KATHARINE M. DRIER (UNITED STATES) v. GERMANY

(July 29, 1935, pp. 1075-1080; Certificate of Disagreement by the National Commissioners, June 18, 1935, pp. 1037-1074.)

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Certificate of Disagreement by the National Commissioners

The American Commissioner and the German Commissioner have been unable to agree as to the action to be taken on the question presented by the Petition filed by the American Agent on behalf of the claimant for an award for additional damages in this case, their respective opinions being as follows:

Opinion of Mr. Anderson, the American Commissioner

This claim is for damages alleged to have been suffered by the claimant through the unauthorized disposition of certain property in Germany belonging to her by action of the German authorities in a manner which, she claims, rendered the German Government liable for resulting damages under the Treaty of Berlin.

The basis of the claim is that the claimant was deprived of her property by action of the German authorities without just compensation, and should be paid the full value of such property less certain amounts already paid on account under previous awards by this Commission.

On January 14, 1925, this Commission made its first award on account of this claim for the amount of $48,000, with interest until the date of payment, which was August 1, 1928, when $68,782.70 was paid on account of principal and interest.

This award admittedly was not final, and in accepting it the claimant reserved " the right to pursue her claims against Mittag & Rost, and in the event of failure to recover from them, to apply again to the Commission for an additional award " (Paragraph II of the Memorandum of the German Agent filed March 20, 1928, in reply to the American Agent's Motion for an Additional Award). In that Memorandum the German Agent made no objection to the " admission of the Motion by the Commission " (Id., Paragraph I), and stated that " the facts as set forth in the Motion will not be contested " (Id., Paragraph III). He added, " The German Agent has no knowledge or information sufficient to form a belief as to the actual value of the estate, the equipment of the castle, etc. at the time of the sale " (Id., Paragraph IV).

The American Commissioner understands that the position of the German Agent, as set forth in Paragraphs III and IV of his Memorandum, above quoted, is that all the facts alleged in the Petition are admitted except the allegations as to the actual value of the estate and its equipment.

Inasmuch as the question now presented to the Commission for its decision involves to some extent the value of the aforesaid estate and its equipment, it is necessary to examine the allegations of the American Agent's Motion (Petition filed March 19, 1929), which are referred to in the extracts quoted from the German Agent's Memorandum in response to that Petition.

This Petition is in full as follows:

" In the above matter the Mixed Claims Commission, United States and Germany, on January 14, 1925 rendered an award for $48,000.— plus interest in favor of the claimant.

" This award was based upon an agreed statement the basis of which was an understanding reached between the two Agencies in Berlin on September 4, 1924. Mr. Alexander Otis was at that time in charge of the claim.

" When this settlement was arrived at it was the understanding of the claimant that it was not to be final but that she reserved the right first to pursue her claims against certain German nationals who by their acts had caused her great injury and in the event that she would fail in these efforts to take the matter up once more before the Mixed Claims Commission and ask for an additional award. That this

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was the condition precedent to her acceptance of the compromise will not be disputed. Compare also Exhibit H attached hereto.

" The claimant in pursuance of this understanding has brought suit against the above mentioned German nationals, but has not been successful because the German domestic law did not provide for a remedy. She is forced therefor now to apply to the Commission and to rely on the protection assured to her by the Treaty of Berlin.

" The facts in the case are as follows:

" The claimant, Mrs. Katharine von Rosenberg-Drier was the sole owner of the estate of Bonnewitz in the neighborhood of Dresden, Germany, which she had inherited from her first husband Baron von Rosenberg, who died in 1913. A description of this estate is contained in Exhibit A attached hereto. After the United States had entered the war this estate was placed under compulsory administration and on May 10, 1918, one Dr. Spiess, attorney at law in Dresden-Pirna, was appointed administrator. Mrs. Drier was at that time absent from Germany having left in 1917 together with her second husband, U.S. Consul Drier. She returned to Dresden after the armistice in the first part of 1919. Upon this occasion she called at the Ministry in Dresden and conferred with the Counsellor of Ministry Dr. Hast who was in charge of sequestered enemy property. At this conference the question of disposing of the estate by sale was discussed and Mrs. Drier who had in former times received various offers — among others one from the brother of the King of Saxony — and had invariably refused considering them, told Dr. Hast that she was absolutely opposed to any sale of the property. The same statement was by claimant to the administrator Dr. Spiess.

