence submitted was insufficient, and, who, therefore, have been unable to discover new points of attack. *It may also be noted that in no case, as yet, has the Commission granted an application to reopen a claim in which a final decision has been rendered.*

" The Commission will not consider questions of law, which have been settled in its earlier decisions, as to the jurisdiction of the Commission and the liability of Germany, under the Treaty of Berlin and the Agreements of August 10, 1922, and December 31, 1928, between the United States and Germany, as interpreted by this Commission.

" The law of the Commission, as established in its earlier decisions, will control the decisions of the Commission in all later cases." (All italics mine.)

This decision plainly shows that the Commission had *never* the intention to apply a rule of reopening to its procedure.

3. Moreover it shows that the whole question of reopening is *res judicata*; it has already been passed upon by the Commission and is " final and binding ".

4. But even assuming for a moment and for argument's sake that the Commission had the power to reopen and were now willing to use it, yet it never would be authorized to make such rule *retroactive.*

If there exist principles of a legal nature common to all or the larger part of civilized nations, they are that a law or a rule must be clearly expressed to make it applicable and that no law whatsoever shall be retroactive except when especially made so by the act creating said law.

Now, here again it needs no argument, that this Commission has no power transferred upon it to make rules retroactive.

Therefore even if this Commission had the power to provide for a reopening it could not reopen a case but after having made a special rule providing for such right and moreover it could not make such rule retroactive.

5. Thus the Commission would have no power to reopen, let alone a power to retroactively provide for a reopening even if the Agreement of August 10, 1922 would be silent as to the legal effect of the Commission's decisions.

But the Agreement is far from such silence. Instead it expressly states in a formal and solemn way that " the decisions of the Commission shall be accepted as *final* and *binding* upon the two Governments " (italics mine). If language can be clear and unambiguous, this language is.

Moreover we know that from the very beginning both Governments were anxious to expedite the Commission's work as much as possible. At the same time therefore, when they made the Agreement of August 10, 1922, they further agreed to limit the time for filing claims with the Commission to a rather short period thus clearly indicating what their conception of the Commission's task was.

6. As I tried to show, under the principles controlling the procedure of this Commission even an unanimous decision be it of the two Commissioners alone or be it of the two *and* the Umpire cannot establish a right to reopen.

But assuming for argument's sake that the Commission by an unanimous vote would have the authority to provide for a rule to reopen a case, such authority would not meet the question, whether such rule could be established

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by majority vote or — what comes to the same — by the Umpire alone if the two national Commissioners disagree.

Theoretically the only possibility would be that under Article II of the Agreement the Umpire were called upon to decide the issue.

But this would not only mean that the Umpire had to pass upon the principal question of the " inherent power " of the Commission as well as of its retroactive effect. Beyond that it would mean that assuming that on those two questions his findings would be in favor of the American Agent he had to pass on all cases reopened, whenever the national Commissioners disagree.

Thus by the simple means of producing " new evidence " a case already decided by the national Commissioners could be brought before the Umpire.

Now under the Agreement wherever the two national Commissioners agreed upon a decision the Umpire has no jurisdiction, and actually in innumerable and important cases the Commissioners have agreed on awards without the cooperation of the Umpire though in many cases from sound and good reasons he has been sitting with the Commissioners — if for no other reason, yet for the purpose of expediting the work and of avoiding in cases where the Commission ordered an oral argument, an unnecessary duplication of the argument should the national Commissioners disagree.

Now under the American Agent's theory the right to reopen a case — or even to reopen a decision denying a reopening — is inherent in any case and numerous are the instances where he has attempted to exert this " right ".

Consequently even in those cases in the decision of which the Umpire has not participated, the question whether a petition for reopening should be allowed would have to be decided by him wherever the two national Commissioners should disagree on that question.

That would mean that the Umpire had to examine and consider the " new evidence " adduced or the argument made in support of a petition for reopening even in such cases wholly unknown to him (and those are by far the majority) in the adjudication of which he did not participate and in which he might differ from the findings of the two national Commissioners be it with regard to the legal or to the factual basis as presented at the time of the decision though such basis is also binding upon him under the provisions of the Agreement.

From a logical point of view there is no reason why the Umpire if he has a right to consider a case on the ground of facts newly submitted should not have the same right on the ground of a legal argument newly presented.

Thus he could change the Commission's rules.

And he could even do so in cases where the Umpire acting at the time of the decision had concurred in such decision.

Since in consequence of death the Umpire has changed several times during the work of the Commission and since the present Umpire has not taken office but after almost all cases had been decided, this would mean that a new man, wholly unfamiliar with the motifs and considerations which guided the former Umpire in joining the Commission's decisions would have to answer the question whether the so asserted " new evidence " be of such kind that if produced at a time prior to the decision it would have influenced and modified it.

To point out these consequences is to prove the utter impossibility.

Moreover such procedure would mean that in cases passed upon by both Commissioners — and therefore " *final and binding* " upon the two Governments — the case could be brought anew to a trial by the simple means of a petition of reopening, if such petition could be brought to the cognizance of the Umpire in case of a disagreement of the Commissioners and if then the Umpire should allow such petition.

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Thus the question of the right to reopen a case already decided by the concurrence of the two Commissioners involves also the "subquestion" whether in case of dissens of the two Commissioners on the reopening question the Umpire by *his sole authority* can have the power to pass on the merits of such case and eventually to reopen it.

That this cannot be the meaning of the Agreement seems to me undeniable.

7. It is hardly necessary to explain here that the Commission's practice to alter a decision wherever it found that an error in its findings of fact *on the evidence produced* at the *time the claim was submitted* or in applying the principles of law and the rules of the Commission had influenced the decision, has nothing whatever to do with the question of reopening on the ground of *new evidence*. In pursuance of this practice the Commissioners have acted *unanimously*. Moreover they left the *basis* of their decision to wit the facts as produced and the law and rules applicable thereto *unchanged* and merely were willing to correct their *conclusions* derived therefrom.

