DECISION RENDERED IN CONFORMITY WITH THE AGREEMENT CONCLUDED ON SEPTEMBER 30th, 1932, BETWEEN THE GOVERNMENT OF FINLAND AND THE GOVERNMENT OF GREAT BRITAIN AND NORTHERN IRELAND

FOR THE SUBMISSION TO ARBITRATION OF A QUESTION CONNECTED WITH A CLAIM IN RESPECT OF CERTAIN FINNISH VESSELS USED DURING THE WAR.

The Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Finland agreed on September 30, 1932, to submit to the decision of the Arbitrator the following question: "Have the Finnish shipowners or have they not exhausted the means of recourse placed at their disposal by British law?"

Memorials and Countermemorials having been transmitted to the Arbitrator, the parties made a demand for oral hearing, which took place on September 4-9, 1933. At the oral hearing appeared on behalf of the applicants, the Finnish Government, Sir Maurice Amos, K.B.E., K.C., Professor Friedman and Mr. A. P. Fachiri (instructed by Messrs. Roney & Co.) and on behalf of the respondents, the British Government, the Solicitor-General (Sir Boyd Merriman, K.C., M.P.), Professor H.C. Gutteridge, K.C., and Mr. W.S. Morrison, M.P. (instructed by the Solicitor, Board of Trade).

The Arbitrator has now, in accordance with the Agreement of Sept. 1932, to give his reasoned decision in writing.

Narrative of events leading up to the submission of the Arbitrator.

During the second half of 1916 and during 1917, thirteen ships belonging to Finnish shipowners, were used by the British Government in the service of the Allies chiefly to the White Sea and France. Four of them were lost whilst on that service.

The Finnish shipowners, having failed in their endeavours to be paid by the British Government for the hire of the ships and for the value of three of the ships lost—for the fourth vessel lost they were paid by a Russian Government Committee set up in London—the Finnish Government in 1920, through their minister in London, made claims for compensation, which were rejected by the British Government. The question having been again raised by the Finnish Government without result, the Finnish shipowners submitted the case to the Admiralty Transport Arbitration Board, set up under the Indemnity Act 1920 to deal with claims against the British Government for payment or compensation for the use of ships requisitioned during the War, for the employment of the same in Government service, and compensation for loss or damage thereby occasioned.

The Admiralty Transport Arbitration Board in their judgement of January 26, 1926, found that the steamers were not nor was either of them requisitioned by or on behalf of Great Britain and that they were each of them requisitioned by or on behalf of the Government of Russia. The action therefore failed.

The shipowners did not appeal to the higher Courts.

In 1926, after that decision of the Board, the Finnish Minister in London proposed international arbitration. The British Government, rejecting this proposition, said that the Finnish shipowners, who had a right of recourse

to the Court of Appeal, and from the Court of Appeal to the House of Lords, had not appealed and there seemed no valid reasons for referring the claim, which had been exhaustively dealt with by the Admiralty Transport Arbitration Board, to any other tribunal.

In 1931 the Finnish Government submitted the question in dispute to examination by the Council of the League of Nations, invoking the provisions of the Covenant for the settlement of disputes, which, if remaining unsettled in spite of a proposal made by one of two States for a peaceful settlement, may disturb the good understanding between the two parties.

The Finnish Government contended in their Memorandum to the Council that the undisputed material facts—namely, that the ships were taken in British ports, that they were operated throughout under British official instructions and that they were largely employed for objects in which Russia was not immediately concerned—create a *prima facie* presumption to the effect that the taking and use of the ships constituted measures for which the British Government incurred a direct and independent responsibility. The British Government, in taking and using the ships in question had incurred the obligation to pay compensation to the owners of the ships, both in respect of their use and in respect of the loss of such of them as were destroyed. The British Government having not fulfilled this obligation, the Finnish Government were entitled, in international law, to claim compensation from the British Government. The benefit of this obligation accrued, in the first instance, to the aggrieved owners, as a matter of private right. It was not until their claim for compensation was adopted and put forward by their Government that the obligation and corresponding right passed to the domain of international law. (First Finnish Memorandum Nos. 25, 21, 36.)

This contention was further explained and defined by the Finnish Government before the Arbitrator, in their Memorials and at the oral hearing.

The British Government in their Memorial (No. 34) stated and the Finnish Government in their Countermemorial (No. 23) concurred that when a State makes a claim against another State in respect of an alleged injury to its nationals, the State itself becomes the claimant and the basis of its claim must be an injury to itself in the person of its nationals and it must establish that this injury is the result of a breach of an international obligation by the State against whom the claim is made. The State must claim on the basis of injury done to itself in the person of its nationals and the compensation, if any, due is payable by the respondent State to the claimant State, and the respondent State is not interested in, nor entitled to concern itself with, the manner in which the claimant State disposes of the compensation when it has received it.

The Finnish Government before the Arbitrator, at the oral hearing, contended that, though there is a recognised right for a State in time of war, in certain cases of emergency, to take property belonging to foreigners found in the State, it becomes a wrong in international law if the original act of taking is not accompanied by payment. The British Government had committed breach of international law in not paying the shipowners. The claim of the Finnish Government is based on this initial breach of international law and not on any breach of international law consisting in failure of the British courts or of the British law to satisfy the requirements of international law. (4th Day of oral hearing, pages 17, 49, 46.)

The Finnish Government before the Council of the League of Nations also put forward an alternative claim.

The British Government had contended that the ships were, under agreements entered into in 1916 by Great Britain and Russia, requisitioned or chartered by the Russian authorities and handed over to the British Government for user in the service of the Allies to France and other places and that—the British Government being liable under the agreement as subcharterers to pay to the Russian Government British Blue Book rates of chartered hire and liable for war risk—payment of the hire and compensation for loss of ships had been credited Russia in the running account between Russia and Great Britain in which account there was still a large balance owing from the Russian Government. (First British Memorandum Nos. 3-9, 28.)

The representative of the Finnish Government, before the Council of the League of Nations, said that, assuming that there was a contract between the British and the Russian Governments, as the British Government allege, —an assumption the correctness of which the Finnish Government could not admit—the Finnish Government was of the opinion that it would be entitled to claim, under international law, at least the sums due for the Finnish vessels in respect of the contracts *ex hypothesi* made between the British Government and the Russian Government. The Finnish Government added that certain credits in respect of hire were not entered in the Russian Governments account until after the revolution and that, furthermore, the Russian Government had never been credited with the value of one of the ships sunk, *Hermes*, and that the credit for the ship *Hesperus* did not represent its real value. Set-off could not, in any event, apply in respect of these last-mentioned matters; but the Finnish Government considered that, even apart from such points, the set-off relied on was not in conformity with international law and could not deprive it of its right to claim any compensation provided for in a contract (should it exist) between Great Britain and Russia on the subject of these vessels.

The Finnish Government, however, when putting forward this claim also used the expression that the Finnish Government regarded the payments under the alleged agreements between the British and the Russian Governments as accruing to the shipowners and therefore recoverable by the Finnish Government on their behalf from the British Government. (Second Memorandum No. 7.)

The British Government observed, at the Council of the League of Nations, in regard to this proposition of the Finnish Government, that it was contrary to the generally accepted view of international law as a law regulating the rights and duties of States *inter se* and creating no rights and imposing no duties on individuals—a view which the Permanent Court of International Justice appeared to have definitely adopted—and that the proposition was hardly consistent with the legal position, when a State makes an international claim in respect of injuries to its nationals, as laid down by the Permanent Court of International Justice. (Third Memorandum No. 17.)

The Finnish Government, before the Arbitrator in their Memorial (Nos. 11, 17) and their Countermemorial (No. 47), declare that even in regard to the alternative claim the Finnish Government had taken up the case in its own direct right against the British Government. The alleged agreements would, as regards the shipowners, be *res inter alios acta*. The rights of the Russian Government under the alleged agreements had now passed by operation of law to the Finnish State. At the oral hearing the Finnish Government further explained that the Finnish Government based this alternative claim on the rights to succeed to the position of the Russian Govern-

ment under the alleged agreements which deal, amongst other things, with ships which had now become ships over which the Finnish State is the sovereign and belonging to nationals which had now become nationals of the Finnish State. It were not a claim of the Finnish Government to be a successor in general and under international law to the Russian Government, but only in respect of that isolated matter. The interest of the Finnish shipowners were not a legal one but a moral interest purely (4.108).

The British Government in their Memorial (No. 82) and their Countermemorial (No. 14) submit that the Finnish Government are not entitled to reformulate the alternative claim put forward at the Council and there based on the alleged obligation of the British Government as regards payments "intended for the benefit of the shipowners" and "under the principles of international law regarded as accruing to them and therefore recoverable by the Finnish Government on their behalf from the British Government".

The British Government before the Arbitrator, at the oral hearing, observed that originally the alternative claim was based upon rights which accrued to the Finnish shipowners and that it was not certain whether the Finnish Government were entitled thus to shift their ground (5.88.)

The Finnish Government in their Countermemorial (No. 61) desire to state quite definitely that they had never intended to contend that any payments due by the British Government under the agreements alleged were recoverable under international law, or at all, by the shipowners, or that under international law the shipowners—private individuals—acquired a right to these payments in their own persons. Such a contention would be patently absurd. In making this claim the Finnish Government would, in law, be asserting its own right, but a right in respect of this particular matter —namely the hire of the Finnish ships—and the purpose of the claim, would be to obtain the sums due for its nationals the shipowners. It is in this sense and in this sense alone that the claim could be said to be "on behalf of" the shipowners. The Finnish Government before the Arbitrator, at the oral hearing, contested that the alternative claim as now definitely defined by the Finnish Government differed from the alternative claim put forward before the Council of the League of Nations.

The Arbitrator, who has been invited, by the British Government in their Countermemorial and at the oral hearing, to study the way in which this alternative claim was formulated at different stages of the proceedings and to decide whether the Finnish Government should be entitled to reformulate this claim, is of the opinion that—though the interests of the shipowners in the sums alleged to be due under the agreements at first were put forward in a prominent way and seemingly based on legal rights, and only later on, in consequence of the observations by the British Government, were reduced to a purely moral matter and the claim based on the alleged direct right of the Finnish State against the British Government, and any legal right of the shipowners to the sums alleged to be due under the agreements was strongly denied—the undisputable and still existing connection of the alleged moral, legally not executable, interests of the shipowners with the alternative claim as ultimately formulated, makes it reasonable to accept the restatement of the alternative claim put forward by the Finnish Government in their Memorial and their Countermemorial and at the oral hearing as an explanation of what the Finnish Government really meant to say by their different statements of this claim before the Council of the League of Nations.

Before the Council of the League of Nations the delegate of the British Government observed that the whole point in the case before the Council

is whether the claims put forward are really of the sort which the British Government can be forced to arbitrate against its will. He submitted that they are not such claims. The words of Articles 12 and 15 of the Covenant "any dispute likely to lead to a rupture" were intended to be taken in its strict sense. It would be a great straining of the language of the Covenant to say that "likely to lead to a rupture" means any dispute, whether likely to lead to a rupture or not, which the claimant chooses to bring. As to disputes of a minor character dealt with in Articles 13 and 14, there is no power to deal with them under the Covenant unless the parties so decide. The optional clause, designed to make the submission of such disputes compulsory, subject to the conditions on which each country signed the Clause, was signed by Great Britain subject to the condition that it should apply to past disputes. The theoretical power of the Council to deal with this matter under Article 11 or any other article of the Covenant was not disputed but the Council had always taken the view that Article 11 is intended to cover real international disputes, such as involve the interests or the policy of a country as a whole.

The British Government further contended that there was a right of appeal from the decision of the Admiralty Transport Arbitration Board to the Court of Appeal and ultimately to the House of Lords. The Finnish shipowners had not availed themselves of this right. There was a well-established rule of international law and practice to the effect that a State is not entitled to make any diplomatic claim on behalf of its nationals against another State in respect of any matters where, if the claim is valid, the municipal law affords a remedy, unless such municipal remedies have been exhausted. If the private persons concerned had failed to exhaust their municipal remedies, there was no foundation for any diplomatic claim. In the present case, the essential condition precedent—the exhaustion of municipal remedies—not being fulfilled, it followed that, under this well-established rule, the Finnish Government had not, and never had had, any right under international law to make any diplomatic claim with respect to this matter at all. (First British Memorandum to the Council of the League of Nations Nos. 15, 16, 19.)

The British Government observe before the Arbitrator in their Memorial (No. 50): It is sometimes said as an objection to the rule with regard to the exhaustion of municipal remedies that it operates, in fact, as a dilemma; that if no recourse is had to the municipal courts, then the making of a diplomatic claim is barred because the municipal remedies have not been exhausted, but, if recourse has been had to a municipal tribunal, its decision is final. It is true that the decision of the municipal tribunal is final in municipal law and as between the individual claimants and the party against whom the claim has been made, but it does not follow that this decision is necessarily conclusive as between State and State in international law. When a diplomatic claim has been made, the issue is one between two States and is governed by the rules of international law. It is not the same issue as that between the individuals out of which the diplomatic claim has arisen.

The representative of the Finnish Government, before the Council, contended that the shipowners had exhausted all the means of obtaining satisfaction offered by English municipal law. The shipowners claim had, from first to last, been founded on the use of their ships by the British Government without their consent and the only remedy allowed in English law for a claim of that kind was the one they sought—namely the action before the

Admiralty Transport Arbitration Board under the Indemnity Act, Section 2 (1) (a), which confers a right of compensation in the case of a "requisition" by the British authorities. The Board expressly declared as facts that the steamers were not requisitioned by Great Britain and that they were requisitioned by Russia. There could, according to the Indemnity Act, be no appeal against the Board's decision on a question of fact. There was therefore no room for recourse to the Court of Appeal, and the Board's verdict was decisive for the entire case as the Indemnity Act for the case in question confers a right of compensation only for requisition.

The Finnish Government in their second Memorandum (Nos. 2, 3) added that certain authorities consider that resort to local remedies is unnecessary where the State has previously taken up a claim and that, in any case, when the Finnish Government made repeated diplomatic representations to induce the British Government to submit the question to an international judicial or arbitral tribunal, the British Government rejected these proposals without advancing the argument that the local remedies had not been exhausted. The British Government had, throughout a diplomatic correspondence extending over a period of several years, never raised this objection and it was impossible not to suggest that the controversy so dealt with is not suitable for an international procedure of settlement.

As to the alternative claim the Finnish Government contend that it falls quite outside the scope of municipal law and that therefore the question of exhaustion of local remedies does not arise at all. (Second Memorandum No. 18.)

A member of the Council of the League of Nations was then appointed a rapporteur. He submitted a report, drafted in collaboration with two other members of the Council. This Committee examined the articles which might be invoked in this particular case. It felt that it would, in view of all the circumstances of the case, be difficult to admit that the dispute comes within the category of disputes likely to lead to a rupture within the meaning of Articles 12 and 15 of the Covenant, even when it is recognised that the term "rupture" is not synonymous with "war". On the other hand, the Committee felt that it was possible to consider paragraph 2 of Article 11, which permits of the intervention of the Council when a member of the League, in the exercise of a friendly right, brings to its attention a circumstance which threatens to disturb "international peace or the good understanding between nations". Article 11 permits the Council to propose any measure that it may think appropriate in the circumstances. In the present case none of the undertakings subscribed to by the parties to the dispute required from them to consent to judicial or arbitral settlement. There was nothing, however, to prevent the Council from taking steps with a view to conciliation. In the opinion of the Committee, the Council possesses competence in virtue of Article 11, paragraph 2, of the Covenant.

The British Government, however, the Report continues, holds that the Finnish Government is not entitled to take up the case of its nationals, who complain that, owing to the utilisation of their vessels by the British Government, they have suffered loss for which the latter should grant them compensation, since those nationals have (it is alleged) neglected to exhaust the means of recourse offered by the British Courts. The Committee thinks that it would be expedient to examine first these two questions:

(a) Have the Finnish shipowners, or have they not, exhausted the means of recourse placed at their disposal by British law?

(b) Did the fact that those shipowners had not exhausted the means of recourse in question constitute an obstacle such as to prevent the Finnish Government from claiming compensation from the British Government?

The Report adds: It is understood that the Council could, under any circumstances, subsequently make whatever proposal or suggestion it might think fit. Such being the case, the Committee feels sure that the Council will be glad to see that the parties are agreed to seek a solution for these two questions and that the Council will wish to ask them to keep it informed of the results of their efforts. After examining their communications on the subject, if any point relating to these two questions still remains unsettled, the Council might ask the Permanent Court of International Justice for an advisory opinion.

The British and the Finnish Governments then agreed that the first of the two questions formulated by the Committee of the Council should be submitted to the Arbitrator. In the event of the decision on this question being in favour of the British Government and the Finnish Government still maintaining their contention with regard to the second question, this question also should be submitted for decision to a person or body, selected by agreement between the two Governments. The Finnish Government also concurred in the following observation by the British authorities: "In order to answer the first question, the remedies which were open under English municipal law to the Finnish shipowners must be ascertained, and also the extent to which they availed themselves of such remedies. These are complicated questions of English law. It will then be necessary to decide whether the action which the Finnish shipowners took did or did not satisfy the requirements of the rule of international law that the municipal remedies should be exhausted. This point involves an appreciation of the exact scope of this international rule, and therefore involves to this extent a question of international law."

I. Which are the remedies under British municipal law for a claimant against the British Government?

This question is of interest only as regards the first claim put forward by the Finnish Government, viz. the claim of compensation based on the alleged breach of international law committed by the British Government in taking and using the Finnish ships without paying for it. To the alternative claim as definitely formulated, the question of the exhaustion of local remedies is not relevant as this claim is based on an international agreement which does not give the shipowners any legal right, but a purely moral interest. The shipowners, therefore, cannot have recourse, on that basis, to any municipal court.

Before the Arbitrator enters into an examination of the stipulations of the Indemnity Act—viz. the Act under which the Admiralty Transport Arbitration Board gave its decision—it may be convenient to consider the situation before the passing of this Act as regards claims for compensation under the British municipal law against the British Government.

In a country where a private individual may take proceedings against the Government at the ordinary courts of that country, claiming compensation because the Government have taken and used the property of the individual without paying for it, no other basis than the one now mentioned is primarily necessary to put forward on the side of the claimant. The

Government then has to prove its right to take and use the property of the individual. There is no need for him further to specify and prove the grounds of his claim.

The situation in Great Britain was in this respect different before the Indemnity Act and this Act made it all the more necessary to the individual to individualize the basis of his claim from the beginning. In the British Memorial (No. 56) this situation is described as follows: "A distinction must be made according to whether a claim is, on the one hand, of a contractual character or based on rights to property or, on the other hand, is in respect of a wrongful act or tort. The expression 'claims of a contractual character' includes, not merely claims based upon an actual express or formal contract, but also all cases where a contract is implied by law. 'Implied contracts' also includes certain cases of quasi-contractual character in which, by the employment of a legal fiction, an obligation arising out of a tort can be enforced as if it had a contractual origin. Thus where a defendant has wrongfully withheld money of the plaintiff, he can be sued for 'money had and received' i.e., on the basis of a fictitious contract to repay the money to the plaintiff. In such a case the plaintiff is said to 'waive the tort' and sue in contract. The substance of the law with regard to contracts or property is the same, whether the Crown is involved or whether the parties are all individuals. The remedy for alleged breaches of contract by the Crown or for claims in respect of property or money taken or held by the Crown is by way of proceedings brought in the ordinary courts (the High Court of Justice) against the Crown by 'petition of right'. Apart from certain differences in the procedure, which are not material for the present purpose, the issue is tried in the same way and according to the same principles of law as any other claim in contract or in respect of property. When the claim is not founded upon contract and is not a claim for property, but is based upon an alleged tort (that is to say, an act, not a breach of contract, which is alleged to be illegal) the position is different, seeing that owing to the application of an ancient rule of the common law 'the King can do no wrong' an action cannot be brought against the Crown in respect of a tort. But this does not mean that there is no remedy where an illegal act is committed by a servant of the Crown in the course of his official duties or by a person purporting to act under the authority of the Crown, for the rule 'the King can do no wrong' is also held to imply that the authority of the Crown cannot be relied upon by any servant of the Crown as a defence or as an excuse, if an act committed by him is illegal. Consequently, an ordinary action can always be brought in the ordinary courts against the official or other person actually responsible for the act complained of and, under an almost invariable practice, if the act was done by a servant of the Crown in the purported exercise of his official duties, the defence of the proceedings brought against this individual, as defendant, is undertaken by the ordinary legal advisers of the Crown and the judgement, if any, given against him is satisfied out of the public revenue. At common law, therefore, if any servant or an official of the Crown, whether authorised by his superiors or not, and whether purporting to act in the course of his official duties or not, committed any act which was prejudicial to any individual and was not lawful, the individual had always a remedy by bringing an action of tort in the ordinary courts of law against the Crown servant or official responsible."

According to this description by the British Government of the situation before the Indemnity Act, even then the individual who wanted compensa-

tion of the Crown, had to decide whether he ought to choose the way of "Petition of right" or sue the servant of the Crown and would, in the present case, have had to decide beforehand whether he should base the claim on contract or on implied contract or upon tort. For a claim based on a purported lawful act of the Crown's servants, and neither upon contract nor on implied contract, there was no remedy.

The question of the basis to be put forward for a claim of compensation for property taken and used by the servants of the Crown and, consequently, also the question of the choice of the remedy, became still more complicated during the Great War.