" In June 1919 the claimant went to Stockholm, Sweden, because, as an enemy national, she was not permitted to remain longer in Germany. Before she left she gave power of attorney to one Mr. Rost, who had been a friend of the Rosenberg family for years. This power was upon the request of Rost made out in general terms; the claimant made it quite clear however that Rost was merely to take care of the estate and under no circumstances to dispose of it. While the claimant was in Stockholm Mr. Rost wrote her that certain debts (mostly for taxes and upkeep) had to be paid, that the income from the estate would not be sufficient to cover them and that he thought it necessary therefore to sell the estate. The claimant upon receiving Rost's letter wrote to him in August 1919, that he was not to sell the estate because she would soon be able to settle those debts without such a sale. In September 1919 the claimant left Sweden for the United States and on December 1919 she returned to Stockholm arriving at that place on the 24th of said month. During her absence Mr. Rost had on November 21, 1919 concluded a contract of sale with one Mittag. The price agreed upon was 570.000,— Paper marks for the estate and its entire inventory including the furniture, household goods and works of art belonging thereto. Of this amount M 169,845.— were to be paid in cash, the rest to be secured by a mortgage. Since the estate was still under compulsory administration at the time Mr. Rost requested the administrator, to give his consent to the sale. The administrator, although fully aware that Mrs. Drier was absolutely opposed to such a transaction reported the matter to the Ministry, stating in this report that he had no objections to the sale if Mr. Rost declared that certain things enumerated in a special list would be returned to Mrs. Drier, if Mrs. Drier would agree to paying a certain sum for administration expenses incurred by him and if Mrs. Drier, through Mr. Rost, would waive all claims against the State of Saxony which might possibly arise from the sequestration of the property.

" The Ministry, after at first refusing to give its consent to the sale, agreed to it in the beginning of January 1920.

" The claimant learned of the contract of December 26th immediately after her return to Stockholm and protested at once in two telegrams to Mr. Rost of December 26th and 27th. In spite of these protests Mr. Rost executed the sale on January 5, 1920 by causing its entry in the ground books of the competent court at Pirna and by delivering the estate to Mittag. It turned out however that the entry was legally not affective because Rost in applying for it had made a certain reservation which is not admissible in transactions of that kind under

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German law. The court therefore advised him that the execution of the sale must be repeated in order to become valid. In the meantime the claimant had arrived in Dresden and had withdrawn Rost's power of attorney which was returned to her on January 24, 1920. This being done the claimant who had been informed that the sale had not been validly executed returned to Stockholm toward the end of February where she learned that Rost, although no more in possession of the power of attorney, intended to repeat the execution of the sale. Thereupon she wired again in the first days of May forbidding him strictly to carry out his intention. Rost answered by telegram of May 6, 1920 that decent people were not used to acting on withdrawn powers of attorney. In spite of this he repeated the execution of the sale finally on May 10, 1920 and Mittag was registered as owner of the estate on the same day.

" In March 1922 the claimant brought suit before the competent court in Dresden against Mittag asking for the retransfer of the estate to her. The suit was dismissed on June 19, 1924 upon the ground that Mittag had been without knowledge of Rost's lack of authority and was, accordingly, entitled to the protection of law as 'purchaser in good faith'. The claimant then brought suit against Rost in December 1924 asking for an order to compel him to restore the estate to her. This suit was likewise dismissed on May 8, 1925 upon the ground that the claimant had not been able to prove that she expressly forbade Rost to sell the estate before he concluded the contract of sale on November 21, 1919.

" This decision being final the condition prerequisite for applying once more to the Commission has now arisen.

" The present claim is based on Article 297 e of the Treaty of Versailles as incorporated into the Treaty of Berlin. Under this provision the claimant, as an American national, is entitled to compensation in respect of damage or injury inflicted upon her property by the application of exceptional war-measures or measures of transfer. According to Par. 3 of the Annex to Article 298 measures of that kind comprise measures of all kinds, legislative, administrative, judicial or others, that have been taken with regard to enemy property, and which have had the effect from removing from the proprietor the power of disposition over their property, such as measures of supervision, of compulsory administration and of sequestration, or measures which have had as an object the seizure of, the use of, or the interference with enemy assets, for whatsoever motive, under whatsoever form or in whatsoever place. Acts in the execution of these measures include all detentions, instructions, orders or decrees of Government departments or courts applying these measures on enemy property.