I more than doubt whether the Agents be it by mutual consent be it on their separate volition had ever a *right* to ask for such alteration. But certainly it was practical and sound that the *Commission* adopted this procedure. And it is significant that actually the Commission never changed a decision except with the consent not only of both Commissioners but also of both Agents.

8. This leads to the question also ignored in the argument by the American Agent whether under the assumption that the Commission as such could reopen a case because of new evidence, such power would be vested in it even if not only one of the Commissioners *but also* one of the *Agents* would oppose such measure.

That such *ex parte* measure would not only be outside of the provisions of the Agreement but also outside of any law be it national be it international, is so manifest that no further reasoning is necessary to refute it.

In my mind all these reasons stand so obviously *against* not only the right of the Commission to reopen a case but also against the right of the Umpire to reopen on his sole authority a case already decided by the two Commissioners that according to my opinion the petition of the American Agent must be denied.

Hamburg, 6 Mai, 1933. W. KIESSELBACH

The undersigned, accordingly, certifies to the Umpire of the Commission for decision the questions of difference between the national Commissioners arising out of the pending petition in the sabotage cases, and as shown by this certificate of disagreement and by the respective opinions, above set forth, with reference to that petition.

Done at Washington, October 21, 1933. Chandler P. ANDERSON
American Commissioner

Washington, D.C., November 22, 1933

The Honorable Owen J. Roberts,
Justice,
Supreme Court of the United States,
Umpire, German American Mixed Claims Commission,
Washington, D.C.

Sir:

In accordance with your statement at the close of the meeting of the Commission October 31, 1933, which was recorded in the minutes as follows:

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" it is understood that it is the position of the German Agent that he is not authorized to take any part in this proceeding, and the Umpire further stated that the Umpire will be entirely willing to receive any observations or representations the German Agent may wish to make in the pending matter and he is willing to receive such as in the nature of a special appearance as not conceding anything and without prejudice to the position of the German Agent's Government before the Commission,"

I have the honor to submit to you herewith certain observations of Dr. Wilhelm Kiesselbach, the German Commissioner, which were sent me by cable through the intermediary of the German Foreign Office.

Believe me,

Yours very sincerely,

Dr. Joh. G. LOHMANN
German Agent

[Additional Opinion of German Commissioner.]

I wish to add to my opinion of May 6, 1933 the following:

From the very beginning my view has been that a distinction must be made between a court on which the power to reopen has been conferred and a court which has no such power.

In the first alternative the court would in its discretion have authority to reopen a case even if one of the parties concerned objects.

In the second alternative the court has no right whatever to reopen if one of the parties objects.

The agreement of August 10th, 1922, does not confer such authority upon the Commission. On the contrary, from the clear and unambiguous wording of Art. 6, paragraph 3 it appears that the *decisions* (not the decision) of the commission shall be final and binding upon the two Governments. If nevertheless a petition for reopening is filed the Commission is bound to pass upon it, but to deny it, if and as far as one Government opposes it.

Already in July 1928 I have stated this opinion of mine in a memorandum[a] to the other members of the Commission in connection with a petition for rehearing. So far my memorandum reads as follows:

" Under our charting an award is binding upon both Governments. Only when the Commissioners disagree the Umpire comes into action. But here both Commissioners have agreed upon the award and the Umpire, though having joined the Commissioners' decision, has not acquired jurisdiction. It is therefore to the Commissioners, and to the Commissioners only, to pass upon the motion of a second rehearing. Whether they can grant such motion by mutual consent is — under the provision of the August Agreement — a very close question. But it seems clear to me that not one of them can do so against the protest of the other. And it seems further to be clear that in case of such a dissense the lack of the right of a single Commissioner to grant a rehearing cannot be supplemented by transferring this question to the jurisdiction of the Umpire's."

I have no doubt that this is also the view of my Government as clearly stated in the letter of the Embassy of October 11th and as I know for certain, this was also in the mind of the German Agent when answering the Umpire's question in the last Washington argument. And the same view was taken by me with regard to the Umpire's decision of December 3, 1932, which did not imply a decision on the question of reopening.

From the foregoing it clearly appears that at least from my viewpoint the rules of the Commission do not imply the Commission's authority to reconsider

[a] No such memorandum in the records of Commission, see pp. 1111 *et seq.* (*Note by the Secretariat*, this volume, pp. 179 *et seq.*)

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a case. On the contrary I never left any doubt that I thought a reopening impossible against an objection from one side. It was for this reason that I relied on the principal statement of the Commission's decision denying a petition for reopening as recited by the American Commissioner in his opinion Page 7 [p. 1090, this print],[a] saying that the rules of this Commission conforming to the practice of International Commissions make no provision for a rehearing. A statement which seemed to me the more clear and unambiguous as it referred to the practice of international Commissions that is to the side of the principle of the question.

If nevertheless the Commission dealt with the merits of the case that was done, as I understood it, in order to soothe the feelings of the parties concerned.

This is what I have to add to my opinion dealing with the question of the power of this Commission to reopen a case. It is unnecessary to say that my argument is still stronger if we have to deal, as is the case here, with the question of reopening a case dismissed not by one but by two decisions rendered on it.

KIESSELBACH

Supplemental Opinion by the American Commissioner

In the proceedings now pending before the Umpire on the question of the jurisdiction of the Commission to reconsider its decisions in the so-called sabotage cases, each of the national Commissioners has filed his opinion in support of their respective contentions as to the questions in disagreement, and the German Commissioner has now filed with the Umpire, on November 22, 1933, an additional opinion in reply to the original opinion filed by the American Commissioner.

In reply to this additional opinion, the present memorandum by the American Commissioner is now filed with the Umpire as a supplemental opinion.

The German Commissioner states at the outset of his additional opinion that it is an addition to his opinion of May 6, 1933, already filed with the Umpire. At the time the German Commissioner's original opinion was filed, he stated in his letter of May 5, 1933, to the American Commissioner (see minutes of meeting of October 31, 1933 [1] that he was under instructions from his Government " to bring now the question whether or not our Commission has the right to reopen, to a final decision ". He, therefore, inclosed a copy of his opinion, but reserved the right to amend and supplement it if the American Commissioner should prepare an opinion in disagreement, and he suggested, " in order to expedite the matter ", that such opinion should be sent to him by the American Commissioner with a Certificate of Disagreement, to be signed and returned by the German Commissioner together with his final opinion.