The British Government in their Memorial (Nos. 58, 59) explain the causes of this situation: "In the national emergency created by the Great War it was necessary for the Crown to assume and exercise a number of powers involving the control of, and interference with, the ordinary liberties of individuals, particularly in the conduct of their businesses or on the management of their property. The emergency compelled the Crown not merely to make a wider and more extensive use of its prerogative powers under the common law, but to assume additional powers which were conferred upon it by Acts of Parliament passed during the war, such as the Defence of the Realm Acts and Trading with the Enemy Acts. These Acts made lawful acts of control or interference which, otherwise, would, or might, have been *ultra vires* and might have given rise either to actions of tort against the Crown's servants or in other cases to petitions of right against the Crown. In so far as the act of the Crown were lawful either under the prerogative or under these or any other Acts of Parliament, no legal proceeding would (speaking generally) lie to recover compensation for any loss they might cause to individuals. Nevertheless, during the war the British Government, though under no legal obligation to do so, granted compensation as a matter of grace to persons whose business or property had been interfered with through the exercise of its prerogative or statutory powers for the defence of the Realm. And for the purposes of assessing such compensation a tribunal known as the Defence of the Realm (Losses) Commission was set up. Furthermore, a special tribunal known as the Admiralty Transport Arbitration Board was constituted to deal with claims for compensation by shipowners whose vessels had been requisitioned. As was natural, there were a number of cases where it was a matter of dispute whether the acts done by the Crown were or were not within the powers possessed by it under the prerogative or under these special statutes, and persons were consequently in doubt whether to proceed upon the basis that acts were unlawful and bring proceedings in the ordinary courts (i.e. by action of tort against the Crown's servants or by petition of right) or whether to proceed upon the basis that the acts were lawful and to apply to these special tribunals for compensation *ex gratia*. Further doubts were also felt as to the effect upon the rights of recourse to the courts of a prior attempt to obtain *ex gratia* compensation from these tribunals."

It was in these circumstances that, shortly after the conclusion of the war, the Indemnity Act of 1920 was passed. It is, according to the introductory sentence, an Act to restrict the taking of legal proceedings in respect of certain acts and matters done during the war and to provide in certain cases remedies in substitution therefor.

The Finnish Government before the Arbitrator, at the oral hearing, observed that the Indemnity Act was not only, as said in the British Memorial, a measure to the advantage of the individuals concerned but in some ways

very restrictive of their rights, with a purpose to prevent that, at the end of the war, when admittedly many things had been done which were not strictly within the law of the land, excessive or exorbitant claims were being put forward based on a strict view of the law. The Finnish Government added that the Finnish Government had, however, never suggested that there is anything wrongful or anything to complain about in that (4.73).

The Indemnity Act only applies to acts done during the war in good faith by a person holding office under, or employed in, the service of the Crown and done and purported to be done in the execution of his duty and for the defence of the Realm or in the public interest. The Act in consequence does not deal with cases where the servants of the Crown have not acted in good faith. In this case the Crown, evidently, does not acknowledge any responsibility. In the present case bad faith has not been alleged. Legal proceedings even in respect of such acts done in good faith are however barred by the Act, but with far going exceptions among which the following ones are of interest for the present case.

The owner of a ship which has been requisitioned at any time during the war in the exercise or purported exercise of any prerogative right of the King or of any power under any enactment relating to the defence of the Realm, or any regulation or order made or purporting to be made thereunder, is entitled to payment or compensation for the use of the same and for services rendered during the employment of the same in Government service and compensation for loss or damage thereby occasioned, and such payment or compensation shall be assessed on the principles specially stated in the Act and by a special tribunal to be set up, the Admiralty Transport Arbitration Board.

Any person who has otherwise incurred or sustained any direct loss or damage by reason of interference with his property or business in the United Kingdom through the exercise or purported exercise, during the war, of any prerogative right of the King or of any power under any enactment relating to the defence of the Realm, or any regulation or order made or purporting to be made thereunder is entitled to payment or compensation in respect of such loss or damage, and such payment and compensation shall be assessed on the principles specially stated in the Act and by the Realm Losses Commission, to be styled and known as the War Compensation Court.

The right to payment or compensation in the two cases now mentioned is not, however, conferred on any person unless notice of the claim has been given to the tribunal in such form and manner as the tribunal may prescribe within one year from the termination of the war or the date when the transaction giving rise to the claim took place, whichever may be the later.

The institution or prosecution of proceedings in respect of any rights under, or alleged breaches of, contract—for which a petition of right shall be deemed to be a legal proceeding—are allowed, if the proceedings are instituted within one year from the termination of the war or the date when the cause of action arose, whichever may be the later.

The British Government before the Arbitrator, at the oral hearing, observed that though the Finnish shipowners were years out of time in order to go before the Arbitration Board, all questions of time were expressly waived in their favour (4.7).

As regards the question of appeal there is, in the Act, prescribed that, in the above-mentioned cases of claims based on requisition of a vessel or upon interference with property or business, the party which feels aggrieved by

any direction or determination of the tribunal on any point of law, may, within the time and in accordance with the conditions prescribed by rules of court, appeal to the Court of Appeal, or as respects Scotland to either division of the Court of Session, and the decision of the Court of Appeal or Court of Session on any such appeal shall, with the leave of that Court but not otherwise, be subject to appeal to the House of Lords.

By order LV (B) r. 41 of the Rules of Supreme Court the time prescribed within which an appeal to the Court of Appeal could be lodged was 21 days (Finnish Memorial No. 8).

As shown by the examination of the rules of the Indemnity Act the private individual who wanted to base his claim against the British Government on acts done during the war in good faith by a person holding office under, or employed in, the service of the Crown, and done or purported to be done in the execution of his duty and for the defence of the Realm or in the public interest, had to choose one of the three ways indicated in the Indemnity Act: he could go to the Admiralty Transport Arbitration Board, if he wanted to base his claim on the requisition of his vessel; to the War Compensation Court if he based his claim on interference with his property or business, and to the ordinary Court, after having received the permission of the Crown (by Petition of right), if he wanted to base his claim on a right under contract or alleged breaches of contract. The possibility to sue by Petition of right on the basis of a quasi-contract, waiving the tort, is however—this is common ground—barred by the Indemnity Act in cases where the Act applies. Apart from the Indemnity Act, if it is really a tort not done as described in the Act, there is still the way of suing the individual officer, and then, as said by the British Government, the Crown may as a matter of practice back up the proceedings and, eventually, pay the damages. (2. 56-58.)

II. Which were the remedies under British municipal law open to the Finnish shipowners?

Appeal from the decision of the Arbitration Board.

As previously has been mentioned the Finnish Government failed in their endeavours to procure by diplomatic negotiations compensation to the Finnish shipowners. The shipowners then lodged a claim before the Admiralty Transport Arbitration Board composed by Lord Trevethin, late Lord Chief Justice of England, Sir James H. Warrack and Sir F. C. Dawson. Having heard the case during seven days the Board dismissed the claim. The shipowners did not appeal from that decision.

At the Council of the League of Nations the objection of the British Government that the municipal remedies were not exhausted chiefly turned on the fact that the Finnish shipowners had not appealed from this decision. (First British Memorandum No. 18.)

The remedy of appeal relied on by the British Government may be said always to be open to a claimant in that sense that there is a right to file a notice of appeal and to have the contentions of the appellant as to his formal right of appeal dealt with by the Court of Appeal. It is, however, common ground that this is not sufficient to bring in the local remedies rule; the remedy must be effective and adequate.

A remedy of appeal is effective only if the Court of Appeal may enter into the merits of the case. But even this does not exhaust the condition of

effectiveness under international law. The Arbitrator will deal with these matters in the subsequent parts of the judgement.

Was an appeal from the decision of the Arbitration Board effective and adequate ?

The Finnish Government before the Arbitrator, in their Memorial (No. 16), contend that even if there existed a technical right of appeal from the judgement of the Arbitration Board, such right was illusory and ineffective in that any appeal, having regard to the findings of fact of the Board, was bound to fail. The failure to appeal therefore cannot be treated as a failure to exhaust local remedies within the meaning of the international rule. It is no objection to an international claim that there exists some theoretical or technical possibility of resort to municipal jurisdictions. The local remedy must be really available and it must be effective and adequate.

The contention of the Finnish Government that the local remedy must be effective, also expressed by Borchard (*Diplomatic Protection of Citizens abroad* § 383) to the effect that "the rule that local remedies must be exhausted before diplomatic interposition is proper is in its application subject to the important condition that the local remedy is effective in securing redress" is, it appears, approved of by the British Government (British Countermemorial No. 21).

The meaning of this term "effective" has however been discussed almost exclusively in connection with the question whether there is or is not a failure of law or courts to fulfil the requirements of international law, e.g. in cases where it is suggested that, as Borchard observes (a.a), it is unnecessary to exhaust local remedies because, as Secretary of State Fish once said, "these were no justice to exhaust". This is quite natural as amongst the cases of international claims for compensation the cases of alleged failure of law or courts have been beyond comparison the most frequent. But there may arise, and have arisen, cases where, without it being suggested that there is such a failure of law or courts, it is contended that the remedies open to the individual claimant were not effective. Such cases were e.g. the prize cases, cited by Borchard (a.a.) where it was held that in the face of a uniform course of decisions in the highest courts, a reversal of the condemnation being hopeless, an appeal was excused. Here, it appears, it was not a question of a failure of the courts nor of the law to fulfil the requirements of international law but the claim failed on its merits and it was hopeless to appeal.

The Finnish Government have expressly declared that they do not suggest that in the present case there has been any failure of British law or British courts to fulfil the requirements of international law. But they allege that the remedies open to the shipowners were, anyhow, not effective : Generally, in regard to the remedies under the Indemnity Act, because damages corresponding to the loss sustained cannot under Section 2 of the Indemnity Act be recovered. Secondly, because in consequence of the provisions of the Indemnity Act that appeal is allowed only on points of law, the only remedy open to the shipowners was barred, as the decision of the Arbitration Board that there was a Russian and not an English requisition, was a finding of fact from which there was no appeal. And, in this respect, the Finnish Government in the second line argue that there is no effective remedy on appeal because, at all events, there are adequate reasons for thinking that the remedy was not effective. This, the Finnish Government contended, is anal-

ogous to the Prize Court cases, because in those cases it was almost certain that, if the claimants had gone to the Prize Court of Appeal they would have lost their cases, because this court had given a decision in a case very like the claimants' cases. You could hardly say that the cases were identical. They might have been able to distinguish the cases from the case already decided. The Finnish Government therefore suggested that the Prize Court cases are very close to their second line. (Oral hearing 4.117.)

British legislation effective?

The Arbitrator will first deal with the question, whether the local remedies rule is not applicable because of the alleged fact that British law—viz. in this case the Indemnity Act—though fulfilling the requirements of international law as regards effectiveness is anyhow wanting in effect because of the limitation of the possible amount of compensation prescribed in the Indemnity Act.

The Finnish Government before the Arbitrator, in their Memorial (No. 18) and Countermemorial (Nos. 44, 50), contend that the remedies under the Indemnity Act were not effective in that respect that the payment or compensation provided under Section 2 of the Indemnity Act shall be assessed on the principles set out in the Schedule and that under these principles damages corresponding to the loss or inquiry sustained cannot be recovered. It is not contested that the value of the three lost ships as assessed by the Board is fair and adequate. But as regards hire the Blue Book rates (Schedule, Part I) did not represent fair market rates. They were deliberately fixed to exclude the effect of war upon current rates of hire. And one of the principles laid down in Part II of the Schedule is that in awarding compensation "nothing should be included in respect of any loss or damage due simply and solely to the existence of a state of war", a provision which, in almost all cases, prevented the recovery of the market price of property.

The British Government before the Arbitrator, in their Memorial (No. 69) and their Countermemorial (No. 29), contend that it is obvious that the application of the principles set out in Part I of the Schedule of the Indemnity Act would give a substantial and entirely adequate payment for the hire. The rates and conditions contained in the Blue Book report were the result of agreement between the Admiralty and shipowners and the rates of hire were considered to represent fair market prices and were increased from time to time as the costs of running steamships became greater. Even if it were the case that the Blue Book rates were below the market rates, as alleged by the Finnish Government, they were certainly substantial, and a remedy by which they could be obtained could obviously not be rejected under any formulation of the municipal remedies rule. Even if the international rule were limited to remedies by which complete redress can be directly obtained, the redress which could be given under the Indemnity Act was clearly adequate redress.

The British Government, in their Memorial (No. 46) and their Countermemorial (No. 21), further contend that the fact that the municipal court, contrary to what is here the case, may not be able to award all the compensation to which the State of the claimants consider that they should be entitled, if the respondent State is to discharge all its international obligations, is no ground for excusing recourse to its tribunals. A claim is dependent upon certain allegations of fact which may be disputed and upon certain

legal contentions, which may be doubtful, and the respondent Government is entitled to the decision of one of its own courts upon these points, before it takes its decision to pay, or refuse to pay, compensation. It would seem that, provided there was a municipal tribunal which was in a position to decide upon the merits of the case, the respondent Government would be entitled to insist that recourse must be had to it, even if the tribunal was not, in fact, in a position actually to award compensation at all, in order that the questions of law and fact arising might be decided. It must be remembered that the rule covers all possibilities or recourse to administrative tribunals or enquiries and that such bodies frequently only possess advisory functions.

The Finnish Government in their Countermemorial (No. 33) submit that this view is untenable and contrary not only to common sense but to the authorities cited both in the Finnish and the British Memorials.

As regards this last contention of the British Government—although in the case of an initial breach of international law (viz. arising from an act of the governmental authorities, quite apart of a failure of law or courts to fulfil the requirements of international law) the reasons for the local remedy rule are not only that the State shall have an opportunity of discharging its responsibility by doing justice in its own way but also that the State shall have the investigation and adjudication of its own tribunals upon the questions of law and fact which the international claim involves for being able to appreciate its international responsibility (cf. Brit. Mem. No. 49 note 32) —it appears hard to lay on the private individual the burden of incurring loss of money and time by going through the courts only to exhaust what to him—at least for the time being—must be only a very unsatisfactory remedy; and although the Arbitrator is aware that the contrary opinion has been frequently expressed, the Arbitrator is inclined to find it doubtful whether the fact that such a kind of exhaustion has not taken place always can give the respondent State the right to object to an international interposition.

But, as the British Government say in their Memorial (No. 46), the case of an ordinary judicial tribunal being in a position to decide on the merits of the case but not to award compensation must be a comparatively rare one.

As to the present case the Arbitrator, upon the reasons brought forward by the British Government, finds that the compensation which could be given under the Indemnity Act does not fall short of what has been meant by the term adequate being used in connection with the term effective remedy.

Is the municipal remedy of appeal which was open to the shipowners, under international law to be considered as effective on the merits of the case?

Before the Arbitrator enters into the examination of the question whether, under international law, on the merits of the case there was an effective remedy by appeal from the decision of the Arbitration Board, there arise, in the opinion of the Arbitrator, three questions which must in beforehand be considered.

Firstly: Which contentions of fact and propositions of law are to be considered by the Arbitrator? Every plausible contention "by which the individual claimants can, or probably can, obtain from a tribunal a decision on the merits of their claim provided they formulate their claim in the right way" (British Memorial No. 45)? Or only the contentions brought forward

by the Finnish Government before the Council of the League of Nations? Or added to these the contentions of the Finnish shipowners before the Arbitration Board, if there are any such additional arguments?

Secondly: Are the contentions of fact and propositions of law which are thus to be taken into account when applying the local remedies rule to be considered as well founded? (British Memorial Nos. 44, 45, and Countermemorial No. 21; Finnish Memorial No. 31.) Is, as regards the legal propositions, the case to be considered upon the basis only of the propositions of law which reasonably arise out of the facts? (Finnish Memorial No. 31.)

Thirdly: Is the local remedy under the local remedies rule to be held as not effective only where it is obviously futile to have recourse to the remedy on those merits of the case which are to be taken into account, or is it sufficient that such a step only appears to be futile? (British Countermemorial No. 21; Finnish Government at the oral hearing 6.2.)

As to the first question it is to be observed that the British Government before the Arbitrator, in their Memorial (No. 45), say: A case is not taken out of the operation of the local remedies rule because it can be formulated in a way and upon grounds so that there is no municipal remedy, if there are other grounds and other ways of formulating it upon the basis of which a municipal remedy exists.

The British Government, at the oral hearing, further contended that the points of law put forward at the proceedings before the Arbitration Board are to be considered, whether they afterwards may have been abandoned by the claimant State or not (3.49).

The British Government before the Arbitrator, at the oral hearing, added: A respondent state is only able to do justice in its own, or to obtain a decision of, its Courts of justice on the facts and the law in a case, if the grounds of law and fact on which the international claim is based are actually raised and submitted to its tribunals. The very idea that you are going to do justice and that you are going to investigate a claim must mean that all the relevant questions of law and fact are before the tribunal. In order to satisfy the local remedies rule it is necessary that all contentions, both of law and of fact, should have been raised and submitted to the tribunal and pronounced on by them. Otherwise you could not carry out the *raison d'être* of the local remedies rule. It is therefore necessary in the present case to see how the claimants formulate their claim and to examine the grounds on which it is based and then to see whether the various contentions could have been taken before the Arbitration Board in the first place and before the Court of Appeal in the second place. If they could have been raised and taken then it is, in order to satisfy the local remedies rule, necessary that they should be taken (5.75).

The British Government further said that they would not contend that every possible legal argument which could have been used afterwards ought to have been taken before the Arbitration Board. But if it was a legal argument which, if sound, was necessary in order to establish the claim, viz. was an essential constituent element of the international claim in the legal sense, then you must treat it as one which must be raised before the Court of first instance (5.77; 1.78).

As to the second and third question it may be mentioned that the British Government before the Arbitrator, in their Countermemorial (No. 21) and in their Memorial (Nos. 44, 45), say that the local remedies rule does not require recourse to remedies which are obviously futile. But in deciding whether the local remedy is one which must be considered to be obviously

futile, the case must be considered upon the hypothesis that every allegation of fact in the claim is true and every legal proposition upon which it is based is correct. If, upon the assumption that the claim is a good one, there is a means by which the individual claimants can, or probably can, obtain from a tribunal a decision on the merits of their claim provided that they take the proper proceedings within the right time and formulate their claim in the right way, they must have recourse to this remedy. If there is a manner in which they can formulate their claim and obtain redress under the municipal law they must avail themselves of it.

The British Government before the Arbitrator, in their Memorial (No. 44) add: It is stated that there is no need to have recourse to municipal remedies, if it is clear that this action can lead to no possible result other than the rejection of the claim. It may, however, be that there is no chance of success, not because the municipal law fails to provide adequate remedies, but because there are no merits whatever in the claim; it may be founded upon alleged facts which are palpably erroneous and be supported by contentions of law which would be rejected in the courts of any nation. It is clear that the fact that a claim is obviously ill founded and therefore it would be useless to pursue it in the municipal courts is not a ground for taking it out of the rule that municipal remedies must be exhausted. This would be equivalent to saying that the rule applied in the case of meritorious but not to unmeritorious claims, which is manifestly absurd. In order to ascertain whether, under the rule, the case is one where recourse must be had to the municipal remedies or whether without any such recourse it can be stated that no such remedies exist, the case must be considered upon the hypothesis that every allegation of fact in the claim is true and every legal proposition upon which it is based is correct. It is obviously upon this basis that this question must be considered.

The Finnish Government before the Arbitrator, in their Countermemorial (No. 31), say: The relevant principle to be adopted in connection with the rule as to local remedies does not appear to have been discussed by authority. In theory there might be something to be said for the view that some investigation even of the facts would be permissible, in order to ascertain whether municipal means of recourse were open to the claimants, but this involves practical difficulties and it is certainly convenient to proceed upon the hypothesis that the allegations of fact in the claim are true. The Finnish Government, therefore, has no objection to this being adopted as the basis in the present case. But as regards the legal propositions, whilst we consider that, properly understood, those advanced in support of the present claim are substantially correct, the Finnish Government is quite unable to accept the principle laid down by the British Government. The true hypothesis is to consider the case upon the basis of the propositions of law reasonably arising out of the facts. In order to illustrate our meaning we would say that, if a contention of law which is manifestly absurd has been put forward at some time or other in support of a claim, it is idle to assume that that contention is well founded and to ask: What would the claimants rights be under the municipal law upon that erroneous hypothesis?, for it is clear that, in fact, they would have none. Some regard must be had to realities. But it is not necessary, on the other hand, to insist that before a legal proposition is taken into account its correctness must be conclusively established. It is sufficient if the proposition is reasonably arguable so that it cannot be said in advance that the municipal court would reject it, as in this case there may be ground for holding that a local remedy existed. A

proposition of law of this character may, therefore, be assumed to be correct for the purpose of seeing whether, under the international law, resort should have been had to the municipal means of recourse. The rule as to local remedies is not a rule divised for the purpose of preventing international claims from being made because they are, or are thought to be ill founded, but it is based upon quite different conceptions: in cases of the present character the basis of the rule is that the foreign State should, first of all, be given the opportunity of redressing the wrong alleged. Whether a wrong has really been committed is a different question altogether, with which the international rule under discussion is not concerned; the only point under that rule is: Does the municipal means of redress exist?