" It is claimant's contention that under these provisions the Government of Germany is obligated to compensate her for the damage caused to her by the unauthorized sale of her estate.

" In 1918 her estate was subjected to compulsory administration which in itself was undoubtedly an exceptional war-measure. The administrator who was appointed under the German war-legislation was, by virtue of that very legislation, obligated to protect the interests of the claimant. He knew that she was opposed to and had actually forbidden the sale of her estate. In spite of this he applied, upon Rost's request, to the Ministry for the consent to have the sale executed. The Ministry which was likewise informed of claimant's attitude, granted this consent and, in fact, made the contract of sale effective by removing the administration, fulfilling thereby one of the conditions prerequisite to the validity of the contract. If the administrator, as was clearly his duty under the circumstances, had opposed the sale in conformity with the claimant's wishes, Rost would not have been able to carry out his intention and the same would have been true if the Ministry instead of removing its 'protection' at the critical moment had prevented the administrator and through him Mr. Rost from acting against the express orders of the proprietor. There can be no doubt that the sale of the estate became only possible 'by the acts of persons connected with the administration' of the property, namely, Mr. Spiess, the administrator, and Dr. Hast, the Government's Official in charge of sequestration-matters. For the acts and in legal contemplation, for the omissions of these persons, when they had been obligated to act, Germany is responsible.

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" The damage suffered by claimant consists in the difference between the reasonable value of the estate at the time of the sale and the sale's price.

" The estate was sold to Mittag for the absurd sum of $570.000,— Paper-Marks, which at that time equalled approximately $11,400.00. He paid in cash the amount of 169.845,— Paper-Marks or $3400.00 which was all the claimant received at that time in consideration of her estate. The rest of 400.000,— Paper-Marks was secured by mortgages. These mortgages have since been attached by Mittag who reimbursed himself in this for the court and lawyers' expenses incurred by him in connection with the claimant's lawsuit against him. Therefore, while the claimant appears to have received the equivalent of approximately $12,000.00, as a matter of fact all but $3400.00, duly credited below, has been taken away from her as a result of the general scheme and its consequences.

" The actual value of the estate at the time of the sale is shown by the Exhibits B to G attached hereto.

" It appears from these Exhibits that the value of the estate without the forest and without the equipment of the castle was in 1919

" Goldmarks: 385 000,—

" It appears furthermore that the value of the forest standing on the estate at that time was at least:

" Goldmarks: 1 000 000,—

" It appears finally that the value of the equipment of claimant's castle at that time was at least

" Goldmarks: 2 800 000,—

This brings the total value of the estate as sold to Mittag in 1919 to Goldmarks 4 185 000,— or approximately one Million Dollars.

" There are to be deducted herefrom the sums received by the claimant from Mittag, namely 3400 Dollars and the award rendered to claimant in partial compensation of her claim, namely 48 000 Dollars.

" Claim will therefor be made for an additional award in the amount of 948 600 Dollars."

On account of this Petition, and the evidence submitted therewith, the National Commissioners on April 5, 1929, made an additional award to the claimant for $250,000, with interest thereon at five per cent from May 10, 1918, to the date of payment.

The claimant was dissatisfied with the amount of this award, and on November 18, 1932, the American Agent, on her behalf, filed another Petition for a further award. The German Agent, on July 2, 1934, filed a reply requesting that, for the reasons stated therein, this Petition be dismissed. The German Agent, although all the evidence filed in support of the claim had been turned over to him informally by the attorney for claimant on June 1, 1927 (see Annex B, p. 41, of the Memorandum Brief of American Agent filed January 9, 1933), indicated in this reply that he did not desire to file any evidence at that stage of these proceedings. The reason alleged for this position was that " in the present stage of the procedure the Commission is only concerned with the preliminary question of whether or not the case shall be reopened and a retrial be granted. The examination of this question has to be related to the record as it stood when the award of April 5, 1925 [1929], was rendered."

On August 15, 1934, the American Agent filed a reply to the German Agent's Reply, and also a Memorandum Brief in support of the Petition, to which reference is made for the purpose of calling it to the attention of the Umpire, and stating the concurrence of the American Commissioner in the contentions therein made.