This proposed procedure has since been carried out, and now that the German Commissioner's opinion is in final form, as supplemented by the recent addition thereto, and the American Commissioner does hereby file his supplemental opinion in reply, in accordance with the reservation noted by him, the questions at issue between the two national Commissioners are now finally before the Umpire with authority to render the decision of the Commission thereon.

Inasmuch as the German Commissioner's additional opinion now under consideration is, as above noted, merely an addition to his original opinion, its purpose must be understood to be the same as that of the original opinion, which, as above stated, was to bring " to a final decision the fundamental

[a] *Note by the Secretariat*, this volume, pp. 164-165.

[1] See Appendix. (*Note by the Secretariat*, this volume, Appendix IV (A), p. 483.)

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question of whether or not our Commission has the right to reopen a final decision ".

Nevertheless, some confusion results from the position now taken by the German Commissioner in his additional opinion, to the effect that the Commission has not the right either through the national Commissioners, or, in case of their disagreement, through the Umpire, to determine its own jurisdiction on the questions presented, thus, apparently, abandoning his original position. In short, he wants the judgment of the German Government substituted for the judgment of the Commission on the question of its jurisdictional authority, and on this point the two Governments are in disagreement.

The German Commissioner frankly admits, although denying any authority to reopen, that " If, nevertheless, a petition for reopening is filed, the Commission is bound to pass upon it, but to deny it, if and so far as one Government opposes it ".

The only explanation which he gives of the uniform practice of the Commission in considering the merits of a case presented on a petition to reopen is that this was done " in order to soothe the feelings of the parties concerned ".

This idea of *soothing the feelings of the parties* does not appeal to the American Commissioner as a sufficient or even admissible basis for giving serious consideration to a reopening petition if in any event the Commission was bound to reject it. It is rather grotesque to suppose that if the Commission considered from the outset that it was without jurisdiction to reopen the sabotage decision, the feelings of the claimants would be soothed by being permitted and even encouraged to spend upwards of two years and many thousands of dollars in presenting evidence and arguments in support of their petition. Furthermore, the American Commissioner considers that this suggestion is a very serious reflection on the good faith and good sense of the Commission, and he rejects it as utterly without foundation so far as he is concerned.

Whatever may be the view of the German Government on this point, the American Commissioner has no hesitation in saying that so far as his Government is concerned he is confident that an expenditure of time and money " to soothe the feelings " of the claimants by a futile gesture would be characterized as an unwarranted and inexcusable extension of the scope of its functions and duties.

At the meeting of the Commission in Washington last November this very point was raised by the American Agent in his oral argument. He then said (Printed Record, Oral Arguments, page 243):

" There is a question which arises at the very threshold of these proceedings, and that is the jurisdictional question.

" The German Agent opened his remarks by reading a statement; I am not certain whether it is intended as an argument or a protest on the part of Germany to this Commission considering the jurisdictional question. I thoroughly understand his position, that he does not want to be considered as having waived the jurisdictional question by discussing the evidence. But as I listened to the reading of that document it occurred to me that perhaps there was more than that intended by that document.

" I am not sure what the attitude of Germany may be in reference to the jurisdictional question. I am not certain whether it is the attitude of Germany that it will not submit to this Commission jurisdictional questions for its consideration and determination. If that be the attitude of Germany, I think we should know it at the very beginning. I think we should have known it a year and a half ago. If that be the attitude of Germany, then all that has occurred during the past year and a half has been useless. If Germany takes the position that this Commission has no right to consider and determine the jurisdictional question, then this whole proceeding for the past year and a half has been little less than a farce.

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" If on the consideration and determination by the Commission of the evidence which has been submitted for a reconsideration of the decision of the Commission on October 16, 1930, the Commission should upon such determination decide that Germany is liable for both of these destructions, then, if Germany were to take the attitude that the decision of the Commission would not be binding on Germany, it means that Germany is simply submitting its evidence and considering these cases at the present time, but reserving to the end the position which the German Agent announced as the position of Germany, that this Commission has no jurisdiction or power to consider the question as to the right to reopen the case. I can hardly conceive that that is possible, and yet that may be what was intended by reading that protest at the very beginning of the argument."

Then follows the dialogue between the Umpire and the German Agent, quoted in the American Commissioner's original opinion, containing the explicit admission by the German Agent that the question of the Commission's jurisdiction is a justiciable question to be submitted to the Commission for decision.

The German Commissioner asserts that long before the question of reopening the sabotage decision arose he was on record as denying the authority of the Commission to reconsider a decision. The original decision in those cases was rendered in October, 1930, but he says, " Already in July, 1928, I have stated this opinion of mine in a memorandum to the other members of the Commission in connection with a petition for rehearing."

It may be noted in passing, although it is not regarded as of importance in the present discussion, that so far as the records of the American Commissioner, or of the then Umpire disclose, no copy of or reference to the memorandum mentioned can be found. The records show that the German Commissioner was in Hamburg at the date of that memorandum, so it could have been communicated to the other members of the Commission only by mail or cable, but the records of the American Commissioner show that only three letters passed between him and the German Commissioner during the Summer of 1928, and they were all of a distinctly personal nature. Moreover, it has not been possible to identify the case to which the memorandum referred. The only case which seems to resemble it is the Frank case, Docket No. 8130, in which an interlocutory award was made on March 13, 1928, and an order denying a motion to reopen was entered June 14, 1928, and a final award was entered January 31, 1929. But the Umpire did not participate in entering either the order or the award in that case, so that the question of the participation by the Umpire discussed in the 1928 Memorandum was not presented in that case. In response to a cabled inquiry, a cable has just been received from the German Commissioner, dated November 25, 1933, in which he says:

" Cannot remember name of case not does my copy show it but memorandum deals with estate case in which we had oral argument and rendered decision with reasons on question of obligation to distribute. Bonynge was very insistent therefore I thought it important and wrote memorandum for you and Parker. (Signed) Kiesselbach."