The British Government before the Arbitrator, at the oral hearing, submitted that there is not a right to challenge the British Court of Appeal for not being an effective means of redress without approaching the question on the basis that the submissions were effective submissions in law and not bad points of law which, after having been rejected by the Court of first instance, could not be taken to the Court of Appeal (3.106). The Courts of England are being arraigned in an international procedure for not affording justice to people (3.50). This matter must be decided on the assumption that the propositions of law put forward at the Arbitration Board were sound propositions. A man has not the right to put forward a whole string of contentions, have them rejected, and then say that the appeal is illusory because they have been rejected, unless he is prepared to go on to say: "These propositions of law must be assumed to be sound, on the assumption that they are sound, was there an appeal?" (1.50, 51). Throughout the statements of the Finnish Government there is the assumption that there is the injury, that there is the right to compensation corresponding to the injury and that the British Government does not provide effective and substantial means of obtaining that redress. This leads to the basis that the submissions of law are valid and that the Finnish shipowners therefore have an *injuria* to which the British Government are unwilling to give a redress. You must not slip from the conception of a claim put forward by a wronged individual who has suffered an injury into the conception of a claim, however ill founded, which it is idle to pursue (3.102). You can only see whether their injury will get no redress by assuming that their points are right, because if their points of law are right the decision ought to have been the other way. It is only by assuming that their points of law, or sufficient of them to change the decision of the Arbitration Board round, were right that you can put them into the position of being able to say that they have an injury which we have failed to redress (3.108). You have to approach the question, not on the truth but on the assumption that at least one or more of those submissions of law, being relevant to the decision, were right (3.111). It is a perfectly accurate statement of the Finnish Government that the hypothesis must be that the contentions of law reasonably arising out of facts are well founded, although, of course, the law may come in at the beginning or in the middle or mixed up with the facts or at the end. But the Finnish Government cannot be allowed to say that any point of law which has actually been put forward by that side does not reasonably arise out of facts (3.104). If they argued them at the Arbitration Board or are trying to argue them before the League of Nations, they cannot be heard to say that they do not reasonably arise (1.105).

The Finnish Government before the Arbitrator, at the oral hearing, contended that the question whether a claim is meritorious or not has nothing to do with the rule of exhaustion of local remedies. This rule has nothing to do with the question of the merits of the case. It is not to be lightly assumed that a responsible and civilised Government is going to take up a completely and palpably bad claim. But if it did, it would be very easy for the other Government to deal with it from an international point of view, but the rule as to local remedies has nothing to do with the question whether the claim is a good claim or not on the merits. Neither can it be said that the fact that a contention has been put forward makes the contention reasonable (4.78).

The Finnish Government before the Arbitrator, at the oral hearing, further contended that the international law requires that a foreigner should exhaust only such remedies as appear to be effective and adequate (6.2).

In the view of the Arbitrator, the British Government, when saying that the Courts of England are being arraigned in an international procedure for not affording justice, cannot mean that here is an alleged case of failure of courts to fulfil the requirements of international law, creating liability for the British Government under international law. This is the case e.g. where there is a decision of the courts which is, as Borchard says (*Diplomatic Protection of Citizens abroad* §§ 130, 81), "grossly unfair and notoriously unjust". That this here should be the case has, of course, not been alleged. The contention of there being an arraignment can only mean to say that the Finnish Government contend that the claim rejected by the Arbitration Board is a meritorious claim. But a rejection of a meritorious claim by a British Court does not in itself under international law create any liability for the British Government.

The international claim of the Finnish Government, in consequence, is not based on the fact of the rejection of the claim of the Finnish shipowners being a breach of international law. If the basis were an alleged failure of courts or law to fulfil the requirements of international law it would have been natural to hold that all relevant facts and points of law which could support the private claim should be taken into consideration. Otherwise such a failure, especially of law, could not be ascertained. But here the alleged fact, creating liability under international law, is an initial breach of international law, consisting in the alleged taking and using of the Finnish ships without paying for it.

In this case the local remedies rule serves only the function explained by the British Government (British Memorial, No. 49 note 32) and accepted by the Finnish Government (Finnish Memorial No. 23 and at the oral hearing 4.56) to the effect that the respondent State is entitled, first of all to discharge its responsibility by doing justice in its own way, but also to the investigation and adjudication of its own tribunals upon the questions of law and fact which the claim involves and then on the basis of this adjudication to appreciate its international responsibility and to meet or reject the claim accordingly.

The Finnish and the British Governments are of the opinion (expressed in the British Memorial No. 4 and the Finnish Countermemorial No. 23) that there may be cases where it can be said that a breach of international law has been committed by the very acts complained of and before any recourse has been had to the municipal tribunal. These acts must be committed by the respondent Government or its officials, since it has no direct responsibility under international law for the acts of private individuals.

The Finnish Government, as has previously been mentioned, contend that the situation alleged to have arisen by the taking and using of the Finnish ships by the British authorities without paying for it, covers such a case.

If what the parties in these respects contend is right—and the Arbitrator is of the opinion that it is so—then it appears that the *raison d'être* of the local remedies rule, in a case of an alleged initial breach of international law, can be solely that all the contentions of fact and propositions of law which are brought forward by the claimant Government in the international procedure as relevant to their contention that the respondent Government have committed a breach of international law by the act complained of, must have been investigated and adjudicated upon by the municipal Courts up to the last competent instance, thereby also giving the respondent Government a possibility of doing justice in their own, ordinary way.

The consequence is, in the opinion of the Arbitrator, that in a case of an alleged initial breach of international law, the rule that the respondent State "is entitled to the adjudication of its own tribunals upon the question of law and fact which the claim involves" can bear only on the contentions of fact and propositions of law put forward by the claimant Government in the international procedure and that the opportunity of "doing justice in its own way" ought to refer only to a claim based upon these contentions. If the claimant Government do not maintain certain of the contentions advanced and rejected in the municipal courts, though perhaps, in fact, these contentions are relevant to the success of the international claim, the disadvantage is on the side of the claimant Government. The respondent Government has no reasonable interest to insist upon that, as a previous condition to further international proceedings, such contentions, perhaps repudiated by the claimant Government and in all events not put forward as a basis of their claim, should be subject to the investigation and the adjudication and the decision by the municipal courts, and it does not seem reasonable to ask the claimant Government in the international procedure to advance and defend propositions which they hold to be wrong.

The Arbitrator is aware of the fact that in learned works, at the conferences of Institut de Droit International and especially at the Codification Conference of 1930 the proposition has been advanced that no responsibility of the State can come into existence until the private claim has been rejected by the local courts, whether the basis brought forward for of the international claim may be a failure of the local courts or law to fulfil the requirements of international law, or the basis is an initial breach of international law.

If this proposition means that the responsibility of the State does not come into existence until the grounds upon which the claimant Government in the international procedure base their contention of an initial breach of international law have been rejected by the municipal courts, this proposition does not seem to result in any difference as to the question which contentions of fact or propositions of law should be considered under the local remedies rule.

It is, besides, of interest to observe that this proposition seems to be in conflict with arbitral decisions by United States and British claims Commission of 1871. The claims to be considered by this Commission were all claims on the part of corporations, companies or private individuals, citizens of the two countries, upon the Government of the other country, arising out of acts committed against the persons or property of citizens of each country during 13 April 1861—9 April 1865, with the exception of the claims

generically known as the Alabama claims, which were dealt with by another commission. In two of these cases the private claimant was excused for not having appealed because of the impossibility to communicate with counsel or because of the court's decision having been given so rapidly that the claimant, residing far away, had no opportunity to interpose any claim or defence. (Moore, Arbitr., pp. 688-690; 3152-3159.) If the international breach does not come into existence until the private claim is rejected by the highest competent municipal court, then the recourse to that court is a matter of substance and not of procedure and it is difficult to see how, if such is the case, an excuse as the one put forward in these cases could have been accepted.

The answer to the first question: Which contentions of fact and propositions of law in support of the international claim shall be considered by the Arbitrator? is then: All the contentions and propositions brought forward by the Finnish Government in the international procedure before the Council of the League of Nations, but only these, shall be taken into account.

The British Government before the Arbitrator, at the oral hearing contended that the international claim is based on exactly the same legal grounds as those which were raised by the Finnish shipowners before the Arbitration Board (5.75). If this contention were accurate the question now dealt with would be of no direct relevance. It will, however, be seen that, on important points, this is not quite the case.

The Finnish Government before the Arbitrator, at the oral hearing, declared to withdraw one of the contentions of law, advanced before the Arbitration Board by the Finnish shipowners and maintained by the Finnish Government before the Council of the League of Nations.

The British Government objected to this withdrawal as the formal arguments of the Finnish Government before the League of Nations are forming the very basis of the Arbitration (3.85).

The Arbitrator is of the opinion that the purpose of the proceedings before him is only to help him to answer the question whether the requirements of the local remedies rule have been fulfilled, and that that question includes the point whether the contentions put forward before the Council of the League of Nations have been tried in the competent municipal courts. Under such circumstances a point of law which has been urged before the Council cannot properly be withdrawn before the Arbitrator.

As to the second question the Arbitrator wants to make the following observations.

According to the principles approved by the Arbitrator every relevant contention, whether it is well founded or not, brought forward by the claimant Government in the international procedure, must under the local remedies rule have been investigated and adjudicated upon by the highest competent municipal court.

The parties in the present case, however, agree—and rightly—that the local remedies rule does not apply where there is no effective remedy. And the British Government, as previously mentioned, submit that this is the case where a recourse is obviously futile. It is evident that the British Government there include not only cases where recourse is futile because on formal grounds there is no remedy or no further remedy, e.g. where there is no appealable point of law in the judgement, but also cases where on the merits of the claim recourse is obviously futile, e.g. where there may be appealable points of law but they are obviously insufficient to reverse the decision of the Court of first instance. The British Government, however, contend that in

this latter case the merits must be considered upon the hypothesis that every allegation of fact in the claim is true and every legal proposition upon which it is based is correct.

The Arbitrator is of the same opinion, with the reservation only that, of course, where it is, as here, a question of remedy on appeal, and contentions of fact maintained by the claimant Government but rejected by the Arbitration Board, are not appealable, such contentions may not be taken as well founded.

The contentions to be taken into account must be considered well founded because otherwise the rule that where recourse is futile recourse is not required, would lead to the consequence, pointed out by the British Government, that unmeritorious international claims would be taken out of the rule that municipal remedies must be exhausted. But, as previously said, every relevant contention brought forward by the claimant Government in the international procedure—whether erroneous or not—must, according to the opinion expressed by the Arbitrator, under the local remedies rule have been examined by the municipal courts, ere the respondent State is bound to enter into further international proceedings.

The Finnish Government agree that the case should be considered on the basis that the allegations of fact are to be taken as true and the contentions of law as well founded, provided that these latter contentions are reasonably arising out of the facts.

The British Government find this statement perfectly accurate, but contend that all contentions of law still argued by the Finnish Government before the League of Nations must be considered as reasonably arising out of the alleged facts.

The effect of this contention is, in fact, the same as the effect of the rule accepted by the Arbitrator, viz, that as every point of law put forward by the claimant Government in the international procedure must be examined by the municipal courts, it does not matter whether the point is erroneous or not. But it is evident that if the alleged facts deemed to be true or the facts which in the decision of the Court of first instance are stated to be true and are not appealable, are in conflict with the facts which, according to the contention of law, equally deemed to be true, are necessary for arriving to the contended act in the law, then the contention of law must be without relevance to the present case. It seems to the Arbitrator impossible to come to another solution in this conflict of contentions which must all be considered as well founded.

As regards finally the third question, whether the local remedy shall be considered as not effective only where it is obviously futile on the merits of the case which are to be taken into account, to have recourse to the municipal remedy, or whether, as the Finnish Government suggest, it is sufficient that such a step only appears to be futile, a certain strictness in construing this rule appears justified by the opinion expressed by Borchard when mentioning the rule applied in the prize cases. Borchard says (a.a. § 383): "In a few prize cases, it has been held that in face of a uniform course of decisions in the highest courts a reversal of the condemnation being hopeless, an appeal was excused; but this rule was most strictly construed, and if substantial right of appeal existed, failure to prosecute an appeal operated as a bar to relief."

These previous questions having been considered, the Arbitrator now has to deal with the matter whether, on the principles thus accepted, the remedy of appeal was effective. This means an examination of the questions whether

there were any appealable points of law in the judgement of the Arbitration Board and whether these points of law, if existent, were obviously insufficient or not on appeal to reverse the decision of the Arbitration Board.

The question whether the final conclusion of the Arbitration Board, that there was a Russian and not an English requisition, is, as the Finnish Government contend, a finding of fact from which no appeal lay or an appealable point of law, depends on statements to be made in connection with the question whether there are any appealable points of law in the judgement of the Board and will therefore be dealt with under this question.

It should be observed that of the three previous questions now examined, only the first question is of interest as to the matter whether there are any appealable points of law in the judgement of the Arbitration Board, and only in that respect that as only contentions maintained by the claimant Government in the international procedure shall be considered, it is of no interest whether a point of law is appealable and thus may give right to a local remedy on the basis of that point, if the point is not maintained by the claimant Government in the international procedure as a basis of their claim.

The second rule that the contentions maintained shall be held as well founded has no application as to the question of whether there are appealable points of law in the judgement, as this depends, firstly on the question whether there is a case of a point of law or of a question of fact, a matter which lies under the decision of the Arbitrator, and secondly whether the contention of law is overruled by the Board, a matter which depends on the view which the Board took of the point. In neither case there is room for any presumption as to the contention being well founded.

The third rule that the local remedy shall be considered to be ineffective only where recourse is obviously futile has, of course, no application on the question whether there are, in fact, any appealable points of law or not. This rule comes in only when a decision upon this question is taken.

These three rules are therefore applicable chiefly as regards the second part of the matter of appeal, viz. whether the appealable points of law, which are considered to exist, were obviously insufficient or not to reverse the decision of the Arbitration Board, but they may also be of interest as regards the other local remedies, relied on by the British Government, which the Arbitrator will later on take into consideration.

Were there any appealable points of law in the judgement of the Arbitration Board?

As already mentioned, an appeal against a decision of the Arbitration Board lies only on a point of law, decided against the party who wants to appeal.

What a point of law is—as distinguished from a question of fact—is a very doubtful matter and subject to conflicting opinions not only of the parties in the present case but of learned judges and authors in Great Britain and in other countries. The question has been dealt with in a thorough and interesting way in all countries, where it is decisive for the right to go to a higher Court. It is here, however, of course, only a question of what is the law of Great Britain according to British authorities.

In Great Britain the necessity of making a distinction between a point of law and a question of fact has its origin in the British system of the jury, which has—both in civil and criminal cases—to deal only with the question of fact, leaving the point of law to the judge.

The reason of this arrangement apparently is that the jury is not considered competent to decide the latter question. The same reason has led to a certain tendency to exclude from the decision of the jury even questions which are not from a theoretical point of view in its strict sense points of law but anyhow cannot properly be left to the jury. This reason for departing from what generally should be taken as the distinction between fact and law does of course not exist where the judge is sitting without a jury. Here, however, other considerations may lead to depart from the principle, e.g. the point of view that it may be appropriate to leave to the Court of appeal—it being in this case only of interest for the right of appeal—freer hands than a strict application of the theoretical distinction would allow.

The first question to decide is therefore: in such a case as the present one, where no jury is engaged, shall yet the same distinction be made between questions of facts and points of law, as in cases where a jury has to give its verdict?

It is the duty of the judge to inform the jury of the relevant points of law and the duty of the jury to take the law from the judge. In civil cases the judge has to explain to the jury which facts are necessary, under the law, to constitute the right alleged by the claimant, e.g. which facts are necessary to bring into existence a contract, further which facts are necessary to constitute the alleged kind of contract, and the additional facts which under the law form a sufficient basis for the claim put forward under the contract. If the judge in any such respect has misinformed the jury, he is said to have misdirected the jury on the point of law.

The jury has to decide which are—considering the evidence put forward on both sides—the facts proved and whether those facts are such as described by the judge as a necessary legal basis of the claim.

As a result of these statements comes the verdict of the jury.

The British Government before the Arbitrator, at the oral hearing, have described how this turns out in practice. "The judge has got to go through the form of saying: Members of the Jury, I direct you that the law is so—and—so, now apply that to the facts of this case. It raises the following issues of law. The plaintiff has to prove this, that or the other thing; on the other hand, if the defendant can prove this, that or the other, it is a complete answer in law. I direct you that there is evidence before you on which the plaintiff can be said to have proved this, that or the other, although, if you like to accept the defendant's witnesses in preference to the plaintiff's, then they have established this, that or that. Now, with those directions before you, will you please tell me what your verdict is." (3.34.)

In civil cases decided by trial by jury, even where no restriction of the right of appeal is stipulated, it is very difficult to disturb an adverse finding of fact. In the absence of any misdirection, the Court of Appeal will not interfere to set aside a verdict or grant a new trial on the ground that the verdict was against the weight of evidence unless the verdict was one which no reasonable man could have found. This amounts, in practice, to an appeal regularly not being allowed on a question of fact but only on a point of law.

As regards County Court cases, where the Judge generally sits without a jury, and cases where the County Court Judge is sitting as Arbitrator without a jury as in cases under the Workmen's Compensation Act, it is expressly said that an appeal lies only on a point of law—viz. the same rule as applies to decisions of the Admiralty Transport Arbitration Board and the War Compensation Court.

In such cases it is held that an appeal lies where the Judge has misdirected himself on a point of law. The fact that this term is lent from the rules of trial by jury—misdirection of the jury on a point of law—indicates that the distinction to be made between the question of fact and the point of law is the same whether it be a question of a limited right of appeal from a decision of a judge sitting alone in any of the courts now mentioned or from a decision in a case of trial by jury.

This is evidently also the opinion of the parties in the present case, as they have both cited decisions in cases of trial by jury as relevant to the distinction to be made between a question of fact and a point of law and it is also in conformity with some observations made by Lord Atkinson in the case Hutchison *v.* Mackinnon (1 App. 1916). As regards the authorities cited under the Workmen's Compensation Act the parties expressly agree that those apply to the present case.

There is however a difference in the matter of procedure as regards the direction in trial by jury and where the judge is sitting alone, which is of some importance.

The parties agree that there is a right of appeal under the Indemnity Act only where the contention of law is overruled by the Court of first instance.

In cases of trial by jury the directions of the judge on points of law must take a definite and express form when the judge adresses the jury. It is thereby clear whether a contention of law is overruled or not. When the judge is sitting without a jury this matter may come out distinctly in an elaborate judgement but the judge may also be content with being satisfied in his own mind of the right decision without elaborating expressly in the judgement the form of reasoning he went through before he arrived at his conclusion.

The Finnish Government in their Countermemorial (No. 54) observe that under the Indemnity Act the decision of the tribunal of first instance shall be final and only allows an appeal, by way of exception from such finality, in regard to "any direction or determination of the tribunal on any point of law". The Finnish Government contended that, in order that an appeal should be possible, there must be some passage in the judgement appealed from, which contains a direction or determination in law.

At the oral hearing the British Government contested that this contention is true (3.43). They cited the case of Moffat Hydropathic Company, Limited (War Compensation Court Reports, 4th Report, p. 90), where Lord Finlay said in the House of Lords: "If a point of law is taken on behalf of a claimant, it is not necessary in order to bring it within the scope of this provision as to appeal, that there should have been a formal decision by the Court on a point of law giving reasons for rejecting it or for modifying the contention of the claimant. It would be quite enough to bring the right of appeal into play if the propositions of law contended for by the claimant were disregarded by the Court, and if it sufficiently appeared that they had made their award overruling in their own minds the contention of the claimant. If it were not so the provision giving a right of appeal would become nugatory. But then it is perfectly plain that it cannot be necessary that the Court should set out in every case the details of each finding."

The British Government added that the highest judicial authority in Great Britain had, in the Moffat Hydro Case, laid it down in unmistakable terms that it is the duty of any Court of Appeal dealing with the War Compensation Court or the Admiralty Transport Arbitration Board to satisfy

itself on all possible material within the written words of the judgement or outside it—the arguments of Counsel, the discussions which took place as the case developed, a report from the Court as to what did happen—as to whether there was or was not a point of law inherent in the decision (3.35). If there must have been the step in law to arrive at the result of the judgement and you can find that out in any way, you get your appeal (3.47, 55).

The Finnish Government cited (5.102) a dictum of Lord Shaw in the same case in order to show that there is a certain disposition in the House of Lords to look with disfavour upon too casuistical and groping a method of hunting out concealed rulings of law. Lord Shaw's dictum is to the following effect: "A point of law should be formulated at the time. Unless that be done, it would leave claimants in the position of lying in wait for the judgement, and then starting the process of groping to see what was at the back of the Judge's mind in law—he being a skilled lawyer—when the judgement was pronounced. Unless there be formulation at the time (or such materials in the case as make formulation unnecessary, the point of law being so clear) then I think it is too late to attempt to raise a point of law afterwards."

Counsel for the Finnish Government later on said that, after having heard Counsel for the British Government, the allegation that the only direction or determination raising an appeal must be one in the judgement itself was withdrawn (6.18). The Arbitrator has, however, found it useful to have these contentions in mind as they are illustrative of the way in which these matters should be considered.

Every point of law, decided adversely to the party who has lost his case, is appealable. In this respect the question of the relevance of the point of law to the ultimate conclusion is of interest only for deciding whether the Board —if not having expressly overruled the contention of the losing party on this point—have in their own minds decided the point adversely to the party.

The question of the relevance of the point in this respect must be distinguished from the question to be dealt with in the second part of the matter of appeal, where the question turns on the point whether, presuming that the contention is well founded, it is anyhow obviously insufficient to reverse the ultimate conclusion.

The Arbitrator will now continue the examination of the disputed and difficult question: what is, under English law, a point of law as distinguished from a question of fact.

It has already been pointed out that under British law the distinction to be made between law and fact is the same whether the appeal, limited to points of law, is from a judge sitting alone—as in the present case—or from a judge sitting with a jury. The limit between the domain of fact and the one of law is therefore in a considerable degree influenced by the procedure of trial by jury.

This is seen by the fact that a contention submitted by the defendant that there is no evidence at all to support the claim is a contention on a point of law, on which an appeal lies, it being in trial by jury the judge's duty to withdraw the case from the jury if he finds this contention true.

A contention that the jury has misunderstood the directions of the judge and therefore misapplied them, is also considered to be a contention of law.

In the present case, where the judge "informs himself" on the points of law, such a misunderstanding cannot take place, nor has it been contended

in the present case that there was no evidence which would have been sufficient to justify the case going to a jury.

The question of inadmissibility of evidence is also a point of law, but has not been raised.

As to other questions which may be termed points of law as distinguished from matters of fact, it is not contested that the interpretation of statutes or of case-made law is a point of law.