At the same time, August 15, 1934, the American Agent, on the understanding that the German Agent did not desire to file any additional evidence, submitted " this claim for final adjudication " by the Commission. So, also,

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the German Agent, on September 28, 1934, filed a Memorandum, stating that he "joins the American Agent in submitting the Petition for further award for decision by this Honorable Commission". The German Agent added, however, that this submission was made on the same understanding as already stated in his Reply that "in the present stage of the proceedings the Commission is only concerned with the question of whether or not the case shall be reopened and that no trial on the merits will ensue without previous opportunity for him to file evidence".

It appears from the foregoing review of the proceedings down to this point that the only question now submitted for the decision of the Commission is whether or not the Commission should exercise its discretionary right to reconsider its previous award.

Before proceedings to an examination of the situation presented by this Petition, it will be convenient to note three points which have an important bearing on the questions to be considered.

In the first place, the German Agent did not present any evidence in opposition to the two preceding Petitions, although, as above set out, he was fully advised as to all of claimant's evidence on valuation of the property involved as early as June 1, 1927, and he has not presented any in support of his objections to the question raised by the present Petition. Indeed, he has frankly stated, as above quoted, that "the examination of this question has to be related to the record as it stood when the award of April 5, 1925 [1929], was rendered." It is true that in his Reply he alleges:

> "Investigations recently carried out in Germany in connection with a plan eventually to settle this case by an agreement, have disclosed that the material filed by Claimant in 1929 and on the basis of which the Commission granted an additional award of $250,000, is not above suspicion. The investigations, furthermore, convinced the German Government that the two awards totaling $298,000 greatly exceed the damages actually sustained by Claimant."

Apart from the inconsistency of referring to this alleged evidence after expressly stating that he did not desire to submit any new evidence at this time, this reference to some vague evidence outside of the record should be disregarded by the Commission.

In the second place, it must be noted that, although the German Agent did not expressly admit the facts presented in the second Petition by the American Agent as to the value of the property taken, he did not deny those facts, and has made no effort to refute them, merely contenting himself with the allegation that he had no knowledge or information sufficient to form a belief as to their correctness.

In the third place, the second award of the Commission was not based on an agreed statement signed by the Agents as to the value of the property taken. The only agreement by the Agents before the Commission when the second award was made was furnished by the admissions of the German Agent as to the undisputed status of the evidence offered by the American Agent in support of that Petition.

Turning now to the present Petition, the pertinent parts of it are as follows:

> "The second award, it is respectfully submitted, did not, however, purport to be, nor was it in fact, in any way related to the amount of the loss proven by the evidence to have been suffered by the claimant. The amount was arrived at in the following manner: The petition of your claimant, dated March 19, 1919 [1929] (Docket No. 11485), showed that she was entitled upon particularized and competent evidence submitted therewith to recover nine hundred and forty-eight thousand six hundred dollars ($948,600.), together with interest from the 10th day of May, 1918. Reference is made to the petition for further award, copy of

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which is hereto annexed and made a part hereof, and to the evidence accompanying said petition. Said petition was duly countersigned and filed with the Commission on the 19th day of March, 1929, by the American Agent. The claimant thereafter had a conference with the American Commissioner at the offices of the Mixed Claims Commission, United States and Germany in the City of Washington. During this conference the American Commissioner stated that the German Commissioner would consent to a further award on behalf of claimant in the amount of two hundred thousand dollars ($200,000). The claimant stated her inability to accept the same. At a later conference the American Commissioner stated that he had procured the consent of the German Commissioner to increase the further award to two hundred and fifty thousand dollars ($250,000.), and to allow interest thereon from the 10th day of May, 1918. At this time the claimant was in destitute circumstances. Upon inquiry as to what would be the result if she declined the award she was informed that the claim would then probably be certified to the Umpire and that considerable delay might ensue before final decision in the matter would be entered. The claimant thereupon stated that if the amount of two hundred and fifty thousand dollars ($250,000.) was the maximum which she would receive, without such prolonged delay, she had no choice in view of her stark necessities to do other than let it go through. It was, however, then and there stated, and later restated to the German Agent, that the claimant was dissatisfied with the proposed award and she expressly said she was reserving the right to bring before the Commission or other appropriate tribunal or governmental agency the wrong she had suffered in not being awarded the full measure of compensation as provided for in the Treaty of Berlin, namely, the value of her property taken and not returned to her through the action of the officials of the Government of Germany. (See Administrative Decision No. III, Opinions and Decisions of Commission, p. 62.)[a] No evidence was at any time presented to the Commission by the German Agent which called in question the proof of loss submitted by the claimant and the two awards in the total amount of two hundred and ninety-eight thousand dollars ($298,000.) had no relation whatever to the amount of her loss and were not in accordance with the evidence and proof before the Commission. She further stated at the time personally and through her attorney that her acquiescence in and acceptance of the awards was due only to her necessitous circumstances and that she intended to insist further on her right to recover the full compensation provided her by the Treaty of Berlin.