In any event, it is clear from the recorded decisions of the Commission that no decision in accordance with the views expressed by the German Commissioner in the Memorandum of July, 1928, was ever rendered by the Commission. At that time no case was pending presenting for decision the questions therein discussed. The sabotage re-argument petitions were not filed until January, 1931, and it has been stated over and over, with the concurrence of all concerned, that the Commission has never rendered a decision on the jurisdictional question mentioned, which has always been reserved for decision at the close of the reopening proceedings in the sabotage cases.

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This memorandum of July, 1928, therefore, has not the importance of an expression of opinion by the Commission, although it is fully conceded to have all the importance to which an expression of opinion by the German Commissioner is entitled. That memorandum is to be considered, therefore, solely from that point of view.

As quoted in the German Commissioner's additional opinion, the memorandum under consideration reads as follows:

" Under our charting an award is binding upon both Governments. Only when the Commissioners disagree the Umpire comes into action. But here both the Commissioners have agreed upon the award, and the Umpire, though having joined the Commissioners' decision, has not acquired jurisdiction. It is therefore to the Commissioners, and to the Commissioners only, to pass upon the motion of a second rehearing. Whether they can grant such motion by mutual consent is — under the provision of the August Agreement — a very close question. But it seems clear to me that not one of them can do so against the protest of the other. And it seems further to be clear that in case of such a dissent the lack of the right of a single Commissioner to grant a rehearing cannot be supplemented by transferring this question to the jurisdiction of the Umpire."

The conclusion of the German Commissioner in this memorandum is threefold. First, he is not sure that the two national Commissioners by mutual consent can change an award. Nevertheless, the German Commissioner has joined with the American Commissioner in many cases in revising awards by mutual consent. Second, he says, " it seems clear to me that not one " of the Commissioners can grant such a motion against the protest of the other. With this conclusion the American Commissioner agrees. Finally, he says, " it seems further to be clear that in case of such a dissent the lack of the right of a single Commissioner to grant a rehearing cannot be supplemented by transferring this question to the jurisdiction of the Umpire ". With this conclusion the American Commissioner disagrees.

It seems to the American Commissioner that the German Commissioner's final conclusion destroys itself by going too far. It goes to the extent of nullifying the provision of the Agreement of August 10, 1922 (Article II), that the Umpire is authorized " to decide upon any cases concerning which the Commissioners may disagree, *or upon any points of difference that may arise in the course of their proceedings* ". The question discussed by the German Commissioner clearly involves a " point of difference " arising between the two national Commissioners in the course of their proceedings, and to deny the right of the Umpire to decide upon it is to deny a right expressly conferred upon him by the Agreement establishing the Commission.

The German Commissioner says in his additional opinion that he has no doubt that the view expressed in his above quoted memorandum of July, 1928, " is also the view of my Government as clearly stated in the letter of the Embassy of October 11, and as I know for certain, this was also in the mind of the German Agent when answering the Umpire's question in the last Washington argument ".

It must be noted that the view expressed in the 1928 memorandum dealt solely with the question of the authority of the national Commissioners to reopen by mutual consent a previous decision, or, failing that, the jurisdiction of the Umpire to act upon the questions presented by their disagreement. This was a distinctly different question from that raised by the German Embassy's letter of October 11th, which challenged the right of the Commission as a whole " to pass upon a difference of opinion which may exist between the two Governments in this connection ".

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So, also, in saying that he knew for certain that the view expressed by him in his 1928 memorandum was also in the mind of the German Agent when answering the Umpire's question on the oral argument, he has not clearly distinguished in his own mind the question of the jurisdiction of the Commission on which the national Commissioners are in disagreement, and the question of disagreement between the two Governments as to the Commission's jurisdiction as a whole. The former issue was all that he was discussing in his 1928 memorandum, but the latter issue was distinctly presented in the question put to the German Agent by the Umpire on the last oral argument.

The Umpire then pointed out to the German Agent that the Commission understood that his position was that the Treaty (Agreement of August 10, 1922) should be construed as conferring no power upon the Commission to review the sabotage cases, but not that the Commission could not consider that question and determine its own jurisdiction under the Agreement. The German Agent replied that " The understanding of the Commission is entirely correct." The Umpire then added, " In other words that is a justiciable question? ", to which the German Agent answered, " Yes."

Therefore, even if the views expressed by the German Commissioner in his 1928 memorandum were in the mind of the German Agent when answering the Umpire's question, those views would not have affected his answer.

The American Commissioner also calls attention to the statement in the German Commissioner's additional opinion that " the Umpire's decision of December 3, 1932, did not imply a decision on the question of reopening ". The American Commissioner considers that the views expressed by the Umpire in that decision, as for instance, the conclusiveness of the Blue Book magazine message as decisive in favor of the claimants if authentic, distinctly imply that he was prepared to decide the petition in favor of the claimants if the facts satisfied him that he was justified in exercising a jurisdictional and discretionary authority to reopen the decision in those cases on the merits.

The other points raised by the German Commissioner's additional opinion have already been covered by the original opinion of the American Commissioner, and do not seem to call for any additional comment now.

It may be noted, however, that the German Commissioner contends that the recital by the Commission in its orders of dismissal that the rules of the Commission " conforming to the practice of international commissions make no provision for a rehearing " is an admission of lack of jurisdiction. This contention is met by the American Commissioner's statement in the original opinion that " the Commission cannot announce in advance any general rule as to how this right will be exercised because that would depend in each case on whether or not the facts presented satisfied the Commission that in its discretion the right should be exercised ".