On the question of interpretation of documents there seems to be a certain difference of opinion between the Finnish Government and the British Government.

The Finnish Government contended before the Arbitrator, at the oral hearing, that the interpretation of documents is a point of law where the document or group of documents (e.g. a correspondence) is propounded as the expression and embodiment of an act in the law (*acte juridique*, *Rechtsgeschäft*), as signifying an expression of will, lawfully directed to the creation, transfer or extinction of a right or a legal status, e.g. such documents as written contracts. The document or group of documents must however have been intended by its maker to embody and express exhaustively his operative intention regarding the act in the law in question (2.3). Where a document purports to express the legal relationship of the parties and stand alone as an expression of the relationship, then the construction is for the judge (1.58). But whenever the evidence on which a juristic act rests, is not to be found in one or more documents alone, but also in extraneous evidence, then the construction of the act is a matter for the jury (1.52). When in addition to instrumental documents, evidence (whether oral or documentary) is properly adduced of such matters as conversations between the parties, the normal course of business between the parties, their beliefs, understanding or intentions relating to the transactions under discussion, then the rule that the construction of documents is a matter for the judge does not apply (2.3).

The Finnish Government added that in the middle of last century there was some conflict of view between the judges as to whether the interpretation of a contract was not a matter for the jury when there was more than one document, when there was correspondence, but it became settled that as long as the evidence did not go outside the series of letters their interpretation was a matter for the judge (1.43).

The Finnish Government further submitted that even where the general rule applies that the construction of documents is for the judge, there are two exceptions where the matters are not for the judge but for the jury. The one is the construction of technical expressions, the other of ambiguous phrases e.g. where a person is a named person or where there is a named place and there are two such persons or two such places. It is then very proper for the jury to give their opinion under the direction of the judge as to what is the meaning of the particular term or that Tom Smith means Tom Smith the elder and not Tom Smith the younger. With that assistance from the jury the document will go back to the Judge to expound what it means (1.58).

The Finnish Government further said that where the matter in dispute is whether or not the document purports to be the instrument under which the parties are bound or whether or not the parties regarded the documents as defining their legal relationship, that question is not a point of law (6.9, 10).

The Finnish Government, at last, submitted that where the matter under investigation is not an act in the law, but a physical act or state of affairs, then the rule with regard to construction of documents can have no application. Nor can it apply in case of a letter from a stranger to one of the parties, this being a purely physical act. Where the evidence is not purely documentary between the parties, the matter is always for the jury (1.60).

The Finnish Government quoted in support of their contentions a case Moore *v.* Garwood, decided in 1849 and reported in 4 Exchequer at page 681. The claimant had applied for an allotment of a railway scrip and paid a deposit, and the Railway Company had answered by a letter of allotment. It was alleged that the terms contained in the letter of allotment were not the same as those in the letter of application and the last letter the Company refused to produce. Pollock, C.B., at the Middlesex Sittings, in effect directed the jury that the nature of the contract into which the parties had entered was rather a question of fact than of law, because it did not consist of one distinct contract between the parties, but of a series of acts and things done from which the jury were to determine what was the real intention and meaning of the parties when they entered into the mutual relation in which they stood; that is to say the provisional committee as the founders and managers of the scheme, and the plaintiff as a person who had applied for shares; and that the jury were to collect what was the nature of the contract from the documents and from what was done by the respective parties.

In the Exchequer Chamber, before Patteson, Maule, Erle, Williams and Talfourd, Justices, on a Writ of Error, Patteson, J., delivering judgement, said: "The main point is—whether it was a question of law for the Judge—whether he ought to have taken upon himself to say what the contract was; or on the other hand, whether that was a question for the jury. Now there was a good deal of evidence, independent of these letters and of other documents. There was the conduct of the parties, which was relied upon, and which appeared from the statements of the witnesses in the progress of the trial. The substance of the learned counsel's argument here has been, that the learned Judge ought to have taken upon himself to say what the contract between these parties was. If the contract had depended solely upon written documents, the argument might have prevailed; but as it does not, we think the question was properly submitted to the jury."

Another case, cited by the Finnish Government, is Harris *v.* Rickett decided in 1859 and reported in 4 Hurlstone and Normans Reports at page 1. In this case there was a claim for certain goods and chattels taken in possession by virtue of a bill of sale executed by a person who shortly afterwards turned bankrupt. The bill of sale, being for an antecedent debt of the bankrupt and being a conveyance of all the bankrupt's property, was *prima facie* an act of bankruptcy and therefore void. The point, however, was whether or not the bankrupt, to whom money had been advanced by the defendant at an earlier time and who had given the defendant the bill of sale of his household goods etc. to secure the payment of the debt, had promised to give the bill of sale already when the money was advanced. The defendant had taken possession under the bill of sale before the bankruptcy. Cockburn, Chief Justice, at the Lincolnshire Summer Assizes, left it to the jury to say whether the bankrupt had promised at the time when the money was advanced to give the bill of sale and told them that if they thought there was an agreement to give it, intended by the parties to be binding, they should find for the defendant.

In this case it was urged by the claimant that this matter should not have been left to the jury but only that the bill of sale was all that bound the parties, that it could neither be added to nor varied, and that consequently there was, in point of law, no antecedent agreement to give the bill of sale.

The Court of Exchequer did not assent to this argument. The bill of sale did not contain, and was not intended to contain the entire obligation of the bankrupt. The Jury had found that it was agreed to give the bill of sale; they had not found nor did it appear to the Court, that the writing (viz. the bill of sale) was intended to contain the whole agreement and the Court was of the opinion that the rule relied on only applies where the parties to an agreement reduce it to writing, and agree or intend that that writing shall be their agreement.

It seems to the Arbitrator that this decision turns more on the question of the tenor of the agreement under which the bill of sale was given than on the point whether this question should be left to the jury or not.

A third case, cited by Counsel for the Finnish Government is Caddick *v.* Terry, decided in 1864 and reported in 5 new Reports, page 137. The facts were that the plaintiff offered the defendant some hops of the 1855 and 1859 growth at Mr. Woodhouse's warehouse and gave him an order to see the hops and take sample of them. The defendant accordingly went to the warehouse and was present while a sample was being drawn from them and thought there were ten pockets of hops. There was afterwards some correspondence between the parties as to the possibility of the defendant buying hops from the plaintiff and then, on the 16th of November 1863, the defendant wrote to the plaintiff: "The most we can give you for ten pockets of 1859 would be 30 s. per cwt." On the 21st of November the plaintiff wrote to the defendant: "In answer to your letter, I accept your offer of 30 s. per cwt. I will write to Woodhouse to have them weighed." On the 23rd of November, 1863, the plaintiff wrote to the defendant: "There are eleven pockets. I will have them weighed, and will send them to you." The hops were accordingly sent and after their arrival the defendant wrote and told the plaintiff that the whole of the hops were not equal to the sample and asked the plaintiff to send for them back. The plaintiff sued the defendant for the price.

According to the report, Shee, Justice, "refused to leave to the jury the question whether it was sale by sample or not? Whether the defendant had an opportunity of seeing the bulk at the warehouse? And ruled that the parties were bound by the written contract contained in the letters of 16th and 21st of November, to buy the whole lot of 1859 hops, and that that was the only question for the jury." The verdict was directed to be entered for the plaintiff for the sum claimed.

The defendant obtained a rule ordering the plaintiff to show cause why the verdict should not be set aside, and a verdict or a nonsuit entered, upon the ground that upon the correspondence and the evidence there was no contract for the sale of eleven pockets of hops; or why a new trial should not be had on the ground of the misdirection of the Judge, for refusing to leave to the jury whether the sale was a sale by sample, and whether the bulk corresponded with the sample, and whether the defendant had an opportunity of seeing the bulk at the warehouse, and whether they were merchantable hops, and whether they answered the description of 1859 hops.

In the Court of Exchequer, Chief Baron Pollock said: The Court cannot direct that a verdict should be entered for the defendant, or a nonsuit entered

on the first ground, that upon the correspondence and the evidence there was no contract for the sale of the eleven pockets of hops. The Court is of the opinion that that is a question for the jury, and that what the contract was is not to be decided by the two letters, but by the whole of the correspondence and the facts, and that the learned Judge misdirected the jury in leaving the case as he did. It is impossible in this case to lose sight of the facts that the defendant saw a sample of the hops drawn, and that there were several conversations and letters written about them, yet the Court is asked to judge of the contract from the two letters only. The Court therefore makes the rule absolute for a new trial, on the ground that the whole of the correspondence, together with the other facts in the case, ought to have been submitted to the jury, to decide on what the contract was. Upon the other points, as there is to be a new trial, the Court will not give any opinion.

Channel and Pigott, Barons, concurred.

In this case, evidently—though the report is not quite clear—the Judge of the first instance left to the jury to decide whether there was a contract for the sale of eleven pockets of hops. This was approved of by the Court of Exchequer, which therefore could not try the contention that there was no contract for the sale of eleven pockets of hops. But as the whole question "what the contract was", including whether the sale was a sale by sample, should have been left to the jury, and there was a misdirection of the Judge to rule that what the contract was is decided only by the two letters, the rule was made absolute for a new trial, viz. a new trial, as to what the contract was, was ordered. It is to be noted that, during the proceedings, Chief Baron Pollock said: "Where the contract is the result of several letters, the effect of that contract is a question for the jury. The intervals between the letters make a difference in the conclusion to be drawn. There are elements then in the case that commercial men can only judge of." And Baron Channel said: "Where there are several letters, is not their effect a question for the jury?" and added: "Chief Justice Jervis says, if the contract lies in one letter, the Judge is to decide on the effect of it. If in several, the jury are to do so."

These dicta seem to show that the judges were then still influenced by the view mentioned by the Finnish Government as existing in the middle of the last century, but now abandoned, that the interpretation of a contract was a matter for the jury when there was more than one document.

Counsel for the Finnish Government at last cited Halsbury, *The Laws of England*, Vol. XIII, page 429: "Where the terms of contract are contained in, or the legal effect of any transaction is to be ascertained from, a number of documents or a series of letters between the parties, which do not involve the consideration of any technical or mercantile expressions, the matter is entirely for the judge to decide as a question of construction, but where, in addition to written documents, it is necessary, in order to ascertain the rights of the parties, to take into consideration their conduct, course of business, and oral evidence of communications made at interviews between them, it is for the jury to judge of the truth or falsehood of the oral evidence and, under the direction of the judge, to decide, upon the whole of the evidence before them, what was the real intention and meaning of the parties."

The Finnish Government observed before the Arbitrator, at the oral hearing, that the point of the authorities quoted is that when the evidence for a contract is derived not only from letters and correspondence but also from other sources, it is a matter of fact (1.57). If an act in the law is to be

proved only by documents between the parties, it is treated as a matter of law (1.60); but where evidence is adduced other than that consisting in instrumental documents, then the construction is not a point of law (2.3).

The British Government did not enter into any discussion of the authorities cited by the Finnish Government but contended that the question whether a given set of facts establishes a certain legal relation between the parties is, speaking generally, a point of law (2.82). The question whether a particular phrase in a particular letter is or is not binding in law on one of the parties is essentially a question of law. The making up of a contract from a series of letters, including the authority of anybody to write a particular letter and to bind one of the parties, is plainly a question of law (1.53).

Discussing the matter whether or not the British Government had requested the Finnish shipowners to get their ships—a request which under the circumstances might constitute a liability (2.89)—the British Government said that supposing there was nothing but a string of letters, some from the British Government, some from a third person, it would be a matter of law whether on the fair construction of those letters there was a request by the Government (1.55, 57). If you can say that the only real evidence with regard to the question of request or demand is contained in a series of documents which anybody can construe but in construing them they are in fact putting an interpretation of law upon them, there arises a question of law (2.99).

It seems to the Arbitrator that the first mentioned contention of the British Government deals with a somewhat other question than the point when the construction of a document is a point of law.

It is evident that where it is in dispute which facts are necessary, under the law, to constitute an act in the law, this question must be a point of law. The judge must explain to the jury whether the alleged facts, and which of them, according to statute-law or case-made law, are sufficient to constitute the alleged act in the law and then the jury has to state whether these necessary facts are proved or not. A dispute may arise upon the question whether these facts are such as to constitute an act in the law. It may be contended that the facts, stated by the jury, are not sufficient, under the law, to constitute the act in the law. If the facts alleged and later on ascertained by the jury, were, in the directions of the judge, stated to be sufficient, then the contention that the acts given did not constitute the act in the law, must mean that the judge has misdirected the jury and this is evidently a point of law.

When the British Government say that the question, whether a given set of facts establishes a certain legal relation between the parties, is a point of law, this is, of course, true. But it does not give us the answer to the question when the construction of a document is a point of law.

When it is not in dispute which kind of facts are necessary, under the law, to constitute a certain legal relationship between the parties, the point is to ascertain whether such facts exist or not. The ascertaining hereof may consist in stating whether certain alleged oral or written expressions of a party have taken place, whether the expressions thus stated were intended, or might properly be regarded by the other party as intended, to be an expression of will, directed, as the Finnish Government say, to the creation, transfer or extinction of a right, and, if these expressions are not unambiguous, what is their true meaning.

Generally speaking these questions seem in English law to be a matter for the jury. The question whether certain oral or written expressions

have taken place and whether the party intended thereby to express a will as to a certain act in the law—there being no dispute as to the acts required for creating such an act in the law—seems not to include any point of law in dispute. More doubtful may be whether—the party having thus created an act in law, the interpretation of this act in the law—of this *lex obligationis*—is not a point of law, just as the interpretation of a statute. Where the meaning of the expressions used is disputed, the construction of these expressions—just as the construction of the expressions used in a statute—might be considered as a point of law independent of whether there is a case of written or of oral expressions.

This has, however, not been suggested on either side in the present case. The British Government, who seem to go further than the Finnish Government, when assuming a point of law, do not contend that a construction of oral expressions, alleged to create an act in the law, is a point of law. The British Government, when contending that a construction is a point of law are referring only to written documents.

In case of a document the expressions used—as far as the document goes—are of course proved by the document itself, provided it is authentic. But to prove the intention of its maker "to embody and express exhaustively his operative intention regarding the act in the law in question" extraneous evidence may be necessary and be adduced. If that is the case it may be doubtful whether the document, under English law, is to be regarded as an instrument and the construction of it—whether it be a case of the intentions of parties or the true meaning of the expressions used in the document—is a point of law.

It seems however that neither the Finnish Government nor the authorities cited by them regard such a document as not being instrumental, even if it is necessary by extraneous evidence to prove it to be the repository and evidence of the final intentions of its maker. The construction—in this case then the true meaning of the expressions used in the document—therefore may be considered to be for the judge, even where extraneous evidence is adduced as a help to explain the true meaning of the words, such evidence being admissible even in case of an instrument, as it is not being admitted to modify the instrument in any way. But an exception is made in the case of the interpretation of words of art or phrases used in commerce, which is for the jury. Another exception is the case where parol evidence is admissible to explain the question which of two possible meanings is intended. In this case the jury has to take from the judge the two possible meanings, this being a construction of the instrument, and then to choose according to the evidence they trust.

But where the document or group of documents is not proved to be an instrument, viz. intended to establish exhaustively a certain legal relation between the parties, and therefore it is necessary to adduce, in conjunction with the document, evidence to prove the act in the law—viz. the expressions used and the intention of the parties—then according to the paragraph in Halsbury, *Laws of England*, cited by the Finnish Government, it is for the jury to judge of the truth or falsehood of the oral evidence and, under the direction of the judge, to decide upon the whole of the evidence before them what was the real intention and meaning of the parties.

The note from Halsbury may be regarded to support the contentions of the Finnish Government and not the contention of the British Government that the question, whether a particular phrase in a particular letter is or is not binding in law, always is a question of law—viz. a matter for the judge—

provided, of course, that the meaning of this contention is not solely the question whether, under the law, a fact such as the one ascertained by that particular phrase constitutes an act in the law. A matter such as the last mentioned is, of course, a point of law.

But if such is the case it must *a fortiori* be held that where it is not a case of a document alleged to constitute itself a legal relationship but only to be documentary evidence—whether it may be written by the party itself or by a third person—for an act in the law, the construction of such documents is a matter for the jury.

The same rule applies, as the Finnish Government before the Arbitrator, at the oral hearing, contended (1.59), when you are dealing with something which does not purport to be an act in the law.

When the British Government contend that where the only real evidence as to the fact of a request or demand having been made is contained in a series of documents which anybody can construe, and if in construing these letters, in fact, an interpretation of law is put upon them, there arises a question of law, the Arbitrator supposes that this interpretation of law then must bear either on the question of the facts required, under the law, to make a request binding in law or on the application of a legal rule of interpretation. In both cases a point of law arises, but they are not the kind of points of law with which we are now dealing.

It may, however, where there is a dispute whether a legal relationship exists or not and it is contended that the facts do not show its existence, be difficult to see whether the dispute concerns which acts are necessary, under the law, to constitute such a relationship or whether it is a question of whether the given acts are similar to the acts incontestably required under the law. In the first case it is a clear point of law; in the second case it is a question of fact provided there is a dispute not as to which acts are required under the law, but only as to the conformity of the acts ascertained by the jury with the acts which according to the instructions of the judge are required, under the law, to constitute an act in the law.

Before entering into the question, whether, under the rules now stated, the points relied upon by the British Government as appealable are points of law, another very important question must be considered, viz. the matter of mixed fact and law.

The British Government before the Arbitrator, at the oral hearing, said: The inference to be drawn from certain facts may be to some extent a question of fact, but it may also be to some extent a question of law (2.93). Where all that is being done is to say, here is fact A, fact B and fact C, what is the proper inference or conclusion of fact to be drawn from those facts, you are still in the region of fact and fact alone. But in the moment into the discussion of any of those facts there comes a determination of law then you are in the realm of mixed fact and law. Lord Atkinson in the House of Lords (Hutchinson *v.* Mackinnon 1 App. 1916) has made it very plain that as long as you have something which is not mere fact, fact and nothing else, as long as you have mixed law and fact or pure law then there is an appeal (3.14).

The case cited by the British Government is a case under the Workmen's Compensation Act and the question to decide was whether the accident arose out of the employment. It was a case of a seaman by mistake taking a drink from a tin, which he thought contained water but which in fact contained a solution of soda, and getting burnt. The Sheriff Substitute—the

Scottish name for a County Court Judge—found that the accident arose out of and in the course of the man's employment (2.86).

Lord Atkinson, in the House of Lords, in this case makes some general observations, cited by the British Government. "The Court, which reviews his decision"—that is the decision of a County Court Judge sitting as Arbitrator under the Workmen's Compensation Act—"just as a Court which reviews a verdict of the jury, may think that his finding was on the evidence erroneous and that a finding to the very opposite effect would have been more in consonance with that evidence. Yet if there was evidence which was reasonably sufficient to support his finding, it cannot be disturbed. A finding, however, in the very words of the statute to the effect that the accident causing the injury of which the workman complains arose out of and in the course of his employment may, in my view, cover three things, first a finding as to what nature and scope the workman's employment was, next what was the sort of injury, and third, whether upon those findings, the case comes within section 1 of the Act of 1906, in other words, comes within the words 'arising out of and in the course of employment'. To decide this latter point he must construe the statute, must determine its true meaning. Ruling wrongly upon a question of law, an arbitrator is styled as misdirecting himself. My point upon these findings in the words of the statute is this, that they may often involve decisions purely on points of law, often decisions on mixed questions of law and fact, and often decisions on pure fact. Where they are of the first or second class it is wholly illegitimate, in my view, to apply to them the same ruling as if they were of the third and last class. Findings in the word of the statute may cover, indeed should cover, findings upon the question what was the sphere of the workman's employment. This may entirely depend on, or involve the construction of, a written document or written documents, rules, for instance, regulating his work and describing his duties. The construction of such documents is a question of law."

The British Government also cited Lord Russell of Killowen's judgement in the case Sparey *v.* Bath Rural District Council (48, Times Law Reports page 87): "The Court of Appeal thought that the Arbitrator's finding that the accident did not arise in the course of the appellant's employment was a question of fact which (there being evidence to support it) they could not disturb. In my opinion the Arbitrator made no finding of fact. The facts were not in dispute. What he did was to enumerate the undisputed facts, and then to apply those facts to the Act and ask himself the question: 'On those facts did the accident arise in the course of the employment?' The question which the Arbitrator decided by his negative answer was, that upon the true construction of the Act, and in the events which had happened, the accident had not arisen in the course of the man's employment. That is a question of law properly open to review in the Court of Appeal and in your Lordships' House."

The British Government further cited (3.16) a note in the Annual County Court Practice 1931 (page 144) to the following effect: "If the inferences of fact drawn by the judge from the evidence could not have been arrived at without an error in point of law an appeal will lie" and one of the cases cited in support hereof: Le Blanche *v.* London and North Western Railway Company (C.A. (1876) 1 C.P.D. 286; 45 L. J. C. P. 521). The point in this case was this. A gentleman wanted to go from Liverpool to Scarborough. He had no business there, he was merely going for amusement. He travelled by train. In spite of the fact that there was plenty of time for the stop at

Manchester the train was late in leaving this town. The gentleman therefore was delayed in his arrival at York where he should have changed into the Scarborough train and found that he would not reach his destination by the ordinary train until at least 1½ hours later than he had intended. So he took a special train. He did not pretend that there was any urgency for taking a special train but he said he wanted to test whether the railway company could be made to pay for it. The County Court Judge held that the plaintiff was entitled to recover the cost of the special train. The Judge did this on the authority of a dictum of Baron Alderson in Hamlin *v.* Great Northern Railway Company, that if one party to a contract does not perform it, the other may do so for him as near as may be, and charge him for the expense incurred in so doing. On appeal to the Court of Common Pleas that court affirmed the judgement of the County Court Judge. On appeal from that decision to the High Court of Appeal this court held that the proper test of what is reasonable in such a case as the plaintiff's is to consider whether, according to the ordinary habits of society, a person delayed on his journey, under circumstances for which the company were not responsible, would have incurred the expenditure in question on his own account (3.21).