" Upon these grounds therefore the claimant prays that this Honorable Commission will increase the awards to an amount commensurate to the undisputed proof of loss; first, that a grave injustice has been done to the claimant and she has been deprived of rights accorded her by the Treaty of Berlin; second, that the awards made are contrary to the rulings of this Honorable Commission as set out in Administrative Decision No. III, in that they do not afford her the full measure of compensation therein provided for; third, the awards as made are juridically wrong in that this Honorable Commission was without authority to reduce the awards made by it to an amount less than the sum shown by the undisputed proof and records of the Commission to be amount of the loss suffered in this instance.

" In conclusion, the claimant respectfully refers to the prior decisions of this Honorable Commission to show that her petition for a further award is grantable squarely within the language of the Commission in the claim of the United States of America, on behalf of Philadelphia National Bank v. Direction der Diskonto Gesellschaft, Germany, dated April 21, 1930 (Docket No. 7531), to the effect that the Commission will take under consideration, the question of reopening or changing the award, ' where it appears that manifestly the Commission committed an error on its findings of fact on the evidence produced by the agents at the time the claim was submitted for decision'." (Filed November 18, 1932.)

There was filed along with this Petition affidavit of claimant of November 10, 1932, explaining the circumstances under which she made the preliminary

[a] *Note by the Secretariat,* Vol. VII, p. 64.

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estimate of $500,000 contained in her affidavit of March 9, 1923, as the value of her property involved.

On December 7, 1932, there was filed affidavit of claimant executed on December 2, 1932, stating that the second award was never accepted by her in full settlement of her claim, and that at the time it was made she expressly reserved her right, and so notified the German Agent, to make demand for an additional award, and that the delay in presenting the new petition was because she had been arrested in Germany in a civil process " in a fictitious suit " after the second award was made. She stated further," As soon as released from prison on this civil process, she was forced to flee from Germany surreptitiously, to escape arrest under a criminal charge that in procuring an award from the Commission she had defrauded the German Government. The State Department of the United States of America was promptly informed thereof, and since the fall of 1930, the matter of the injustice done to this petitioner in the second award and the violations of her person and liberty by her civil arrests and criminal prosecution have been before that Department and the Government of Germany has been informed thereof for more than a year."

In addition to these affidavits, three annexes, A, B, and C, were filed with a printed brief on her behalf, under date of January 12, 1933. These annexes do not seem to be of present importance in relation to the questions now under consideration, except that Annex B shows that the claimant's attorney transmitted to the German Agent on June 1, 1927, all the valuation evidence which was later filed on March 19, 1929, in support of the Petition.

The Reply of the German Agent to this Petition was filed July 2, 1934. The German Agent contends, briefly:

(1) That the Petition presents no facts or reasons furnishing a justification for reopening the second award because, in effect, there can be " no ground for the contention that it (the Commission) misinterpreted the evidence, or that in any other respect its decision involved an error prejudicial to claimant ". He contends further that, in view of the evidence and the circumstances of the case, the Commission had the right to go below the figures set forth in the evidence as to the damages incurred, and acted in accordance with its best judgment in fixing a lower amount than the valuation shown in the evidence.

(2) That the evidence as to value was not undisputed but was challenged by the German Agent's Reply, with the effect of leaving it to the Commission to decide its probative value.

(3) That the claimant, having acquiesced in and accepted the award, was thereby barred from charging the Commission with error or misinterpretation, notwithstanding her express reservation as to pursuing her rights in further proceedings.

The remaining contentions presented in the Reply of the German Agent are argumentative conclusions, based on the points above noted.