In conclusion the American Commissioner considers that the original position taken by the German Government, through its Agent, in the oral argument, and by the German Commissioner in his letter of May 5th to the American Commissioner, that this jurisdictional question is one to be decided by the Commission, is the correct position. The new position now taken by the German Government that this jurisdictional question cannot be adjudicated by the Commission is not admissible. As stated by the American Commissioner at the last meeting of the Commission (minutes of meeting of October 31, 1933), " The American Commissioner regards this attitude of the German Government as an attempt to limit, without the consent of the Government of the United States, the jurisdiction conferred upon the Commission by the two Governments in their Agreement of August 10, 1922, in order to determine independently of the Commission, and upon political or other considerations,

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questions submitted by virtue of that Agreement to the Commission for decision on purely legal grounds."

Done at Washington, this 27th day of November, 1933.

Chandler P. ANDERSON
American Commissioner

Decision of the Commission

The national Commissioners are in disagreement upon certain questions arising in these cases. These questions will best be understood by a brief statement concerning the history of the proceedings.

The memorials were filed by the American Agent in the Black Tom case on March 16, 1927, and in the Kingsland case on March 26, 1927. The answers of Germany were filed on December 14, 1927, and January 17, 1928, respectively. Both Governments assembled evidence before and after the filing of the memorials. With considerable further evidence presented after the premature argument of April 3-12, 1929, the cases of the respective Governments again appeared to be completed so that submission and oral argument could be had in April, 1930. It then developed that some evidence had recently been elicited on behalf of the United States which made it certain that both Governments would wish to file additional evidence, so the hearing was by agreement adjourned to September 18, 1930, and both Governments submitted their cases at The Hague September 18-30, 1930, on the record as then made. The Commission reached its decision dismissing both cases on October 16 and communicated it to the two Governments on November 13, 1930.

On January 12 and 22, 1931, the American Agent filed petitions for rehearing and reconsideration, which assigned as reasons for the requested action that the Commission had misapprehended the facts and committed errors of law. These petitions were considered and dismissed by the Commission in an opinion of March 30, 1931. On the same date the Commission addressed a letter to the two Agents in which it said:

" In the decision handed down today in the Sabotage Cases the Commission has decided the matter of rehearings in these cases so far as the rehearing petitions therein are based on allegations of obvious error. This decision is related to the record as it stood when the cases were decided, and the decision reserves the question of the proposed admission of new evidence, which is a separate question.

" The Commission asks me to advise you that it desires the two Agents, without waiting for the presentation of any additional new evidence, to submit briefs discussing, first, the jurisdictional considerations and legal principles which should govern the Commission's decision as to the admission of new evidence in these cases, and, second, what kind of new evidence, if any, should be admitted.

" The Commission in this connection points out that the two Agents have already presented some argument on the question of new evidence and each Agent has based his argument in part on the decision of the Commission in the Philadelphia-Girard National Bank case. To avoid further discussion as to the proper interpretation of the language used by the Commission in that case we think it best to advise you that the National Commissioners are agreed that it was the intention of the Commission in that decision to rule against the introduction of further evidence of any kind after the evidence had once been closed and a decision promulgated. This ruling is not irrevocable, but it is desirable that argument addressed to the question should be devoted not to the interpretation of that language but to the principle itself. The Commission has not seen the new evidence offered by the American Agent in the Sabotage Cases, but the descriptions of this evidence in his motions filed March 5 and 11, 1931, give the impression that the evidence offered is not new and is not of the character which courts admit after a decision is once made in cases where, after a decision, they admit any new evidence.

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" The Commission accordingly requests that the Agents file their briefs on the points above mentioned within two weeks, with leave to each Agent to file a reply brief within one week after the receipt of the other Agent's brief."

Pursuant to this letter briefs on the question of the Commission's power to reopen and rehear were filed April 27, 1931. Reply briefs were not filed, for reasons not necessary to state here. On July 1, 1931, the American Agent presented a supplementary petition for rehearing covering both cases, on the ground of newly-discovered evidence, and in it set forth that he had procured much additional evidence, some of which had been filed and the balance of which was being filed with the petition. The German Agent offered no evidence (he tendered none from the time of The Hague argument until January 9, 1932). A hearing was had at Boston July 30 - August 1, 1931. The Commission did not pass upon its power to reopen and rehear the cases at that time, but reserved that question until it should have opportunity to examine the new evidence filed. The Commission then stated that perhaps it would need the assistance of an impartial expert to be retained by it to assist it in appraising certain of the documentary evidence filed by the American Agent. This matter was under advisement for some time, and on October 14, 1931, the Umpire, with the concurrence of the Commissioners, forwarded a joint letter to the two Agents stating as follows:

" It has proved impossible to carry out the American Agent's suggestion that Mr. Osborn be employed by the Commission. Mr. Osborn himself is unwilling; the American Agent now objects; the German Agent's consent is subject to restrictions, and the Commission could not accept restrictions. The Commission has now decided not to make further search for a satisfactory expert. In view of Mr. Osborn's standing in his profession, we would welcome the presentation of his testimony if the German Agent himself desires to offer it. The Commission still reserves its decision as to its right to admit new evidence in these cases."

Pursuant to this letter the German Agent on January 9, 1932, filed an affidavit by A. S. Osborn with certain annexes and over a period from January 9 to August 15-29, 1932, filed additional annexes to Osborn's affidavit.

The present Umpire was appointed to fill the vacancy, caused by Mr. Boyden's death, on March 24, 1932, and on April 8, 1932, a session of the Commission was held in order to bring the matter to a head and end the existing confusion. Pursuant to the agreement of the two national Agents an order was entered to the effect that the American Agent should conclude the filing of his evidence in support of his supplementary petition on or before June 1, 1932, and the German Agent file any evidence he cared to present in reply on or before August 15, that briefs should be exchanged and filed on or before September 15, and that the matter should be argued beginning November 1, 1932. The American Agent reserved no right to file reply evidence to that presented by the German Agent but he did assemble reply evidence, and, in order to give him additional time for its presentation, he was allowed until November 15 and the hearing was adjourned to November 21. Permission was also given to both Agents to file briefs not later than the close of the argument. It will be observed that during the entire period from March 30, 1931, to November 21, 1932, what had occurred was subject to the decision of the question of the Commission's jurisdiction to reopen the cases.