The British Government said, when referring to this case: The test was: Was it reasonable or was it not reasonable to incur this expense. It was a pure inference of fact, exactly the sort which a judge had to decide as a jury or leave to a jury to decide. But the Judge in saying that it was reasonable to allow this £11 for the special train arrived at it by a misconception of the law. This was one step in his reasoning and it was wrong. The proper test was: Would any reasonable man for his own purposes if he had not got the railway company to look to for payment have taken a special train in order to get to Scarborough one hour and a half earlier, when he admits that he had nothing to do except to go to bed ? The High Court of Appeal said: He has introduced into this inference of fact an element of wrong reasoning in law and he has applied as a matter of hard and fast law this dictum of Baron Alderson and has directed himself in those circumstances that he ought to apply this test, when drawing the inferences of fact. That raises a point of law and the case must go back for a new trial. This is just what Lord Atkinson has called mixed questions of law and facts and therefore the note in the Annual County Court Practice very properly puts it that if the inference of fact drawn by the judge from the evidence could not have been arrived at without an error in point of law, an appeal will lie.

The Finnish Government before the Arbitrator, at the oral hearing, contended that appealable questions of law in connection with evidence are only inadmissibility of evidence or its total inadequacy to support the findings. There is not an appealable matter of law where a proposition of law advanced and dealt with is one which only goes to the plausibility of the evidence, just a mere matter of, if you believe that proposition you will think the evidence more likely, and if you disbelieve that proposition you will think the evidence less likely. The question of law would then bear only on the credibility of certain suggestions of fact and would not be an appealable point of law (5.102). Only where there is a rule of law laid down for inferences, which one party is concerned to dispute, there is a point of law appealable (5.110).

Counsel for the Finnish Government later on added that whenever a rule of law is a necessary guide, a guide that is to be inevitably used in interpreting facts, that is a matter on which there could be an appeal (6.8). At the question of the Arbitrator whether Counsel would regard as a mixed question

of fact and law the case where the judge had to decide whether the Russian Government had made a request of the Finnish ships and—supposing this to be a question of fact—the judge's decision as to the existence of this fact would be influenced by the question whether the Russian Government had a constitutional right to requisition Finnish ships, Counsel for the Finnish Government answered that this was not an example of a mixed question of fact and law. The true example of a mixed question of fact and law is Le Blanche's case, where the judge misdirected himself as to the standard to be applied in judging whether Le Blanche had acted reasonably (6.11).

At the further question of the Arbitrator whether, supposing the issue to be on a question of fact. and this to be the request mentioned, and supposing the constitutional right of the Russian Government to be a point of law, which is relevant to that issue, would this question of fact then be appealable, Counsel for the Finnish Government said that if the point of law is an essential step in the conclusion reached, then it is appealable (6.38).

Counsel for the Finnish Government further said that in general the inference which you draw from your crude evidence, the actual words in documents and the actual sworn statements and evidence of witnesses are generally governed by standards of law. The judges of fact, the jury, are generally engaged in determining, whether or not, upon the crude facts there should be based inferences which are in accord with some legal standard. But there is no conflict in law. When the question at issue is, whether or not a certain contract was concluded, the evidence is there, the letters, the evidence of conversations, conduct, course of business and so forth. Then the judge will tell the jury: You have to determine whether or not these amount to a contract between the parties. Now he will say: I must tell you what a contract is, and then he is laying down a standard of law by which they have to judge the facts. They will have to draw inferences of fact in the light of those explanations of law. It is rather difficult to determine exactly where the fact ends and the law begins. We therefore, perhaps, call them mixed questions of fact and law (5.99). But the question whether there is a contract or not may be decided without any controversy on law. The point in issue is then not a point of law (1.21). There is only a case of the juror's duty to adjudge upon the evidence, draw inferences, whether in the light of those explanations of law or not. The issue is on a question of fact (1.53).

The Arbitrator considers that, when dealing with these questions, it is necessary strictly to distinguish between two matters: the appealability of points of law and the relevance under international law of these points of law as to the reversal of the decision of the Board. The provision of the Indemnity Act (2 [I] [I]) as to the right of appeal is to the effect that "if either party feels aggrieved by any direction or determination of the tribunal on any point of law, he may appeal". There is no provision that no appeal lies when the point of law is not relevant to the ultimate conclusion of the Court of first instance. But the contention of the party as to this point must be overruled. If there is any express determination of the tribunal, it is clear that there is a decision taken and that that decision must be, as there is a question of an aggrieved party, that the contention is decided adversely to the party. But if there is no express determination, it must be proved that the Court must have overruled the contention in their own minds and the proof of this is that the point of law is of such a relevance to the inferences, whether of fact or law, which are necessary to the ultimate conclusion, that the Court could not have arrived at this conclusion without having decided

the contention of law adversely to the party. In this respect it may be said that the point of law may be appealable only if a decision as to the contention on the point is a relevant step in the judgement. And further, if the point of law is essential to a question of fact being decided as the Court did, this point of law, if appealable, makes the question of fact also appealable, it being here, the Arbitrator presumes, a question of mixed fact and law.

The question whether, presuming under the rule of international law, accepted by the Arbitrator, that the contention of law is well founded, this contention is obviously insufficient or not to reverse the judgement, is another matter belonging to the next part of the effectiveness of the remedy of appeal, later on to be examined.

The Arbitrator wants to add, as regards the question of mixed fact and law, that, under British law, such a question evidently is appealable. But the authorities cited by the British Government deal only with cases where either there is a question of an interpretation of the statute to be applied —the true meaning of the term "arising out of and in the course of employment"—or of the agreement between the parties as to the scope of the workman's employment or, in Le Blanche's case, a misdirection as to the test to be applied to the question of reasonableness. In both cases the determination of these points leads definitely to a decision on a question of fact one way or another. It is not a question of evidence on the one side to be believed more than the evidence on the other side but a question of impossibility or not in law. And as far as questions of fact are in this way intermingled, these are also appealable.

Under the guidance of the rules thus approved of, the Arbitrator has now to decide which contentions of law, put forward by the Finnish shipowners before the Arbitration Board, were overruled by the Board, either expressly or in their own minds, and therefore appealable under the Indemnity Act.

The first and general contention of the Finnish Government is that the shipowners did not have any right of appeal at all. The decision of the Board is, they say, both in form and substance, a decision of fact as the judgement states: "We find as facts: I. That these steamers were not, nor was either of them requisitioned by or on behalf of Great Britain. II. That they were each of them requisitioned by or on behalf of the Government of Russia."

The parties before the Arbitrator, at the oral hearing, however, agreed that the term requisition, as used in the Indemnity Act, is a legal term, bearing on an act in the law (1.36, 60). The Finnish Government, only, observed that the judges generally, when dealing with the matter of requisition "have shown prudence in cutting down by legal definition of this word". In the Sarpen case (1916 Probate Division page 317) Lord Justice Pickford, in discussing the meaning of the word "requisition" under a British Proclamation of August 3rd, 1914, said that "requisition means that the Crown has the right to require the services of the ship without the consent of the owner, but it does not define the terms upon which the Crown may see fit to take those services."

When discussing the case of a requisition by a foreign Government, the Greek Government, Sir Henry Duke in the case of the *Meandros* (1925 Probate Division page 65), cited by the Finnish Government, said: "Requisition is not a term of art. It is barely more than a colloquial expression which has come into use during recent years. It has some connection with a term with which English people became familiar twenty-five years ago—the term commandeering. A requisition is a process by which the State

takes the use or the possession of, or the property in, chattels, and sometimes in land." (1.18—20.)

The British Government before the Arbitrator, at the oral hearing, said that what really arises is that a word comes into use or a certain action becomes common in civilized life and by the mere repetition of its use certain legal considerations gather themselves around it. People in the eye of the law are deemed to do the act or to use the word in a certain definite legal sense so that a word which might originally be a word of general and colloquial interpretation has clustered round it legal conceptions which bring it into the realm of law and not only a word but an act suffers the same fate. It is with that realm of mixed fact and law a great number of the propositions which come before the courts have to deal and there is often a question as to whether a word or an act has crossed the boundary line from pure fact into mixed fact and law. The word "requisition" made the crossing from pure fact into mixed fact and law a good time ago (6.34, 35).

The British Government before the Arbitrator, in their Memorial (No. 75), submit that the question whether a requisition took place or not cannot be a pure question of fact. And then, the question whether a finding is a finding of fact or of law is itself a question of law and consequently appealable.

The Finnish Government, at the oral hearing, said that they would not dispute that it would have been open to the Court of Appeal to say in this respect that in the qualifications of its award the Board was mistaken (1.6).

The Finnish Government, however, before the Arbitrator, in their Memorial (No. 6), contend that the issue before the Board was not whether certain given facts constituted requisition but whether the evidence before the tribunal showed that these ships had been "requisitioned in exercise or purported exercise of any prerogative right of His Majesty".

The Finnish Government, at the oral hearing, further added that the real case of the Finnish shipowners as put before the Arbitration Board was that they had, in virtue of the taking and using of their ships by the British Government, a *prima facie* case. The contention was that the presumption of the liability of the British Government was in their favour. This was a contention with regard to the weight of evidence and the presumptions and not a contention in law. The British Government then brought forward evidence to displace this presumption and to establish a different explanation of the facts, upon which the presumption was based. In the pleadings of the Crown the British Government's defence had taken the form of putting forward the Russian requisition as something they had to prove. The questions in law put forward by the Crown before the Board were all directed to make it more or less plausible that their interpretation of facts is the proper one. There were no points of law decided adversely to the shipowners (5.108, 109; 6.2, 3).

The Arbitrator will, when now examining the special points of law, alleged by the British Government to be appealable, also consider these general contentions of the Finnish Government.

On the British side it is contended, firstly, that the shipowners advanced a legal contention with regard to the meaning of requisition in English law, a contention which was overruled by the Board. In this respect there are cited two paragraphs in the judgement of the Board:

The first paragraph is: "Counsel for the Claimants contended that a requisition is constituted by 'taking' and 'using' and nothing more is necessary to establish a claim under the Indemnity Act. Taking and using are

no doubt elements in the requisition of a ship, but they are not the sole elements. In order to bring the case within the Indemnity Act it must be a taking in the exercise or purported exercise of a prerogative right or a statutory right of His Majesty the King."

The second paragraph is to the effect that Counsel for the shipowners "based his argument upon the contention that the requisition was constituted by the 'taking and using' within the ports of Great Britain, where the power of Great Britain lay, though without any intention to requisition and even though the vessels were taken and used by agreement with the Russian Government; his argument being"—and then the Board continued stating the grounds contended by Counsel why Russian requisition was out of question.

The Finnish Government before the Arbitrator, at the oral hearing, observed that it is impossible to treat the proposition, as cited in the judgement of the Arbitration Board, as a complete statement of the view of Counsel for the shipowners as regards the legal nature of a requisition, viz. that the character of requisition is legally exhausted by taking and using (1.27).

What Counsel for the Finnish shipowners was endeavouring to establish was a point on the weight of presumption. He was trying throughout to say: I have got these ships coming under control and being used under the direction of a British Department, being taken in British ports, and that entitles me as a matter of evidence and presumption and common sense to the decision that this was a requisition by the Crown under the prerogative unless you are able to discharge the converse burden of proving that those facts admit of and require a different and incompatible explanation in fact (1.28). But this contention, dealing with the adequacy of the evidence, was not overruled by the Arbitration Board. The Board did not deal with his contention, because the Board outran him, so to speak, by stating that on the facts proved to their satisfaction it was a Russian requisition (1.31).

As regards the second paragraph cited by the British Government, the Finnish Government said at the oral hearing that there is an appearance on this language that the Board is overruling a contention of Counsel for the shipowners, that unsuccessful contention being that intention was not a necessary element in a requisition (1.36). That there must be, if not an open and expressed intention such as you find in an Order of an Officer, at least a constructive intention, is not disputed. It also appears from the language of the British Government that the Crown agrees that you can have requisition without explicit and express intention (1.34). The contention Counsel for the shipowners made as regards intention was not a contention in law but only with regard to the weight of evidence and presumptions. He said: "My case simply is this: You had my vessels, and if I prove you had my vessels and you used my vessels, I make a *prima facie* case for compensation. That is my point on onus proof (5.2). I say that it raises a *prima facie* case of responsibility." That is, so far, only a question of onus of proof (6.4). What Counsel for the shipowners was endeavouring to establish was a point on the weight of presumption, referring also to the intention of the British authorities to requisition (1.28, 33). This point is not a question of law and it is not overruled because the Board did not say that they disagreed with this presumption. The Board disagreed with Counsel for the shipowners, not because his presumption had nothing in it but because they found lots of facts the other way. It was, in their mind, overborne by the facts to the contrary sense (5.111).

The British Government, at the oral hearing, said that either the statement of the judgement of the Board that Counsel for the shipowners held that all that is necessary to constitute requisition is the fact of taking plus the fact of using is correct, or it is not a correct statement. If it is a correct statement there is a submission of law which was clearly rejected. If the statement is not correct the Board have misunderstood the submission on a vital point and then the shipowners had a very grave ground of complaint for misunderstanding the argument that was presented to them and answering some argument on the vital point which was not the submission they were making. Whichever it is there was an appeal (3.77).

The Finnish Government contended at the oral hearing that the Board had perfectly understood the point in fact made by Counsel for the shipowners but had stated it rather shortly in the judgement. The parties are entitled to go behind the judgement in order to read into the judgement the effect of the discussion which took place in Court (3.78).

It seems to the Arbitrator impossible that Counsel for the shipowners could have contended, against the express words of the Indemnity Act, that it is not necessary for establishing a claim under the Indemnity Act that the taking is in the exercise or purported exercise of prerogative or statutory right or that the Arbitration Board could by the first paragraph quoted have meant to say that this was Counsel's contention. There has never been any dispute about this matter and it cannot be held that any contention of law of the shipowners in that respect is overruled by the Board. With regard to the question of intention the case is doubtful.

Against the express words of the second paragraph cited it is difficult, though the arguments to the contrary seem rather plausible, not to hold that the Board meant the contention of Counsel for the shipowners to be that the taking and using of the ships by the British authorities constituted a requisition independent of whether there was any intention to requisition or not. Whether the Board misunderstood his contention or not is not easy to say on the material which is before the Arbitrator, but as Counsel for the British Government has pointed out, there is in any event a point of law on which an appeal might lie.

Even though, as the Finnish Government say, the point of law whether intention is necessary to constitute requisition, became immaterial to the conclusion of the Board, in consequence of the view which the Board took as regards the Russian requisition of the ships, the Board, however, are in their judgement repeatedly dealing with the question of intention in a way which proves that they disagree with the presumed contention of Counsel for the shipowners that intention is not necessary in the respect mentioned. This contention must therefore be considered appealable.

In the judgement of the Arbitration Board there is another passage relied upon by the British Government to show that here was a contention of law put forward by the shipowners to prove British requisition and decided adversely to them and therefore appealable.

This paragraph is: "The three letters so much relied upon by Mr. Langton (Counsel for the shipowners) were written by an agent of the Russian Government Committee and merely meant that the British authorities had intimated that the vessels were suitable for the service and were needed."

The Finnish Government before the Arbitrator, in Annex 1 to their Memorial, containing a Summary of Facts, say: "In the case of each of the Finnish ships the Chairman of the Russian Government Committee addressed to the English agent of the shipowners a communication to the following

effect: 'I beg to inform you that the Russian Government hereby requisition the above vessel, and on their behalf I request you to forthwith hand her over to the Admiralty so as to be at their disposal until such time as they (the Admiralty) have not further need for her.' With regard to three of the vessels the communication from the Russian Government Committee was proceeded by direct instructions from the British Admiralty to Messrs. Gellatly, Hankey and Co., who were the agents of the Committee and of the Admiralty, to requisition the vessels, as shown by letters dated December 30th, 1916, from Gellatly, Hankey and Co. to the Russian Government Committee, stating in each case: 'We have been instructed by the Government to requisition the above steamer. We are therefore communicating with the owners accordingly.' Besides these three letters, there are among the documents a number of other letters written on behalf of the British Government containing statements which suggest that they regarded the Finnish ships as having been requisitioned by the British Admiralty."

The British Government before the Arbitrator, in their Countermemorial (No. 7, (3)), say: The Finnish shipowners urged that, upon their proper construction, certain letters produced at the hearing meant that the British Government had requisitioned the vessels. The Finnish Government apparently still rely on this point. The proper construction of these documents is a question of law, which could have been urged before the Court of Appeal and there given effect to if well founded.

The Finnish Government before the Arbitrator, at the oral hearing, contested that the construction of these letters is a point of law. With regard to the requisition by the British Government there is no single document or even series of documents standing alone between the parties as to which it is contended that they contain and express the requisition. Everything which was brought forward is by way of collateral evidence. In addition these letters were written not as between the owners and the British Government. If the rule of construction of documents being a point of law were to be applicable it ought to have for its object some document between the British Crown and the Finnish shipowners which purported to express the legal relationship created or that act of the law, that *acte juridique* which is a requisition. These are letters from Gellatly Hankey, who at that time were the agents of the Russian Committee, to the officials of the Russian Committee stating that they had been instructed to requisition the steamer. Looked at from Counsel's for the shipowners view as evidence of what was understood at the time by people close to these transactions it may be possible to be regarded as being valuable; but regarded as an instrument expressing the legal relationship of the claimants and the British Government it is remote from being such a document. No document was put forward by Counsel for the shipowners as being of a decisive character or as incorporating a direct formal requisition by the Crown (1.145).

The British Government at the oral hearing contended that the Arbitration Board had to look to the correspondence to see whether there is anything which in law amounts to a requisition by the British Government. One of the things that they would clearly have to take into account would be whether an expression like "we have been instructed by the British Government to requisition" was decisive of the fact that the British Government had requisitioned, and the question of the right to use that expression as a matter of agency between the Government and these people would arise. The British Government are not saying that the question is wholly one of law. But the construction of a contract, the making up of a contract from

a series of letters including the authority of anybody to write a particular and to bind one of the parties, is plainly a question of law (1.53).

As regards the question whether Gellatly, Hankey and Co. were the agents of the British authorities there is no document brought forward to prove this. A construction of documents is consequently not in question in this respect. Nor is there any dispute as to which facts under the law constitute agency. The dispute about agency—if any—is therefore wholly a question of fact and must be taken to be determined against the shipowners. In the view of the Arbitrator no appeal lies on this question.

Applying then the principles approved by the Arbitrator as to when construction of documents is a point of law the Arbitrator comes to the conclusion that the construction of these three letters cannot be deemed a point of law.

The alleged appealable points of law now dealt with by the Arbitrator have arisen in connection with the endeavours of the shipowners directly to prove British requisition.

There are, however, other points of law, put forward in connection with the question of Russian requisition and alleged by the British Government to have been disputed by the Finnish shipowners and to have been decided adversely to them.

The Arbitrator has previously expressed the opinion that the shipowners could not, when suing the British Government at the municipal courts, base their claim solely on the contention that the British Government had taken and used their ships without compensation and leave to the British Government the burden to plead and prove their right in doing so. When going to the Arbitration Board the shipowners had to show British requisition. They had, if going before the Arbitration Board, to prove, directly or, as Counsel for the shipowners is alleged to have tried, by way of presumption, that there was a British requisition.

The British Government, however, before the Arbitration Board pleaded —as is said in the judgement of the Board—that the use of the steamers was under and by virtue of an agreement with the Russian authorities and that the steamers were requisitioned by the Russian Government for the purpose of this use under the Shipping Controller of the British Government.

In the view of the Arbitrator an agreement under which the Finnish ships should be handed over by the Russian authorities to the British authorities for their disposal and, still more, the fact, if proved, that—agreement or no agreement—the Russian Government performed the "taking" of the ships by "requesting the Finnish shipowners to hand over their ships to the British Government so as to be at their disposal", must go a very long way to make an English requisition unbelievable; and if Russian requisition of these ships is proved, English requisition is not possible.

Several points of law are alleged by the British side to have arisen in connection with these matters and to have been disputed and decided adversely to the shipowners. Amongst these questions are also some points referring to the alleged agreement. Firstly the construction of the agreement May, 1916.—Secondly the question of the subsequent agreement, its existence and construction. And thirdly a special point on the formal validity of this last agreement—called Sir Robert Aske's point. The Arbitrator finds it appropriate to deal with the first two points together and then with the third point.

As to the alleged agreement, the Arbitration Board say in their judgement:

"During 1916 and 1917 large quantities of munitions and stores were required to be transported from England and America to Russia and the ports of the White Sea. The British and Russian Governments agreed each to provide ships for the conveyance of these things. On the 4th May, 1916, an agreement in writing was drawn up between the two Governments providing for the transport of munitions to Russia. This provided that the Russian Government should employ the Russian Volunteer Fleet and would requisition all other suitable vessels of the 'Russian Mercantile Marine' for the purpose of transporting munitions and stores to Russia. These thirteen steamers were vessels of the Russian Mercantile Marine within the meaning of those words in the agreement, for though there was a Finnish register there was no Finnish flag and these steamers sailed the sea under the Mercantile Marine flag of Imperial Russia and not otherwise.

"It is true the agreement of the 4th May 1916 does not in terms cover the user of these ships to France etc., but, as Sir Basil Kemball Cook, the Director of Naval Sea Transport, said, there were subsequent modifications and enlargements of the written agreement under which these ships were taken over and used. That this was so we have no doubt."