By mutual consent the hearing of November 21-25, 1932, was without prejudice to Germany's objection to the Commission's jurisdiction, all agreeing that if the new evidence filed would not change the result reached in the decision of October 16, 1930, the jurisdictional question need not be answered. The national Commissioners disagreed as to the effect of the new evidence, and the question of its effect therefore came to the Umpire for decision. He rendered

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the decision of the Commission of December 3, 1932, holding the new evidence not sufficient to change the original findings and dismissing the petitions for rehearing.

The matter had gotten into such shape that the method of procedure adopted seemed the only practicable one. It was at best an unsatisfactory method, and — without meaning any criticism of anyone — I am convinced, as the matter is now viewed in retrospect, it would have been fairer to both the parties definitely to pass in the first instance upon the question of the Commission's power to entertain the supplementary petition for rehearing, as requested on May 27, 1931, by the American Agent. The reception or rejection of the new evidence would have been a consequence of the decision of that question. As will be seen from the decision of December 3, 1932, Germany insisted upon its objection to the jurisdiction of the Commission to rehear, and the United States asserted that the Commission had such jurisdiction. The German Commissioner reserved the question in the certificate of disagreement upon which the Umpire's functioning was grounded.

On May 4, 1933, a single petition was filed by the American Agent (signed by four firms of private counsel for claimants and countersigned by the American Agent) for a rehearing of both cases, which averred (1) "That certain important witnesses for Germany, in affidavits filed in evidence by Germany, furnished fraudulent, incomplete, collusive and false evidence which misled the Commission and unfairly prejudiced the cases of the claimants", (2) "That there are certain witnesses within the territorial jurisdiction of the United States", some of whom are specifically named in the petition, "who have knowledge of facts and can give evidence adequate to convince the Commission of the liability of Germany for the destruction of the Black Tom Terminal and the Kingsland plant, but whose testimony cannot be obtained without authority to issue subpoenas and to subject such witnesses to penalties for failure to testify fully and truthfully", (3) that evidence can be produced "to show that the Commission has been misled by the German evidence", (4) "That there has also come to light evidence of collusion between certain German and American witnesses of a most serious nature to defeat these claims."

This petition was filed with the proper officers of the Commission, but no action has been taken upon it.

In May, 1933, the Umpire was apprised of the disagreement of the American and German Commissioners with respect to the power of the Commission to entertain the application. The German Commissioner by letter of May 5, 1933, addressed to the Umpire, enclosing a copy of his letter to the American Commissioner of even date and a copy of his opinion on the question of reopening, brought the situation to the attention of the Umpire. The German Commissioner's letter is as follows:

"Hamburg, May 5th, 1933

"My dear Mr. Justice,

"I beg to hand you herewith a copy of a letter I wrote to Mr. Anderson and also a copy of an opinion I wrote on the question whether or not our Commission has the right to reopen a case.

"Though from a strictly formal point of view you, as our Umpire, are not interested in the question but after it has been certified to you by the two National Commissioners, I feel it is my duty to keep you informed on what is going on, since I am afraid that Mr. Anderson and I might not agree on the issue.

"I remain, my dear Mr. Justice,

very sincerely yours,
(*Signed*) W. KIESSELBACH

"Mr. Justice Owen J. Roberts,
United States Supreme Court,
Washington D. C."

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His letter to the American Commissioner appears in the minutes of the Commission's meeting of October 31, 1933,[1] and his opinion enclosed therewith and the American Commissioner's opinion are embodied in the American Commissioner's certificate of disagreement handed to the Umpire at that meeting. An additional opinion of the German Commissioner was filed on November 22 and a supplemental opinion of the American Commissioner on November 27.

The foregoing statement will serve to disclose the nature of the points upon which the Commissioners are in disagreement. A preliminary question of procedure arises which must also be decided. It may be stated as follows: May the Umpire, in the absence of a joint certificate submitting that question to the Umpire, decide a question as to which the two national Commissioners are in disagreement? If this preliminary question be answered in the affirmative, then two others of substance remain for decision, as follows:

Has the Commission the power to pass upon the extent of its own jurisdiction?

If it has, then does this jurisdiction extend to the reopening of a case, once decided, by reason of after-discovered evidence, or disclosure that testimony offered was fraudulent, or a showing of collusion between witnesses for the two Governments, and that, in consequence, the Commission was misled by the record as made at the time of its decision?

Orderly procedure would have required that these issues be decided by the Umpire before the filing of the tendered evidence, since the right to tender such evidence is involved in the decision. The American Agent has, as I am advised, filed a very large quantity of evidence, which, in view of the questions of power now mooted, I have thought it improper to examine or to treat as forming part of the record in the cases.

Addressing myself to the preliminary question of procedure, I conclude that the disagreement of the national Commissioners is before me in such manner as to make it my duty, under the Agreement of August 10, 1922, between the two Governments, to take cognizance of the disagreement and decide the questions involved. The Agreement provides, in Article II, " The two Governments shall by agreement select an umpire to decide upon any cases concerning which the commissioners may disagree, or upon any points of difference that may arise in the course of their proceedings." The duty of the Umpire under the plain terms of the document arises automatically upon a disagreement between the Commissioners and his being apprised thereof. Under the Agreement no formal act is required to bring into operation the authority thus vested in the Umpire. Rule VIII (*a*), entered February 14, 1924 (amending that rule as originally enacted on November 15, 1922), reads: " The two National Commissioners will certify in writing to the Umpire for decision (1) any case or cases concerning which the Commissioners may disagree, or (2) any point or points of difference that may arise in the course of their proceedings, accompanied or supplemented by any statement in writing which either of them may desire to make of his opinion with respect to the decision of the case or cases or point or points of difference certified." But rules adopted by the Commission as a matter of its own convenience and for the guidance of the national Agents can not contravene the explicit terms of the instrument which created the Commission. This brings me to the questions of substance.

May the Commission pass upon its own jurisdiction?

The Agreement of the two Governments created the Commission to deal with three classes of claims specified in Article I arising by reason of obligations undertaken by Germany under the Treaty of Berlin of August 25, 1921.

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[1] See Appendix. (*Note by the Secretariat*, this volume, Appendix IV (A), p. 483.)

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While at the date of the execution of the Agreement, August 10, 1922, it was known that such claims would be numerous and amount in the total to a huge sum, the nature and the validity of the separate claims which might be submitted were unknown. It was for the purpose of passing upon these claims, both as to validity and amount, that the Commission was created. At the very threshold the tribunal might encounter in each case the question whether the claim presented fell within the categories of those to be adjudicated or was outside the scope of the Treaty and the Agreement. In this aspect the Commission was bound to determine its own jurisdiction, and for that purpose to interpret and apply the terms of the Agreement which created it.

A decision that it had jurisdiction of a claim was by the very terms of the Agreement to be accepted by both Governments as final and binding upon them (Article VI). The Agreement submits the questions for decision as between the two Governments to the Commission. What those questions are must be determined within the four corners of the instrument. It is not within the competency of either Government to retract the authority which it conferred upon the Commission. If that body may not from the terms of the Agreement ascertain what power was conferred, it would be wholly incompetent to act except in an advisory capacity, and none of its decisions could in the nature of the case be accepted as final and binding by the Governments, as the Agreement states they shall be. How the Commission shall proceed with its task, the form of pleading to be adopted, the manner of hearing (subject to what is hereafter stated in respect of Article VI), the form and entry of its decisions, its control over a case after a decision is rendered, are all left to its determination and regulation.

The Agreement is to be read in the light of its language and its purpose; and where it is silent, the powers and duties of the Commission are to be determined according to the nature of the function entrusted to it. I have no doubt that the Commission is competent to determine its own jurisdiction by the interpretation of the Agreement creating it. Any other view would lead to the most absurd results — results which obviously the two Governments did not intend.

This brings me to the second question of substance.

Has the Commission the power to reopen a case upon the showing made by the pending petition?

The answer to this question must also be found in the terms of the Agreement creating the Commission. On the one hand it is pointed out that the preamble refers to the desire of the parties that the " amount to be paid by Germany in satisfaction of Germany's financial obligations * * *" be determined. The fact that " amount " is singular rather than plural and while various claims of American citizens and the Government are involved, in the ultimate Germany is to pay a total ascertained by the addition of all the claims allowed, is said to make the Commission the arbiter of a single suit or action consisting of thousands of counts, each count representing the claim of an American national or of the Government of the United States. It is insisted that the Commission is limited by a few covenants, rules, or directions to be found in the Agreement, that it may proceed practically as it sees fit to accomplish the task committed to it, that its only concern is justice and equity as between the Nations signatory to the Agreement, and that if in justice and equity it should rehear a case nothing in the Agreement or in the constitution of the Commission stands in the way. The argument is that in effect the tribunal sits without terms or sessions as a continuing tribunal, trying a single case, and its doors are never closed to the litigants before it until it shall have completed this task and formally disbanded.

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On the other hand it is contended that each of the claims presented constitutes a case within the meaning of the Agreement; that each is initiated by a petition or memorial to which an answer is filed, thus making up an issue for trial; that it was intended, when the Commission reached a decision in any such case, the decision should be final and binding upon the parties; that the Commission is without power, once it has rendered its decision in a case, to reopen or rehear it for any reason.

I think these positions are both extreme and that neither represents the true construction of the Agreement or an accurate definition of the Commission's powers.

I am not persuaded that the use of the word " amount " in the preamble makes the Commission a tribunal to try a single action divided into counts. There is much to indicate that, while the total of the awards is to be taken to make up the amount due by Germany, the claims presented are to be treated as individual cases. Thus in Article II, where reference is made to the selection of the Umpire, his function is amongst other things specified as " to decide upon *any cases* concerning which the commissioners may disagree, * * * ". And cases are in this sentence distinguished from questions. Article IV provides that " The commissioners shall keep an accurate record of the questions *and cases* submitted * * * ". The uniform practice of the Commission indicates this understanding of its function, for each claim has been treated as initiating a separate case and has eventuated in a separate decision (a decision of it as a separate case: even though as a convenience the Commission in one document frequently dismissed a number of claims and less frequently rendered awards in a number of cases, each received the same treatment as if the decision thereof had been expressed in a record devoted to it alone). On the part of the United States this method of dealing with the claims has been recognized in the Settlement of War Claims Act of 1928 where provision is made for the certification to the Treasury of the awards of the Commission as they are made upon individual claims.

My view is that the Commission is a tribunal sitting continuously with all the attributes and functions of a continuing tribunal until its work shall have been closed; and that as such tribunal it is engaged in the trial and adjudication of a large number of separate and individual cases.

The German Government would have me draw from these premises the ultimate conclusion that the Commission is without power to reopen any case in which it has made a decision, and in support of this view refers to the last paragraph of Article VI, which provides " The decisions of the commission and those of the umpire (in case there may be any) *shall be accepted* as final and binding upon the two Governments." This paragraph, in my judgment, furnishes no aid to the German argument. It is a covenant as between the two Nations binding each of them with respect to any decisions which may be made. But it is to be observed that neither this paragraph nor any other provision of the Agreement purports to define what is or what shall be considered a " decision of the commission ". It is left to the Commission to determine when its decision upon any claim is final. It has no concern with the action taken in consequence of its awards. It is a matter for the two sovereigns to carry out their agreement that they shall accept the decisions as final and binding. If a decision should be revised by the Commission as a result of a rehearing and a new decision reached in a particular case, the Commission would have no concern with the adjustment of the settlement consequent upon its action. A court may often render a judgment which, by reason of what has occured, it is not possible to execute in accordance with its terms, but the mere fact that the judgment may be incapable of execution

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in part or in whole in no way alters the jurisdiction of the tribunal or indeed its duty to render such judgment as to justice and right may appertain.

With this preliminary general statement as to the jurisdiction of the Commission, I address myself to a determination of its power to reopen a case in which it has rendered a decision.