The Finnish Government before the Council of the League of Nations (Finnish Memorandum No. 12) contend that the provisions of the agreement of 4th May, 1916, has no application to the ships now in question. They never belonged to the Russian Mercantile Marine. They were all ships registered only in ports of the then Grand Duchy of Finland and, as such, subject to the Finnish Maritime Law of June 9th, 1873, and the Finnish ordinance of November 11th, 1889, which make provision for a Finnish Mercantile Marine distinct from the Russian Mercantile Marine. The undertaking of the Russian Government in clause 4 of the agreement is clearly and expressly limited to the requisitioning of ships "for the like purpose". This purpose is defined immediately above in clause 4 as "the purpose of transporting either to Vladivostok or to the White Sea ports material required for the national defence". Now the majority of the ships in question were admittedly employed for a different purpose. The *Alexa* was throughout employed in the British coasting trade; the *Patria Bjarmia*, *Tammerfors*, *Constantia*, *Trio*, *Leda* and *Sirius* were throughout employed in the carriage of cargoes between England and France. The *Sicilia*, *Herakles*, *Hermes* and *Algol* were employed partly on voyages to the White Sea and partly on voyages to France. The voyages of the *Hesperus* are not known.

The British Government, before the Council of the League of Nations, said that the answer to the Finnish contention as regards the applicability of the provisions of the agreement of May 4th, 1916, on Finnish ships has already been given by the Arbitration Board.

The British Government before the Arbitrator, at the oral hearing, observed that in the judgement of the Arbitration Board the words "Russian Mercantile Marine" are placed in inverted commas, which is very frequently adopted when you are construing a document. This point, dealt with in the judgement, appeared in the contentions of the Finnish Government before the League of Nations: "The ships which are subject to this dispute never belonged to the Russian Mercantile Marine" (5.81). If the Board were wrong in saying that these steamers were of the Russian Mercantile Marine within the meaning of the agreement because Finland was at that time an independent duchy, then the statement of the Board was

challengeable and any inference based upon that was based upon a misdirection (3.61).

The Finnish Government before the Arbitrator, in their Memorial (No. 6), say that it is not, of course, disputed that the construction of a written contract is a question of law, but it was not a construction of a written contract between the two Governments which was in question here. The only written contract referred to was the agreement dated May 4th, 1916, and it is plain, as the tribunal state in their judgement that the "agreement of May 4th, 1916, does not in terms cover the user of these ships to France, etc.". What the British Government endeavoured to prove in the course of the proceedings was that there were subsequent modifications and enlargements of the written agreement under which these ships were taken over and used. It was not a matter of construing an admitted contract, but of finding whether or not it was established by the evidence that there existed a contract between the British and the Russian Governments covering these ships. That is a question of fact, which the Court of Appeal would not have had jurisdiction to reopen.

The Finnish Government in their Countermemorial (No. 52) add that they dispute that arrangements were made to modify the formal agreement of May 4th, 1916. It is not merely the validity of the arrangements and their legal effect, but their existence, that is disputed.

The British Government before the Arbitrator, in their Countermemorial (No. 6), contend that the question whether certain negotiations created a contract or not, is not a pure question of fact, and in any case the statement of the Finnish Government of the position ignores the fact that after the Board had found the terms of the contract, they would have to proceed to apply the terms of the contract to the circumstances of the claim, and in so doing would cross the boundary which separates questions of fact from questions of law.

At the oral hearing the Finnish Government contended that there were no documents before the Arbitration Board which were of that instrumental character which lets in a proper application of the rule that the construction of documents is a matter for the judge—with the possible exemption of the agreement of May, 1916 (1.52). The alleged subsequent enlargements of the agreement are not incorporated in any document. There is no document to construe. The subsequent modifications and enlargements were believed in and found to exist by the Board, but were based on the evidence of Sir Basil Kemball Cook. The Board believed Sir Basil, but there was no document for it; there was no document which the shipowners could take to the Court of Appeal to interpret (1.61).

The British Government before the Arbitrator, at the oral hearing, contended that as to the subsequent agreement it depended, in fact, entirely upon the construction of two letters from Sir Basil Kemball Cook to the Russian Committee of September 5th and October 30th, 1916. They had said somewhere in their Memorial that it depended on discussion and letters, but Sir Basil, when giving evidence as regards this agreement was unable to point to any discussion or telephone conversation or memorandum of any sort except those two letters (2.90). The British Government will not say there were no other letters, which tended the same way, but there were no other letters setting out the terms of the agreement in the same way (2.104). As a matter of fact the inference is overwhelming when you look at the letters, but if it is said that a wrong construction was placed upon those letters by the Board, that raises a point of law (2.82).

The material parts of these letters is as follows:

First letter: "With reference to the requisitioning of Finnish steamers, it is understood no arrangements have yet been made by you for the management of the vessels in the same way as the Russian colliers.

In this connection, I would draw your attention to the fourth paragraph of my letter of July 8th last.

I have to state that the Admiralty cannot be responsible for running the steamers, and, as all that are suitable will be used for taking coal to the White Sea, the others being employed in the French railway or British Admiralty service, it would appear the best arrangement is to place them in the hands of Messrs. Martens.

In connection with the terms on which these vessels are requisitioned, I have to state that, judging by the many applications made to this Department, you do not appear to have made it clear to the owners that they should look to your Committee or to the Russian Government for the payment of hire, etc., in all cases.

The correct position would appear to be that, as regards the Finnish steamers not employed in the White Sea service, the British Government is liable to the Russian Government for such expenses as arise from the employment of the vessels on the conditions set forth in T. 99, including hire at Blue Book rates, and that, as regards those which are employed in the White Sea service, the Admiralty has no liability at all except to stem, bunker and load them as it does the Russian colliers.

In neither case can the British Admiralty be liable in any way to the Finnish owner or the charterer, nor is it concerned with the terms the Russian Government make with the owners for the hire of the vessels, so long as the terms are generally equivalent to those of the Blue Book." (Appendix 1 to the first British Memorandum before the Council of the League of Nations.)

Second letter: "With reference to your letter of 29th September, and to the meeting held in the Transport Department on the 18th October, regarding the requisitioning of Finnish steamers, I beg to recapitulate as far as possible the terms on which these steamers are being taken over from your Committee.

The Admiralty will be liable to you for hire of the steamers at Blue Book rates, on the terms of Charter T. 99 (see my letters of 9th August and of 5th September). This includes the payment, by the Admiralty, of extra wages over pre-war rates (see clause 9 of the Memorandum of Agreement), and excludes any liabilities arising from Marine risks. If therefore the terms on which these Finnish steamers are taken, necessitate the Russian Government being liable for marine risks, instead of the owner and the Admiralty is required to relieve the Russian Government of these risks, while employed on non-Russian service, it follows that a reduction in the Blue Book hire must be made equivalent to the amount the Owner would have to pay to cover Marine risks." (Finnish Countermemorial, p. 60.)

The British Government before the Arbitrator, at the oral hearing, further observed as regards those two letters that Sir Basil Kemball Cook in his evidence, when he was challenged on the point of them, said that surely it is not disputed that the letters were agreed to by the Russian Government Committee (2.103).

The Finnish Government at the oral hearing observed that the judgement of the Arbitration Board purports to rely upon what Sir Basil Kemball Cook says (3.81).

The British Government replied that Sir Basil admitted or was driven to admit that there was nothing that he could point to except these two letters and he founded himself at the end of it all quite accurately on those two letters (2.82).

The British Government at the oral hearing further said: Those two letters contain what is the modification of the May, 1916, agreement. Sir Basil had no other evidence (2.103). Nobody really seriously disputes that the letters mean what they purported to mean. But if they had disputed the interpretation of those letters that would have been a matter of law which would have been dealt with on appeal (3.82). If the letters were capable of any other construction, then there might emerge a question of law on the interpretation of the letters, but the British Government do not really lay much stress on that (5.59).

The Finnish Government observed that there does not appear to be any dispute as to the nature of the arrangement incorporated in those letters, the whole dispute is whether they constituted an agreement and whether they incorporated the whole of the agreement (6.4). The Crown asked the tribunal to infer from the conduct of the parties that there was an agreement (2.105). It was disputed that the letters were agreed to. The letters were not the whole of the evidence of the agreement. Sir Basil Kemball Cook in the letter of October 30th, 1916, is calling attention to there being other transactions between the parties than these two letters. And in the British Memorial it is said that the extension of the agreement of May, 1916, was arranged by discussion and correspondence between the British Ministry of Shipping and the Russian Government Committee. The construction of these letters is not a point of law and there is no dispute as to the meaning of the letters (6.10).

When considering whether the points now in question are points of law, decided by the Arbitration Board adversely to the shipowners, the Arbitrator has come to the following conclusion.

It is not contested that the agreement of May 4th, 1916, is an instrument. The shipowners before the Arbitration Board and the Finnish Government before the League of Nations have brought forward the contention that this agreement did not apply to the Finnish ships, because the ships did not belong to the Russian Mercantile Marine. The meaning of this term as used in the agreement has then to be construed. The Arbitrator holds that under English law this is a point of law and that the Board, stating that "these 13 steamers were vessels of the Russian Mercantile Marine within the meaning of those words in the Agreement" decided this point of law adversely to the shipowners.

As to the question whether there was a subsequent agreement between the British authorities and the Russian Government Committee, contained into instrumental documents, whose construction is a point of law, the Arbitrator finds that even if the two letters, relied upon by the British Government, could be regarded as such instruments, which is not the case, considering that it seems not certain that the agreement does depend only on those letters, there is in all events no dispute as to the meaning of the letters and consequently no construction in this respect is necessary. Nor is there any dispute as to which facts are, in law, necessary to constitute an agreement. No disputed points of law are in those respects decided against the shipowners.

As to the third point—Sir Robert Aske's point—the representative of the Finnish Government before the Council observed that concerning the

alleged arrangement between the British and the Russian Governments as regards the ships in question, the Finnish Government, while making reservations as to the statement as a whole regarding Finnish ships, point out that it is inconsistent with the agreement of May 4th, 1916. It is significant that this agreement was officially confirmed and signed by the British Secretary of State for Foreign Affairs and by the Russian Ambassador in London. If this solemn form was necessary for the validity of this agreement, why was it not equally so for other agreements to which the British Government refers? The whole system depends on so-called verbal "arrangements" between British officials and members of the "Russian Committee" and the Finnish Government maintain the view that informal arrangements of this nature cannot release the British Government from the liability arising out of the admitted facts with regard to the use of these vessels. This conclusion is reinforced by the fact that the powers of one party at least, the Russian Committee, were limited and did not include the requisitioning of vessels.

The British Government before the Council of the League of Nations in their third Memorandum (No. 18) contended that it is essentially a question of law whether an agreement in solemn diplomatic form can be modified by informal arrangements between subordinate officials and on this question an appeal lay from the Board to the Court of Appeal.

The Arbitration Board in their judgement only say: Sir Robert Aske, who appeared for the owners of the one steamer the *Tammerfors* contended in a very clear and able argument that the modifications of the agreement of May, 1916, between the British authorities and the Russian Committee, not having been reduced to writing and approved and signed by the Ambassador of Russia, were of no authority.

The British Government before the Arbitrator, at the oral hearing, observed that, assuming that the modification of the agreement of May, 1916, was correctly spelled out of uncontradicted evidence, it is maintained by the Finnish Government that the modification was not reduced into a proper written form and therefore had no legal authority (5.61). But whether those letters were not sufficiently formal to make an agreement between the two Governments, Sir Robert Aske's point, is a question of law (2.104).

The British Government at the oral hearing observed that the Finnish Government do not dispute that the point of Sir Robert Aske is a point of law. The Finnish Government is maintaining this point at the League of Nations and it can therefore not be excluded (3.83).

The Arbitrator finds that it is not contested that the point put forward by Sir Robert Aske is a point of law and that it is rejected by the Board. It is, in consequence, appealable.

The Finnish Government before the Arbitrator, at the oral hearing, submitted that the point of Sir Robert Aske was not to be considered. This point put forward by Sir Robert Aske, who represented one of the shipowners, was a very bad point, which was repudiated by Mr. Langton who was for 12 out of the 13 ships and rejected by the Board (2.18).

The British Government objected to that this point, which was maintained by the Finnish Government before the Council of the League of Nations, could be withdrawn before the Arbitrator.

The Arbitrator, as previously has been said, is of the opinion that such a withdrawal cannot properly take place in the proceedings before the Arbitrator.

The Finnish Government before the Arbitrator, at the oral hearing, further contended that, as Sir Robert Aske's point referred to the validity

of the alleged supplementary agreement between the two Governments, it could not properly be adjudicated upon by a municipal court. They cited in support the case of Cook *v.* Sprigg (reported in 1899, Appeal Cases), where the Judicial Committee say: "It is a well-established principle of law that the transactions of independent States between each other are governed by other laws than those which municipal courts administer" (6.111).

The British Government replied that the case Cook *v.* Sprigg was a case in which a man was claiming money under an international agreement and the Court said: We cannot deal with the matter; we cannot enforce the agreement in your favour. If the statement of the Finnish Government were right, then the Arbitration Board were wrong in taking account of the extention of the agreement. But the municipal courts are not precluded from taking into consideration international agreements (6.56).

In the view of the Arbitrator the British Government is right.

Further points, alleged by the British Government to be points of law in connection with the question of the alleged Russian requisition, on which points, it is contended, there lay an appeal, are questions of the illegality of a Russian requisition under Russian and Finnish public law and the powers of the Russian Committee to requisition ships.

The Arbitration Board in their judgement observe that the British Government allege that the steamers were requisitioned by the Russian Government for the purpose of the use under, and by virtue of, the agreement between the two Governments and then continue:

"A great variety of answers to this suggestion was made by Counsel for the Claimants. First it was said that these were Finnish steamers and that the Russian Government could not requisition them unless it were done in pursuance of regulations for the guidance of a Finnish Committee in the requisitioning of Finnish steamers.

"It is no doubt true that a Finnish Committee had been set up at Helsingfors, and regulations for its exercise of a power of requisition in Finland had been made which were not complied with in the case of those steamers which were requisitioned in British ports. It was suggested that the Imperial Government of the Czar, who was also Sovereign of Finland under the title of Grand Duke of Finland, did not possess the prerogative of requisitioning outside his national waters. No authority was cited for this and the prerogative to requisition in time of national emergency would not be stultified by any such limitation. This prerogative is akin to the right of self-defence and is enshrined in the maxim *salus populi est suprema lex*."

The Board then added that "The Imperial Government of Russia appointed a body known as the 'Russian Government Committee' to act for it in London and that one of the duties of the Committee was by its transport section 'to find suitable ships'. It could only do this from London when informed by the British authorities that a vessel flying the Russian flag had arrived in a British port and that it was suitable for requisition by Russia. The Russian Government Committee thereupon 'requisitioned' her and handed her over to the Shipping Controller who used her for the service of the Allies. This was indirectly in the interest of Russia. The Committee was in telegraphic communication with Petrograd and there was never any repudiation in their so doing."

The Finnish Government before the League of Nations, in their first Memorandum (Nos. 26, 12, 16), said: "It is the present contention that, in estimating the effect of the somewhat obscure evidence involved in support of the alleged Russian character of the requisition, due weight must properly

be attached to the presumption that the Russian Government was not acting in a manner contrary to law; that it did not deliberately commit a breach of the constitutional privileges guaranteed by law to subjects of the Grand Duchy of Finland, or of the specific provisions made. in deference to those privileges, distinguishing in the matter of requisition between ships of Russian and ships of Finnish register. The measures attributed by the British Government to the Russian Government would, had they in fact been taken, have been illegal acts. This cannot lightly be assumed. The existing public law of Russia disentitled the Imperial Russian Government itself from requisitioning Finnish ships. Under regulations in force during the war, the Commander of the Russian Baltic Fleet was empowered to requisition Finnish vessels in Finnish ports for the purpose of supplying the Fleet with necessaries, and a Committee was set up at Helsingfors for the purpose of assisting him in this task. The Commander, however, had no power or authority to requisition Finnish ships outside Finnish ports."

The representative of the Finnish Government before the Council maintained that in the case of Finnish vessels any requisition of the nature alleged by the British Government was incompatible with Russian law.

The Finnish Government in their Memorandum (No. 8) further observe that the Statute creating the Russian Government Committee does not purport to give the Committee any power or authority whatsoever in regard to the requisitioning of ships. The powers and functions of the Committee are defined in the first paragraph which stated that the Committee has for its purpose "the realisation of orders abroad, the carrying out of purchases and the fulfilment of other commissions of the Russian Government connected with the requirements of State Defence, and also to assist in the realisation of orders abroad of public organisations and of private industry, working in Russia for requirements of defence".

The British Government, before the Council of the League of Nations in their first Memorandum (No. 26), said that they do not admit that the Russian Government did not, in fact, possess power under the constitutional law of the Russian Empire to requisition Finnish ships, and strong evidence to the effect that they did possess such power was given by eminent Russian lawyers before the Arbitration Board.

The British Government before the Arbitrator, in their Memorial (No. 66) and their Countermemorial (No. 7), observe that the Finnish Government had brought forward the legal arguments that the Russian Government had no power under the constitutional law of the Empire to requisition Finnish ships in British ports and further that Finnish steamers could not validly be requisitioned by the Russian Government unless it were done in pursuance of regulations of a Finnish Committee for the requisitioning of Finnish steamers. On this point the Board found that such a Committee had been set up, that regulations for its exercise of a power of requisition had been made, and that these regulations had not been complied with. If the contention of the Claimants that these facts barred a valid requisition by the Russian Government had been sound in law, there was nothing in the findings of the Board to prevent them urging this contention of law before the Court of Appeal.

Counsel for the Finnish Government, at the oral hearing, said that, as regards the question whether the Russian Government had no constitutional power to requisition Finnish ships in British ports, it may be conceded that the Board appears by implication to have rejected that view (2.13, 14). But the question of the Czar's constitutional power would have been a

matter of foreign law and foreign law is a matter of fact. Although by recent Statutes it has been provided that matters of foreign law shall be decided by the Court and not by a jury where there is a jury, it does not follow that they become matters of law because they are matters for the judge (2.15). Counsel cited in support of his contention Dicey's *Conflict of Laws*, Rule 204.

Counsel for the British Government replied: Here is the Supreme Court of Judicature Act, 1925, which says foreign law is to be for the judge and not for the jury. Does it not necessarily follow from that, that the judge must direct the jury on his own responsibility as to what is foreign law? If he was wrong, that would be a misdirection and would plainly be the subject of appeal to the Court of Appeal. That is the whole point of transferring it to the jury (2.17).

Counsel for the Finnish Government said he wanted to reflect upon this objection. Possibly he was wrong about that. He might have an opportunity of making a further submission to the Arbitrator (2.17).

No such submission was made but Counsel for the Finnish Government contended that the submission as regards the illegality, which was only an evidential proposition to the effect that the Russian Government would not offend what they took to be the law, did only concern what the Russian Government thought were their constitutional powers and not what according to the very best opinion was Russian law. But what the Russian Government thought is a question of fact (6.14, 15; 5.104, 105).

Counsel for the British Government replied that even if the proposition were only evidential, which he denied, a misdirection on the point of law of illegality was an element in the conclusion as regards the alleged relevant question of fact and therefore appealable (6.39—43).

The British Government before the Arbitrator, at the oral hearing, further observed that the point was for one thing that the Czar had no legal right to give orders to his own subjects about people who are the subjects of himself in his capacity of Grand Duke and, what is more, to give those orders to Russia about Finnish subjects, not in Finland or Russia but in England, and for the other thing that he had no right to requisition Finnish ships outside Finnish waters (3.67).

The decision of the Board was that even in the absence of any authority one way or the other, prerogative included the right to requisition outside your own territory and included the right, even in such a case as the one being discussed, where the ultimate Sovereign, who is ordering the requisitioning has two different capacities, as the Czar of the one country, through whose Committee the action is taken, and as a Grand Duke of another country, on whose subjects the requisition is made (3.68). This particular point is a point as between the status of Russia and the status of Finland (3.64). It is dealt with as a point of law and is decided as a point of law. The Finnish Government, before the League of Nations, is maintaining that the requisition of the Finnish steamers by the Russian Committee was illegal (3.85).

As to the question of the powers of the Russian Committee it was stated before the Arbitrator, at the oral hearing, that Counsel for the shipowners before the Arbitration Board had contended that the Russian Committee had no authority to requisition; they were only a subordinate body (3.117).

The Arbitration Board in their judgement on this point said: "The Imperial Government of Russia appointed a body known as the 'Russian Government Committee' to act for it in London."

The Finnish Government before the Arbitrator, at the oral hearing, said that at no stage did the shipowners dispute the fact that the Russian Committee represented the Russian Government. As to what scope its power was, that was another matter but that in general it represented the Russian Government was quite undisputed, and all they are saying here is that they appointed a body to act for them in London. This statement was not disputed (3.118).

The British Government, at the oral hearing, contended that here is a perfect plain finding that the Russian Committee had authority without any qualification in any respect to act for the Russian Government in London. The Board must have dealt with the point (3.118).

The British Government seemed also to contend that the argument had been put forward that the Russian Committee could not requisition Finnish ships as the Russian law does not enable Russia to requisition Finnish ships (2.104; 3.63) and they further submitted that the question of whether the authority of the Russian Committee included the requisitioning of vessels is a point of law (3.85), whether this matter depends on the Statute creating the Committee not giving such power or on it being contrary to Russian law (5.61).

The Arbitrator has no doubt that the question of the illegality of the alleged Russian requisition under Russian and Finnish public law is a point of law and that this point of law brought forward by the claimants before the Arbitration Board is decided by the Board adversely to their contentions.

As to the question of the powers of the Russian Committee, according to the Statute creating the Committee, to requisition Finnish ships, this point—in so far it is not included in the question of law just mentioned—seems to the Arbitrator also to be a point of law. There has been a dispute whether the words in the Statute creating the Committee cover powers necessary for authority to requisition. There is reason to believe that the Arbitration Board rejected, in their own minds, the contention that there was no such authority.