1. I think it clear that where the Commission has misinterpreted the evidence, or made a mistake in calculation, or where its decision does not follow its fact findings, or where in any other respect the decision does not comport with the record as made, or where the decision involves a material error of law, the Commission not only has power, but is under the duty, upon a proper showing, to reopen and correct a decision to accord with the facts and the applicable legal rules. My understanding is that the Commission has repeatedly done so where there was palpable error in its decisions. It is said on behalf of Germany that this has never been done except where the two Agents agreed that such course under the circumstances was proper. And the argument is drawn from this fact that the Commission is without power to take such action of its own motion or in the face of opposition by either Agent. I can not follow this argument.

If the Commission's decisions once made are final and the body wholly without power to reopen them, then a case once decided can only be reopened by a formal agreement of the two Governments amending the Agreement under which the Commission sits, for no additional power can be conferred upon the tribunal except by the parties who called it into being and gave whatever jurisdiction it originally possessed. If, therefore, a case may be reopened by consent, the same action may be taken without consent. The first petition for reopening and rehearing filed in these cases by the American Agent was based in grounds such as are above described. I have no doubt that the Commission had power to consider that petition and to deal with the case in the light of the matters it brought forward.

2. I come now to the question of jurisdiction to reopen for the presentation of what is usually known in judicial procedure as after-discovered evidence. I am of opinion that the Commission has no such power.

In cases where a retrial is granted or a reopening and rehearing indulged for the submission of so-called after-discovered evidence, this is usually by a court. It is to the interest of the public that litigation be terminated, and municipal tribunals have the power to set a case for trial and to compel the parties to proceed. While they will not compel a litigant to proceed without hearing his reasons for delay, neither party has a right to hold the case open until he feels that he has exhausted all possible means of obtaining evidence. If such right existed, courts would be unable to function. By analogy, if this Commission had the power to make an order to close the proofs in any case and compel the parties to proceed, either party who was not then ready, because it had not exhausted its sources of information and evidence, might well have an equity to ask a reopening that it might be permitted to offer evidence theretofore unavailable.

But the situation here is quite otherwise. Article VI, second paragraph, provides " The commission shall receive and consider all written statements or documents which may be presented to it by or on behalf of the respective Governments in support of or in answer to any claim." All must admit the parties intended the Commission should not sit indefinitely but should expeditiously complete its work. The Agreement provides that all claims to be considered must be brought to the Commission's attention within six months of its first session. But, on the other hand, no time limit whatever was set in

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the original Agreement for the closing of proofs. In contradistinction, such a mandatory provision for closing proofs was embodied in the supplementary Agreement of December 31, 1928, as to claims embraced within the scope of that instrument.

The Commission has from its inception been sensible of its lack of power to compel the closing of the record and the final submission of any case. While it has urged the Agents to complete their records and to submit and argue their cases upon such completion and has sought the cooperation of the Agents to bring the cases to final submission, it has never, as I am advised, entered an order for the final closing of the record in any case without consent or over objection. I do not think it has power so do to. The clause quoted from Article VI compels the reception of any written statement or document presented by either party. As I read this provision, so long as either party is of opinion that written statements or documents are or may be available in support of its contention it may of right demand that the Commission await the filing thereof before final submission of the cause. The American Agent was under no obligation to close his record and submit his case at The Hague if he knew, or had reason to expect, that further evidence was obtainable.

It is suggested in the petition for reopening that the United States was unable to obtain the evidence from certain witnesses without the power to compel their testimony. This fact was as obvious in the autumn of 1930 as it is today. The German Government availed itself of its ordinance of June 28, 1923, which permitted the summoning of witnesses, placing them under oath, examining them before a court, and rendering them liable to penalty for false-swearing. No reason is apparent why a similar statute could not at any time have been adopted in the United States. The best evidence that it could is that when the American Agent and the Department of State requested the passage of such a law it was promptly enacted and has been availed of in obtaining evidence now proffered (Act of June 7, 1933). The lack of an instrument which would have been ready to hand if requested can not excuse the failure to obtain the testimony thereby obtainable.

The Agreement does not contemplate that when the two Agents signify their readiness to submit a case and do submit it upon the record as then made to their satisfaction, obtain a hearing and decision thereon, the Commission shall have power to permit either Agent to add evidence to the record and to reconsider the case upon a new record thus made.

3. The petition now under consideration presents, in the main, a situation different from either of those above discussed. Its allegations are that certain witnesses proffered by Germany furnished the Commission fraudulent, incomplete, collusive, and false evidence which misled the Commission and unfairly prejudiced the claimants' cases; that certain witnesses, including some who previously testified, who are now within the United States, have knowledge and can give evidence which will convince the Commission that its decision was erroneous; that evidence has come to light showing collusion between certain German and American witnesses to defeat the claims. These are serious allegations, and I express no opinion of the adequacy of the evidence tendered by the American Agent to sustain them. I have refrained from examining the evidence because I thought it the proper course at this stage to decide the question of power on the assumption that the allegations of the petition may be supported by proof, postponing for the consideration of the Commission the probative value of the evidence tendered.

The petition, in short, avers the Commission has been misled by fraud and collusion on the part of witnesses and suppression of evidence on the part of some of them. The Commission is not *functus officio*. It still sits as a court.

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To it in that capacity are brought charges that it has been defrauded and misled by perjury, collusion, and suppression. No tribunal worthy its name or of any respect may allow its decision to stand if such allegations are well-founded. Every tribunal has inherent power to reopen and to revise a decision induced by fraud. If it may correct its own errors and mistakes, *a fortiori* it may, while it still has jurisdiction of a cause, correct errors into which it has been led by fraud and collusion.

I am of opinion, therefore, that the Commission has power to reopen these cases, and should do so, in order that it may consider the further evidence tendered by the American Agent and, dependent upon its findings from that evidence and any that may be offered in reply on behalf of Germany, either confirm the decisions heretofore made or alter them as justice and right may demand.

Done at Washington December 15, 1933.

Owen J. ROBERTS
Umpire

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