The British Government further allege that one more point of law concerning the Russian requisition is decided against the shipowners.

The Arbitration Board said in their judgement: "Mr. Langton based his argument upon the contention that a requisition was constituted by the 'taking and using' within the ports of Great Britain, where the power of Great Britain lay, though without any intention to requisition and even though the vessels were taken and used by agreement with the Russian Government; his argument being that power to take and enforce the taking was necessary in order to constitute a requisition and that, as the Russian Government had no physical power over ships in the Ports of Great Britain, it could not be requisitioning them even though it purported to do so—as in fact it did. This seems to ignore the view that requisition is based upon allegiance"—it should be noted that the Arbitration Board previously in their judgement state: A requisition is an exercise of the sovereign power over the property of a subject. The subject is liable to it by reason of his allegiance to his Sovereign—"and also to ignore the fact that the owners themselves and their property were within the State of Finland, which was a part of the Russian Empire or if not part of the Russian Empire strictly so called, was within the jurisdiction and power of the Grand Duke of Finland, who was the Czar of Russia."

The Finnish Government, before the League of Nations, in their first Memorandum (Nos. 29, 27), say: A measure of requisition is an act whereby

possession is taken of property by a Government, for a public purpose, without the free consent of the owner. In the normal case, there is no room for question as to the identity of the Government whose material force or compelling commands have been brought effectively to bear, or as to the authority of power to which the dispossessed owner has been forced to bow. In the present case, it is suggested that the authority or power which was exercised was not that of the sovereign on whose territory the requisition took place, and whose officers were instrumental in giving effect thereto, but that of a foreign sovereign. The present question is governed by the presumption which arises from the fact that a requisition is an act of sovereign authority. Strict and cogent proof may properly be demanded for the proposition that measures of requisition taken within the territory of His Britannic Majesty can properly be deemed to have been the acts of a foreign sovereign. This interpretation should not readily be placed upon facts susceptible of a less improbable explanation.

The British Government before the League of Nations, in their first Memorandum (No. 24), reply that, in the present case, these requisitions were made with the consent of and by agreement with the British Government, in pursuance of the common purpose of carrying on the war.

The British Government before the Arbitrator, in their Memorial (No. 66), contend that the Finnish Government had relied on the legal arguments that the Russian Government could not, consistently with international law, requisition ships in British ports, and that the Russian Government could not enforce upon ships in British ports any requisition which they purported to make, and the authority and power behind the requisitions must have been that of the British Government.

The Finnish Government before the Arbitrator, at the oral hearing, said that they could not find that Counsel for the shipowners had anywhere said that the Russian Government could not consistently with International law requisition ships in British ports. The proposition which it is suggested was made unsuccessfully—that because a Russian requisition would be contrary to International law it cannot happen, or that it is impossible in law to reach the conclusion that it did happen—would be a very foolish argument, which cannot be reasonable to impute to Counsel for the shipowners. There would be no violation of International law if the Russian Government were to have obtained the consent of the British Government to this requisition, and secondly, there are such things as breaches of International law. Counsel for the shipowners can only have meant to submit that there was a presumption against such an act being done. There is no trace in the judgement of the Board of a finding that the alleged proposition that the Russian Government could not consistently with International law requisition ships in British ports is erroneous (2.10). The next point alleged to have been brought forward is that the Russian Government could not enforce upon ships in British ports any requisition which they purported to make, and the authority and power behind the requisitions must have been that of the British Government. Either that is the same as the previous point or it is merely the proposition that they had not got the physical powers, which is a pure question of fact even more obviously than the other one (2.13).

The British Government replied that the submission of Counsel for the shipowners was that requisition implies that the party requisitioning is able to put physically his requisition in force. Even though the British Government never intended to requisition, even admitting that the purported

agreement was made, still Counsel for the shipowners is submitting that there cannot be requisition by the Russian Government because it had no physical power over the ships. It is an absolutely plain submission as to what is the legal meaning of "requisition". The Board rejected that submission saying that it overlooked the fact that the owners of the ships owed allegiance to Russia and that requisitioning turned on allegiance. They overruled the contention of Counsel of the shipowners that taking and using and the application of the physical contact with the ships is the decisive test and said that the real test is allegiance (3.92). There were frequent requisitions by the British Government of British ships in foreign ports and it was never challenged that that was a valid requisition (3.93).

The British Government further contended that if the Board thought that this was an evidentiary proposition, tending to show the probability or the improbability of Russian requisition, they would have said: It is urged upon us as a reason for coming to the conclusion of fact that there was no Russian requisition, that it is highly improbable that there was such a thing, because that would be contrary to the surroundings of the case. And they would have answered fact with fact. But what they actually say is: It is urged that it is impossible because requisition means physical force: but the legal argument urged against it, based on allegiance, appears stronger than the other legal argument and therefore as a matter of law we decide that the contention of the claimants is wrong (6.45).

The Arbitrator finds it doubtful whether the Arbitration Board actually regarded the argument of Counsel for the shipowners as a proposition that a Russian requisition was impossible in law and not only as a contention that it is not probable that a Russian requisition would take place where the Russian Government has no physical power over the ship; but the words chosen by the Board make it difficult not to hold that the contention of the Counsel for the shipowners was considered by the Board to deal with a point of law, and it is clear that it was overruled by the Board.

The Arbitrator has previously mentioned the contention of the Finnish Government that the ultimate finding of the Arbitration was a finding of fact and that therefore no appeal lay against the decision of the Board as a whole.

The Finnish Government has admitted that the requisition is an act in the law. Counsel for the shipowners contended before the Arbitration Board that power to take and enforce the taking is necessary in order to constitute a requisition and that, as the Russian Government had no physical power over the ships in the ports of Great Britain, it could not be requisitioning them even though it purported to do so. This contention of law was rejected by the Board. This rejection forms part of the finding as regards the Russian requisition and so far this finding is appealable.

The appealable points of law thus to be considered—and assumed to be well founded—are they obviously insufficient to reverse the decision of the Arbitration Board ?

When examining the question whether the points of law, found appealable by the Arbitrator, are or are not obviously insufficient to reverse the decision of the Arbitration Board, the Arbitrator will follow the same order of dealing with these points as previously.

There is then at first the appealable point of intention.

The point of law regarding the Board having misunderstood the contention of Counsel for the shipowners in this respect is, the Arbitrator assumes,

relevant only if the alleged true understanding of the contention could have led to another result than the one of the finding of the Board. The contention of the Finnish Government is that Counsel for the shipowners only meant to say that, taking and using of the ships being established, the burden of proof that there was no intention to requisition was on the British Government.

The Arbitration Board, on the documents produced, positively stated that the one thing that is clear throughout is that the British Government never during the period in question intended to requisition the Finnish ships. The proof of not intention is in consequence to be taken as performed.

Under these circumstances it appears that the contention of Counsel for the Finnish shipowners, if understood in the way which the Finnish Government allege is the right way, would have been of no avail and that an appeal, founded on the appealable point of law of misunderstanding, in consequence would have been obviously futile.

If, on the other side, the shipowners' contention was meant to be that intention is not in law a necessary element in requisition—which contention then is to be assumed to be well founded—an appeal founded on that contention would under certain circumstances not be obviously futile.

The Arbitration Board has found that there was a Russian requisition. As long as this finding stands, there is no room for a British requisition. The point of intention is then immaterial.

If, however, an appeal, founded on the appealable points of law, bearing on the question of Russian requisition, which the Arbitrator is later on going to deal with, cannot be considered obviously futile, then the effect of the appealable point of intention comes into consideration.

A British requisition is then not to be deemed obviously impossible because of Russian requisition. British intention to requisition is denied by the Arbitration Board. If intention were to be held in law to be a necessary element in requisition, this finding of the Board would prove an obstacle to British requisition. The presumed contention of the shipowners that intention is not necessary in law—which contention according to the rule accepted by the Arbitrator is to be held for well founded—would under such circumstances therefore be relevant.

The final decision whether this contention as regards intention is obviously insufficient to reverse the decision of the Board must therefore stand over until the matter of the Russian requisition has been dealt with.

The effect of the appealable points which concern, in the first place, the matter of Russian requisition shall now be examined.

The question of the Russian requisition is, as previously mentioned, vital as to the necessary basis of the claim before the Arbitration Board, viz. the British requisition, in that respect that if there is a Russian requisition it cannot be a British requisition.

There is, however, another act which has almost the same effect.

A necessary element of a requisition is, as previously said,—and that appears to be common ground and is also stated by the Arbitration Board in their judgement—the taking of the chattels by the Governmental authorities. In the present case British taking would mean that the British authorities have, without procuring the consent of the shipowners in a way which gives rise to an express or implied contract, obtained, in fact, that the shipowners obey their orders as to the use of their ships. This "taking" is the first necessary step on the road to requisition.

"Taking" by the British authorities, however, is hardly possible to assume if the "taking" is already done by the Russian Committee, whether that taking amounts in law to a requisition or not.

The Finnish Government contend that the British Government have "taken and used" the ships.

The using is admitted by the British Government, but the taking is contested.

In the view of the Arbitrator the matter of Russian taking is almost equally important as the question of Russian requisition. If the Russian authorities have taken the ships and handed them over to the British Government there is no reason to presume British taking, whether amounting to a requisition or not.

The Finnish Government before the Arbitrator, in their Memorial (No. 6), say that the finding of the Board that there existed a contract between the British and the Russian Governments covering the Finnish ships is a question of fact which was conclusive of the claim. In their Countermemorial (No. 48) they add that the weight to be attributed to the agreement would depend upon the terms of the agreement and the action taken under it.

The question of taking is dealt with by the Arbitration Board in their judgement to the following effect: "One of the duties of the Committee was by its transport section 'to find suitable ships'. It could only do this from London when informed by the British authorities that a vessel flying the Russian flag had arrived in a British port and that it was suitable for requisition by Russia. The Russian Government Committee thereupon 'requisitioned' her and handed her over to the Shipping Controller who used her for the service of the Allies."

The word "requisitioned" put into inverted commas must, in the view of the Arbitrator, mean "took" her—without any decision at this stage of the judgement on the point whether that amounted to a requisition or not in law.

If that statement of fact cannot be disturbed through the appealable points of law, which the Arbitrator is now going to deal with, it is not possible to assume a British requisition. The first condition, the taking by the British authorities of the ships from the shipowners, could then not reasonably be considered to have taken place. Every appealable point of law must therefore be examined also from the point of view whether the contention in question—which under the accepted rule is to be held as well founded—is essential to a determination of the existence of the fact of a Russian taking or not.

It is of interest in this connection, viz. the effect of the fact—if stated—that the Finnish ships were taken by the Russian and in consequence not by the British authorities, to note that Counsel for the British Government before the Arbitrator, when dealing with the matter whether a claim before the War Compensation Court was open to the shipowners said: "All the time we know that in fact, whatever the legal effect of that is, the Russian Government went through the form of requesting—do not let us use the technical word 'requisitioning'—the handing over of the ships." Now if that was in law a requisition by the Russian Government then *cadit questio;* there is no more to discuss. If, however, for some one or other of the legal reasons put forward it did not amount to a requisition by the Russian Government then there was still nevertheless a request by the Russian Government that the ships should be handed over to them to deal with and they dealt with them by handing them over under some arrangement or

other to the British Government. I can quite understand it being said in those circumstances, because it is only another way really of saying what the tribunal ultimately said, that if the Russian Government purported to requisition but it has been found that they did not requisition in law and that they did something else, they acquired the ships, to use a neutral word, and then handed them over to the British Government, the British Government did not requisition them in law because they never went through any act of requesting. But, nevertheless, supposing that it were so and supposing you got to the result that neither Government requisitioned the ships but one Government is left in possession of them and uses them, then the owner of the ships is in position to say: "it is true that the Court is against me, I cannot say that Government A or Government B have requisitioned the ships but I find Government B in possession of them and using them and I want to use them and they are interfering with my wish to use my own ships; they say they are doing it under an arrangement and I say that arrangement is bad in law and gives them no authority, just as if a thief—I am using deliberately an extreme case—has passed my property on to a perfectly innocent receiver who then says: Well, I had a perfectly good contract with the thief. This is no answer at all. The man who has ultimately received it under the belief that he had acquired a good title or made a valid arrangement with the thief has no defence" (2.68, 73).

The Arbitrator will deal with this last point in connection with the appealable points of the absence of power of the Russian Committee to requisition ships and the illegality under Russian and Finnish public law of the Russian requisition.

The first appealable point in connection with the matter of Russian requisition is the construction of the agreement of May, 1916.

The Finnish Government before the Arbitrator, at the oral hearing, observed that the reliance of the Crown was upon the informal extensions of the agreement of May, 1916, which agreement did not, it is common ground, cover other purposes than the White Sea service (2.14). The question of the applicability of the agreement of May, 1916, to what the Board found in fact was done is irrelevant because the decision of the Board is rested not upon the formal agreement but upon the informal extensions of it (2.13).

The questions of the effect of the present point of law has not been discussed on the British side and the British Government do not seem to lay stress on it. The possible relevance of the point seems to the Arbitrator to lie therein that if the agreement of May, 1916, according to the contention of the Finnish shipowners—which shall be assumed to be well founded—does not apply to Finnish ships and it is common ground that it is not wide enough to cover the user of any ships to France, etc., the informal agreement then must be of a more independent nature than a mere extension of the agreement of May, 1916, and this agreement therefore may be less of a proof of the existence of the informal agreement than otherwise would be the case. The Arbitrator has, however, found that the statement of the Board as regards the subsequent agreement is a question of fact and the present point of law can obviously not disturb that statement.

The second appealable point is that of Sir Robert Aske, maintained by the Finnish Government before the League of Nations, and of the effect that the alleged subsequent agreement between the British authorities and the Russian Committee not having been reduced to writing and approved and signed by the Ambassador of Russia is of no authority.

The British Government before the Arbitrator, at the oral hearing, contended that if the so-called new arrangements could not exist for want of due legal form, then the British Government never got any authority from the Russian Government Committee or anybody else to take the ships and the British Government would be defenceless (3.86). It would have disabled the British Government from saying that they had taken the ships under a contract with the Russian Government (3.88). The British Government then either should have been held to have requisitioned the ships or, if they were held for some technical reason not to have requisitioned them, they should have been held either to have interfered with the property of the shipowners or else impliedly have undertaken to pay for them (3.87).

Regarding the effect of the alleged formal non-validity of the subsequent agreement—which contention is to be taken as well founded—to Russian taking or Russian requisition, there are to be considered the statements of the Arbitration Board, in their judgement, that the Russian Committee obtained the disposal of the Finnish ships and handed them over to the Shipping Controller who used them for the service of the Allies, that the Committee was in telegraphic communication with Petrograd and there was never any repudiation of their so doing; that monthly payments in cash or credit on the term of T. 99 in respect of these steamers were made by Great Britain to Russia and these were accepted without demur; that in the confusion of the documents in the case, the one thing that is clear throughout is that the British authorities never during this period intended to requisition these ships and that they were careful throughout to observe their position of taking over the ships from the Russian Government and to maintain the position that their liability was to the Russian Government and not to the owners.

The formal invalidity of the subsequent agreement obviously cannot disturb these statements which are, in fact, that the British authorities and the Russian Government acted throughout as if a valid agreement existed. The British Government then had no need of using their sovereign power to get the disposal of the ships; they were handed over by the Russian Committee. Whether this amounted to a requisition in law does not depend on the formal validity of the subsequent agreement.

The third appealable point is the question of the authority of the Russian Committee, under the Statute creating the Committee, to requisition ships.

This contention—which is to be deemed well founded—does not seem to be relevant. Whether the power to requisition ships was given to the Russian Committee in the Statute itself or afterwards does not appear to be of any importance. The Arbitration Board in their judgement state as a fact that the Russian Committee "requisitioned" ships, flying the Russian flag, and handed them over to the Shipping Controller who used them for the service of the Allies; that the Committee was in telegraphic communication with Petrograd and that there was never any repudiation of their so doing.

The Finnish Government before the Council of the League of Nations, in their first Memorandum (No. 8), only deal with what the Statute creating the Russian Committee purports to do as to the power in question, but contend, generally, that there was no such power.

If, however, the possibility of the Russian Committee to requisition was subject to the consent in each case of the authorities in Petrograd, and this was, as the Arbitration Board evidently hold, always given, this appears to be, in respect of the point now in question, equal in value to a power given beforehand.

This is a decision of fact by the Board which the appealable point now dealt with cannot disturb.

The Arbitrator will now examine some propositions of Counsel for the British Government, based on the presumption of a contention that there was no authority given to the Committee either in or outside the Statute.

Counsel for the British Government before the Arbitrator, at the oral hearing, said that the Finnish shipowners before the Arbitration Board argued to the following effect: The Russian Committe had no authority to requisition the Finnish ships and therefore they had no authority to hand them over to the British Government. If the Russian Government Committee, without authority, hand over the Finnish ships to the British Government, the British Government are in just the same position, not different in any way from what they would have been if they had taken and used the ships without reference in any way to the Russian Government Committee. Great Britain had taken the ships, no doubt under a belief that all this was regular, but it was not regular, and so they have simply taken them and they are defenceless. If the point was a good one, it would be a complete answer to the suggestion that the British Government had not requisitioned or had not interfered or had not become liable in any way because the requisition was a Russian requisition. If the Finnish shipowners put it in the forefront of their case, it is no use saying now: "We do not think it was a good one"; they took it. The decision adverse to it was a vital step in the reasoning and could have been a ground for appealing the whole judgement (3.64, 65).

Counsel for the Finnish Government observed that the point which he quite definitely and frankly said was a bad one was the point of the informality of the Supplemental Agreement. He did not cast such contempt upon this point (3.66).

The Arbitrator, firstly, observes that the point of law now mentioned which was brought forward by the shipowners before the Arbitration Board is not advanced by the Finnish Government before the Council of the League of Nations, nor discussed by the Finnish Government before the Arbitrator. It seems to the Arbitrator that there are good reasons for the Finnish Government not relying on that point. Even if power to requisition was not given to the Russian Committee by the Statute or outside of it, the taking of the ships by the Russian Committee is not therefore out of the question.

The Finnish Government before the Council of the League of Nations, in their first Memorandum (Nos. 9, 10), say that the Russian Committee, at the request of the British Admiralty and the British Ministry of Shipping, purported to "requisition" the Finnish ships now in question. They add, however, that it is indisputable that the purported "requisition" consisted of nothing more than the despatch of a letter to the owner's agents. All the acts of possession and control were done by the British Government alone.

The Arbitration Board, in their judgement, stated, as previously said, that the Russian Committee "requisitioned" the Finnish ships and handed them over to the Shipping Controller.

Notwithstanding that the Russian title to the disposal of the ships might be bad in law because of the absence of authority on the part of the Russian Committee, the situation as to the British taking is, in the view of the Arbitrator, the same, the taking being done by the Russian authorities. This latter fact can, as the Arbitrator previously has pointed out, not be disturbed by the alleged absence of power of the Russian Committee. The British authorities have not gone through the procedure of taking and they

cannot be said to have done it because they are using the ships. And, what is more, a taking, in order to be the necessary step to a requisition which makes the British Government liable under the Indemnity Act, must be done in exercise or purported exercise of prerogative or statutory right. To hold that the taking is done in such an exercise when the British Government have received the ships from the Russian authorities, only because these authorities' title of acquisition is bad, is obviously wrong.

The Finnish Government before the Council of the League of Nations have not advanced such a proposition, and under the rules accepted by the Arbitrator the point is therefore not to be considered.

As previously said, the alleged absence of power, on the part of the Russian Committee according to the Statute, to requisition, cannot have the effect that the statement of fact of the Arbitration Board as to the Russian taking should be reversed.

The appealable point in question is therefore obviously insufficient to reverse the decision of the Board.

As to the relevance of the fourth appealable point of the illegality under Russian and Finnish law—which is to be considered well founded—the Finnish Government before the Arbitrator, at the oral hearing, observed that Counsel for the shipowners had not contended that the Czar's lack of constitutional power makes it legally impossible for the Board to find that in fact he did requisition (2.15). Counsel for the shipowners put it forward only as an evidential proposition, that there is a very strong presumption that a responsible Government will not offend what they take to be the law (6.12, 15).

The Finnish Government also cited a contention of Counsel for the British Government brought forward before the Arbitration Board that it is utterly irrelevant to any issue in the case before the Board to consider whether the Russian Government had power to requisition. The question here is who did requisition and it is immaterial to go into questions of Russian law or Finnish law or any other kind of law to decide that issue which is one of fact (2.7).

It should here be mentioned that, even if—as is contended on the Finnish side, a contention which should be taken as well founded—a Russian requisition is illegal under Russian and Finnish public law, there is some doubt whether this may be taken into consideration by a British Court.

The Finnish Government before the Arbitrator, at the oral hearing, called the attention to what the President of the Arbitration Board in this respect said: "According to our law we cannot look into what the authority of a State is."

This point had been raised by the British Government before the Arbitration Board in words to the following effect: "No Court, upon the principle of Comity of Nations, has any right to enquire into the validity of legislation or executive acts of a foreign friendly sovereign State."

The British Government before the Arbitrator, at the oral hearing, said that the contention of the Finnish shipowners, maintained by the Finnish Government, that there was no right of the Russian Government to requisition Finnish ships in Great Britain through the Russian Committee, was not necessarily a point which could not properly be presented to a British Court (4.15). Speaking generally, of course a sovereign act of a foreign State cannot in the British Courts be disputed, but this is not an act of a sovereign State on its own subjects; it is an act of one State on the subjects of the same chief but who are his subjects in another capacity and, what is more, directed

through a Russian Committee, not a Finnish Committee, not in Russia or even in Finland but in Great Britain (4.14, 15). The principle of not inquiring into a State's authority to deal with its nationals or foreigners in their own territory—which was the case of Luther *v.* Sagor—is not necessarily applicable to the present matter (3.66).

This argument put forward by the shipowners before the Arbitration Board must be assumed to be, the British Government contended, if not right, at least doubtful. It must be assumed to be at least uncertain, which way the Court of Appeal or the House of Lords would have decided it (4.16).

It does not, in the view of the Arbitrator,—even if the illegality of the foreign State's executive acts in the present case might be considered by British Courts—follow from this illegality that a requisition by that State has not taken place. A taking in the exercise of sovereign power can be and has been done, in time of national emergency, even where it is not in consonance with existing laws, under the maxim cited by the Arbitration Board: *Salus populi est suprema lex*. Even if this is bad in law it can scarcely be held that the consequence is that there is not a requisition, at least not in so far it can be considered that the Sovereign has done it by making use of his sovereign power. In all events, the statement of fact in the judgement of the Arbitration Board as regards the taking of the ships by the Russian Committee cannot be disturbed by the point of law of the illegality of a Russian requisition. The taking by the foreign Government, in the present case the Russian authorities, then still is there, and a Russian taking has, as has previously been said, almost the same effect as a formal Russian requisition to put a British requisition out of the question.

The fifth appealable point is the contention that the Russian requisition was impossible in law because the Russian Government had no physical powers over the ships in British ports and power to take and enforce the taking is necessary in order to constitute a requisition.

The British Government before the Arbitrator, at the oral hearing, said that here is a point on which the Court of Appeal could have upset the whole judgement. It goes right to the root of the matter (3.91).

The Finnish Government before the Arbitrator, at the oral hearing, said that the contention of Counsel for the Finnish shipowners, if it were dealing with a point of law, which they contested, would be a foolish argument because to such a requisition the Russian Government had obtained the consent of the British Government and that would not, anyhow, be the same as a British requisition. There would be no violation of International law. Counsel for the Finnish shipowners can only have meant that there was a presumption against a Russian requisition in British ports (2.12).

The British Government cited a contention of the Finnish Government before the League of Nations that the main question is "the identity of the authority which must be deemed in the eye of law to have effected the requisition". (Brit. Mem. Annex 1 No. 31; 6.47.)

As to the contention that power to take and enforce the taking is necessary in order to constitute a requisition—which the Arbitrator, according to the rules laid down, has to regard as true—the Arbitrator holds that the question whether there was not a Russian requisition in the technical sense of the word is, even if important, not conclusive.

Even if there were no Russian requisition in the legal meaning of the word, there is still the taking of the ships by the Russian Committee—evidently with the full approval of the British authorities—stated as a fact by the

Arbitration Board, a statement which cannot be disturbed by the impossibility in law of a Russian requisition.

The Arbitrator, when deciding, as regards each of these appealable points of law, that it cannot disturb the statement of fact of the Arbitration Board that there was a Russian taking of the Finnish ships, is applying the rule, presumed, as previously said, to be expressed by the authorities cited, viz. that there is a mixed fact and law only where a point of law leads definitely to a decision on the question of fact, one way or the other. This cannot be supposed to be the case as regards any of the appealable points of law in respect to the question of fact of the Russian taking of the ships. The decision of fact of the Arbitration Board in this respect could therefore not be disturbed.

This being the case and as a Russian taking makes a British taking of the ships obviously unnecessary and unbelievable, and as without a British taking of the ships no British requisition can have taken place, the Arbitrator comes to the conclusion that the appealable points of law, whether directly referring to British requisition or not, obviously would have been insufficient to reverse the decision of the Arbitration Board as to there not being a British requisition and that, in consequence, there was no effective remedy against this decision.

Were there any other municipal remedies open to the shipowners?

As previously mentioned the British Government, in their Memorial (Nos. 79, 80), contend that as claims might be brought before the War Compensation Court in respect of direct loss or damage sustained by reason of interference with property, an additional remedy under the Indemnity Act existed, which the Finnish shipowners should have availed themselves of, and that their failure to do so is an additional reason for holding that they failed to comply with the requirements of the local remedies rule. If the contentions of the Finnish Government are right, then it would appear that, if there was not a requisition, there was an interference with the business or property of the Finnish shipowners. In consequence the remedy of a claim brought before the War Compensation Court was open to them. Even if it were contended that, while the decision of the Arbitration Board as to the fact that the ships had been requisitioned by the Russian Government remained unreversed, this decision would have rendered this point *res judicata*, a contention which the British Government do not admit, this would be no excuse as it was open to the shipowners to appeal on the point of the Russian requisition and they failed to do so.

The Finnish Government, in their Memorial (No. 9) and their Countermemorial (No. 59), say that all the considerations with regard to the alleged agreement between the British and the Russian Governments would have applied, in precisely the same manner, to a claim based upon interference by the British Government. It cannot, surely, be maintained that the shipowners, having prosecuted their claim before the Arbitration Board, as a result of which that tribunal reached certain findings of fact which were conclusive of a claim under the Indemnity Act, based on British interference as well as on British requisition, were bound to repeat that process before the War Compensation Court, a court of co-ordinate jurisdiction. If the judgement of the Arbitration Board was appealable on the point of the Russian

requisition it was appealable altogether and there is no conceivable reason why the shipowners should have gone to the War Compensation Court.

The Finnish Government before the Arbitrator, at the oral hearing, further said that if the shipowners had gone before the War Compensation Court after an adverse finding of the Board, they should probably have been met by the very reasonable objection that all the matters in issue, or those which could possibly be discussed, had been finally decided as matters of fact by a Court of equal authority. Even without going into the somewhat technical questions of *res judicata*—the rules in that respect, not being, as in the law of France, of a purely technical kind, can be invoked under three headings: of estoppel at large, of *res judicata* and under the heading of the staying of frivolous and vexatious actions—it certainly may be suggested that to have attempted to reopen what were substantially the same issues of fact before a second Court might be treated as frivolous and vexatious (2.44, 45).

In support of this contention the Finnish Government cited the case of Stephenson *v.* Garnet, reported in 1898, 1 Queens Bench p. 677.

The British Government before the Arbitrator, at the oral hearing, agreed that as long as the finding that there was a Russian requisition stands, it would be perfectly futile for the shipowners to go to any other tribunal and it is not suggested that they ought to have done so (4.4). But the shipowners could have appealed on the point of Russian requisition. And if it was decided that there was no Russian requisition then they could have said that we base our claim on the user of the ships, which is an interference in the exercise of the prerogative (4.10).

Counsel for the British Government, at the oral hearing, further said that if the Finnish Government still go on talking about the case in a way which would have fitted into one or other of those two categories—cases of Arbitration Court and of War Compensation Court—they cannot simply discuss whether the only remedy open is an appeal from the Arbitration Board (2.49). Supposing it had been found that the Russian Government did not requisition and the British Government had not requisitioned them, the next point would have come: But, anyhow, you took and used the ships, you interfered with our property, which is the alternative way of putting it under the Indemnity Act, the way that goes before the War Compensation Court (2.65, 66). The Finnish shipowners would, of course, have been completely out of time to bring a claim before the War Compensation Court, but they were years out of time also in order to go before the Arbitration Board, and all questions of time were expressly waived in their favour.

The Finnish Government before the Arbitrator, at the oral hearing, said that it was not possible to formulate the facts as they see them otherwise than as a taking by the British Crown in the exercise of the prerogative. The only ground upon which they were entitled to make a claim on the British Government, was on the ground that they had taken the ships in such circumstances that it amounted to a requisition (2.42).

The Finnish Government, at the oral hearing, further said that the moment the Anglo-Russian agreement is brought in that puts an end to all municipal remedies. If this agreement is made out, the shipowners cannot go to the War Compensation Court. If there was an agreement by which Russia took the ships and gave them to Great Britain, Great Britain has done nothing to the shipowners and therefore there is an end of all local remedies.

There is no interference by the British Government with the shipowners (4.87).

The British Government then argued—as has already been mentioned when discussing the question whether the appealable points of law were obviously insufficient to reverse the decision of the Arbitration Board—that, even if the British authorities did not go through any act of requesting the shipowners to hand over their ships to the British Government, the British authorities are left in possession of the ships and use them. The owners of the ships are then in a position to say that the arrangement under which the British authorities are doing this is bad in law and gives them no authority. This arrangement is therefore no defence. Once it is found that there is a requisition by the Russian Government, this automatically negatives requisition by the British Government; it affords an answer to any suggestion that there has been interference by the British Government because it was not in exercise of the prerogative; it was by arrangement with the Russian Government; and of course it would equally negative any implied promise to pay the owners of the ships, which on that hypothesis had already passed to the control of the Russian Government with whom the arrangement to pay was made. But if there was not a Russian requisition then it must be either requisition by the British Government, or if not interference with property because it was not in exercise of the prerogative, then it must be a form of taking which raised the implied promise to pay (2.68—70).

The Arbitrator is of the opinion that not only a Russian requisition but also the taking of the ships by the Russian Committee would, even if that taking did not in law amount to a requisition, have the effect attributed by the British Government to a Russian requisition. The Finnish Government, however, contend that the Russian taking, if any, is unlawful. Even if the consequence thereof were that the arrangements between Russia and Great Britain as to the handing over of the ships by the Russian to the British authorities ought to be, by a British court, considered as bad in law, the user of the ships by the British authorities was not interference by the British Government under the Indemnity Act. Under this act such an interference with property or business shall take place in the exercise or purported exercise of prerogative or statutory right. Even if the arrangements between the Russian and British Governments were no defence, being bad in law, the British Government, having received from the Russian authorities the ships taken by the Russian Committee, cannot be considered to have kept the disposal of the ships and so have used them in virtue of sovereign power, nor did they purport to do so.

Therefore—even if the proposition of the legal effect of the badness in law of the arrangements above mentioned, under the rule approved by the Arbitrator ought to be deemed to be well founded, which as previously is pointed out is not the case, as the Finnish Government have not before the Council of the League of Nations advanced that proposition of law—the Finnish shipowners could not, for the reasons above, base any claim before the War Compensation Court on the user of their ships by the British Government.

As to the question of a remedy by Petition of right the British Government before the Arbitrator, in their Countermemorial (No. 11), say that the observations in the Finnish Government's Memorandum to the Council of the League of Nations, which are alleged to have given rise to misunderstanding, have been again restated in the Finnish Memorial (No. 11), and it is now stated that there was never any question of a contract either express

or implied between the shipowners and the British Government. The British Government content themselves with saying that if there were any such questions, the procedure by Petition of right was open to the claimants, and that this procedure completes the system of municipal law, by which the British Government fulfilled the international obligations of the State to do justice.

The representative of the Finnish Government, before the Council of the League of Nations, in fact said that there was never any question of a contract between the Finnish shipowners and the British Government during the period we are considering (Minutes page 4), and in their second Memorandum (No. 6) before the Council of League of Nations, the Finnish Government maintained this contention.

It therefore appears that the British Government, in their Countermemorial, put forward their observations as to the the remedy by Petition of right chiefly in order to show that, as there is under British law a complete system of municipal remedies, the requirements of international law are fulfilled.

Before the Arbitrator, at the oral hearing, the British Government, however, contend that the remedy by Petition of right should have been exhausted (2.66, 67; 3.87). The British Government observed that if there was not interference with property, then it must be a form of taking which raised the implied promise to pay.

The British Government further said that the whole foundation of the remedy by Petition of right is that in English law the Crown is assumed always to want to do the right thing. That is why a Petition of right begins. When a man says: "I have claim in some sort of contract upon the Crown", the thing begins by going before the Attorney-General for his "Fiat", and as long as there is the shadow of a case exhibited the Attorney-General marks it: "Let right be done." The whole origin of the Petition of right is that it is never assumed that the Crown can take the property of one of its subjects without intending to pay the subject for it. So that if you failed for one reason or another to bring a claim within requisition or interference with property, the party would still be able to say: "But you have acquired my property. You have asked me to let you use this property, and it is inherent in the British law that when you do that you intend to pay me for it." Therefore, on the assumption that the other ways of dealing with the case are ruled out, the Crown would be left naked and defenceless by a Petition of right (2.66. 67).

The British Government added that if it were established that, although the Russian Government purported to requisition, there nevertheless in law could not be a Russian requisition, then it must be some form of taking or request by the British Government. One or other of the consequences would then have followed: if not British requisition, then interference; if not interference, then implied contract to pay and Petition of right, or, if you like, a purely arbitrary interference by some officer, which is not really in question, giving rise to an action for tort against that officer. But all those alternatives depend on negativing the Russian requisition (4.4, 5, 9).

It seems to the Arbitrator that the British Government is overlooking the fact that even if in law it could not be a Russian requisition, it does follow that it must be some form of taking or request by the British Government. There is the taking of the ships by the Russian authorities, not amounting in law to a requisition, a question with which the Arbitrator has dealt with previously. The contentions of fact in that respect put forward by the

Finnish Government before the Council of the League of Nations, are that the Russian Committee at the request of the British Admiralty and the British Ministry of Shipping purported to "requisition" the Finnish ships, addressing to the agents of the shipowners a communication to the effect that the Russian Government hereby requisitioned the ships and that on their behalf the agents were requested to forthwith hand them over to the Admiralty so as to be at their disposal until such time as they (the Admiralty) had no further need for them. Although making the observation that all the acts of possession and control were done by the British Government alone and purporting, seemingly, thereby to contend that this was, notwithstanding the acts done by the Russian Committee, sufficient, in law, to constitute a British requisition, the Finnish Government before the Council of the League of Nations never contested that there were such a taking by the Russian authorities as above described, including a request directed to the shipowners to hand over the ships to the British authorities. The point, which can be raised, is then only if by the contended act of possession and control an implied contract may be considered to have come into existence, a fact which is continuously contested by the Finnish Government.

The Finnish Government before the Arbitrator, at the oral hearing, observed that the question of the possibility of proceedings being taken under Petition of right might have arisen if it had been possible for the Finnish owners to allege that they had a contractual relationship and a contractual claim against the British Government. The exception under the Indemnity Act preserving the remedy of Petition of right arises only when there is a true contract. The shipowners have never at any time entertained or put forward the suggestion that they had a right based on a true contract, express or implied. The shipowners cannot take proceedings by Petition of right against the Crown on the basis of facts which they do not admit and which they dispute. Neither was there a quasi contract, on which the party could sue, waiving the tort; and, moreover, the Indemnity Act does not leave it open to proceed on that basis by Petition of right (2.56).

The Arbitrator wants to point out that in the Indemnity Act there is, for the case of the remedy by Petition of right no proviso stating that the act on which the claim is based shall necessarily be done, as is the case in regard to requisition and interference, in the exercise of prerogative or statutory right, viz. as the Arbitration Board say in "exercise of the sovereign power". According to Section 1 (1) of the Indemnity Act no action or other legal proceeding whatsoever shall be instituted in respect of any act, matter or thing done during the war, if done in good faith and done or purported to be done in the execution of his duty for the defence of the Realm or the public safety or otherwise in the public interest, by a person holding office under the Crown.

Under this rule a claim for compensation, based on the user of the Finnish ships by the British authorities during the war, which could not be brought forward under the provisos concerning requisition or interference, would have been completely barred, if not an exception (sub-head (b) of the proviso to section 1) had been made, in the Act, to the following effect: Where a claim for payment, or compensation can be brought under section 2 of this Act—section 2 saying: For the purposes of this section (viz. the section containing the exception) a Petition of right shall be deemed to be a legal proceeding—the institution or prosecution of proceedings in respect of any rights under, or alleged breaches of, contract, if the proceedings are instituted within one year from the termination of the war or the date when

the cause of action arose, whichever may be the later, shall not be prevented by the general stipulation of section 1 (1) barring actions there mentioned.

The Finnish Government, as previously mentioned, before the Arbitrator, at the oral hearing, contested that this proviso was applicable to the present case. The Finnish shipowners themselves at no time entertained the idea that there were any contract between them and the British Government and the Finnish Government have entirely repudiated such an idea (2.53). There was neither an express nor any implied contract. In British law the term implied contract is used in a somewhat confusing sense. An implied contract is sometimes taken to mean a contract implied in fact from the conduct of the parties as distinguished from a contract which is incorporated in an agreement, and it is sometimes used to mean something very different when the word "quasi" contract is used—viz. where the party waives the tort and sues in contract. It has been decided that under the exception in the Indemnity Act as to Petition of right being allowed that exception does not extend to quasi contractual proceedings; it only extends to an express contract or a contract implied in fact. It is a true contract but a contract implied from the conduct of the parties. As regards an implied contract in the true sense of an implied contract the Finnish Government do not admit that it ever existed or was ever claimed. As regards a quasi contract, there was no such contract and even if there was, the Finnish shipowners could not have proceeded by Petition of right under the exception in the Indemnity Act (2.56, 57).

The British Government before the Arbitrator, at the oral hearing, said that you can found a Petition of right upon a true contract, which was not expressed but only implied; you cannot found a Petition of right on what is really a tort by going through the form of waiving the tort and purporting to sue in contract. Apart from the Indemnity Act, if it was really a tort the Crown cannot be sued for tort but you sue the individual officer and then the Crown as a matter of practice backs up the proceedings and if they are found liable pays the damages, but that is in a sense an act of grace (2.58).

In support of the contention that a claim by way of Petition of right was barred to the shipowners, the Finnish Government cited the case of Brocklebank, Limited *v.* The King (K.B I 1925, page 52).

In this case, where there was put forward a Petition of right to recover money paid to the Shipping Controller, who had purported, when requesting the suppliants to pay the money, to act under the authority of the Defence of the Realm Regulations, Bankes, L. J., held that the claim was barred under the Indemnity Act, the proviso to s. 1, sub-s. 1, the Legislature intending to preserve under the proviso the case where parties have actually entered into a definite contract and one of them is seeking to enforce it and not a case where the law will allow a remedy arising out of an assumed contract.

Scrutton, L. J., could see no reason for such a limitation of the ordinary meaning of the word "contract". If we are to exclude "implied contracts based on fictions" we are legislating, not interpreting.

Sargant, L. J., said that he understood the suppliants' argument as follows: The claim against the Shipping Controller himself was in tort. But the Crown cannot commit an actionable tort and the Shipping Controller cannot have been the agent of the Crown for this purpose. Hence the only cause of action of the suppliants against the Crown arose by reason of the Crown having received from the Shipping Controller the proceeds of his tort with notice thereof, or at any rate without being a purchaser for value

without a notice. And this sole remedy is by way of assumpsit, that is by virtue of at least an implied contract. Therefore, it is said, the case falls within sub-head (b) of the proviso to s. 1 of the Indemnity Act; and proceedings having been instituted within one year from the determination of the war the right of the suppliants is not barred. Even if, which is not admitted, an action against the Shipping Controller himself, had he not parted with the money, could not have been sustained, because the first and principal remedy against him was in tort, and therefore was barred by the Act, and even if therefore the action against him on an implied contract could only have been pursued secondarily, and upon a waiver of tort, the case against the Crown on implied contract is said to be stronger, because there never was any other remedy against the Crown. To this it is replied by the Crown that whether the claim in implied contract is pursued against the Crown or, had the proceeds been retained by him, against the Shipping Controller, the main and necessary constituent of the cause of action is tort; that, unless the suppliants pleaded (as they did in fact plead) and proved this tort, their action whether against the Crown or against the Shipping Controller must necessarily fail; that according to any ordinary use of language there never was in fact any contract at all between the suppliants and the Crown; that it was contracts in the ordinary sense that were being dealt with by sub-head (b) of the proviso; and that the main and principal cause of action—namely that against the Shipping Controller for tort—having been barred by the general words of s. 1, it would be defeating the general purpose of the section to preserve either against the Shipping Controller (had he retained the proceeds) or, as things are, against the Crown, an alternative remedy based upon an implied contract or quasi-contract merely introduced by and resting on a legal fiction.

Lord Justice Sargant then continued: In my judgement this reply of the Crown is sound and should prevail. I cannot think that the saving by sub-head (b) of "rights under or alleged breaches of contract" extends to anything but definite substantive contracts, or includes rights arising from implications of contracts under legal fictions, particularly when these implications arise incidentally from transactions which in themselves and primarily constitute torts, and are in that regard dealt with by the Act and rendered non actionable.

Of course the rule of the Indemnity Act section 1 that a claim based on tort by a person holding office under the Crown is barred does not apply to a claim based on tort by Russian authorities, consisting in taking unlawfully the Finnish ships. But if you—rightly—take out of the saving by sub-head (b) concerning "rights under or alleged breaches of contracts" all rights arising from implications which arise incidentally from transactions constituting torts rendered non actionable by the Indemnity Act section 1, then it seems difficult to include in the saving other than true contracts, whether express or implied.

That there was no definite contract between the Finnish shipowners and the British Government is common ground. And it is impossible to see how, under the contentions of fact put forward by the Finnish Government before the Council of the League of Nations, which are, of course, in that respect not contested by the British Government, it can be supposed to have been any intention on the side of the British Government to pay the shipowners for the user of the ships.

Apart from the result now arrived at as to the remedy by Petition of right not being open to the shipowners, this remedy is also from another point of

view not to be taken into consideration when dealing with the local remedies rule. The Finnish Government, although basing their international claim generally on the fact of "taking and using without payment" have expressly excepted as a ground of their claim any contractual relations between the shipowners and the British Government. This ground—which, according to the rules accepted by the Arbitrator, shall, in consequence, not be taken into account when dealing with the question of the requirements of the local remedies rule being fulfilled—being the only one which makes a Petition of right possible, the remedy of Petition of right is also for this reason not to be included when there is a question of this rule being applied to an international claim founded as the one put forward by the Finnish Government before the Council of the League of Nations.

The Arbitrator's decision on the question submitted to him, in consequence of the above considerations, is that the Finnish shipowners have exhausted the means of recourse placed at their disposal by British law.

Stockholm, 9th May, 1934.

Algot Bagge,
Arbitrator.