On August 15, 1934, the American Agent, as above stated, filed a Reply to the German Agent's Reply of July 2, 1934, together with a Memorandum Brief in support of the Petition.

In the opinion of the American Commissioner, this Reply and Brief of the American Agent ably and satisfactorily dispose of the objections raised by the German Agent, and as these documents form part of the record which will come before the Umpire with this Certificate of Disagreement, the American Commissioner simply repeats his previously expressed concurrence with the contentions of the American Agent without detailed comment.

The American Commissioner desires, however, to call attention to some misapprehensions as to his position in making the second award, which appear in the discussion of the effect of that award.

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It seems to have been assumed by the German Agent that the American Commissioner agreed to that award on the theory that it was a compromise acceptable to the claimant, and, consequently, a final disposition of the claim. On the contrary, the claimant definitely stated, and the American Commissioner clearly understood, that, as she alleges in her Petition and supporting affidavit, she was dissatisfied with the amount awarded and proposed to pursue her rights, as she understood them, for further relief.

The situation will be clarified by considering the implications arising from the suggestion to the claimant of an alternative course, which was that if she preferred, the question of the amount of damages to be awarded would be referred to the Umpire for decision. The suggestion of that course necessarily implied a disagreement on that point between the two National Commissioners. Only questions on which they disagreed came within the jurisdiction of the Umpire. It is clear, therefore, that the American Commissioner thought that the award should be for a larger amount than the German Commissioner would agree to. Inasmuch, however, as the two Agents had not signed any agreed statement of facts, recommending the amount which the German Commissioner was willing to agree to, the possibility had to be considered that there might be considerable delay before the Umpire rendered his decision, and that eventually he might not make a larger award than the National Commissioners were prepared to make at once. Accordingly, it seemed to the American Commissioner that the best interests of the claimant would be safeguarded by agreeing with the German Commissioner upon the largest amount he would consent to, thus giving the claimant immediate relief and leaving her free to petition for a reconsideration of the award, if she desired, in order to secure a further award for additional damages on the merits if the Commission should be willing to reconsider the case, and this is the course which the claimant has now taken in filing the present Petition.

It is true that at the time the second award was made the Commission had not yet definitely decided that it had the right to reconsider an award once made, but the American Commissioner and the American Agent had always considered that the Commission had this right and would exercise it in its discretion, and that the Commission could not prevent a claimant from petitioning that this right be exercised.

It has now been definitely settled by the Umpire's decision of December 15, 1933, that the Commission not only has the right, but is under an obligation, on proper cause shown, to reconsider an award. In view of that decision, the only question raised in these proceedings is whether the claimant has shown cause within the limitations of that decision for a reopening and examination of the claim on its merits. That point is fully discussed in the American Agent's Brief, and need not be reexamined here.

Apart from the question of whether the claimant in this case agreed to accept the second award as final, which she denies and as to which the German Agent has not offered any evidence in refutation of that denial, this case is no different from the cases in which awards by consent were entered at the last meeting of the Commission, in which awards had previously been made by the Commission, and the consent awards were for amounts in addition to the amounts originally awarded, and all were made on petitions for rehearings.

Action similar to that taken in the cases above cited is all that the claimant is now asking, and these consent awards furnish precedents showing that the mere entry of an award, although accepted by the claimant, does not preclude the claimant from petitioning for an additional award.

The omission in this Opinion of any discussion of the negotiations between the representatives of the two Governments for a compromise settlement of

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this claim by an additional award of $160,000 does not mean that the American Commissioner overlooks the importance of those negotiations as bearing upon the questions under consideration. The American Agent has fully discussed in his Reply and Brief the bearing of those negotiations upon the situation, and as the American Commissioner concurs in the views of the American Agent, it is not necessary to extend this already voluminous Opinion by reviewing them here.

In conclusion, the American Commissioner is of the opinion that the Commission should grant the claimant's Petition to the extent of reconsidering the second award, with leave to the German Agent to submit any new evidence as to the damages to be awarded, after a reexamination of the case on the merits. The time for the submission of new evidence should, however, be limited, and the American Commissioner suggests that a period of one month, after a decision granting reconsideration, be fixed for that purpose, with leave to the American Agent to apply to the Commission for an opportunity to file evidence in rebuttal within a limited period to be fixed by the Commission.

Chandler P. ANDERSON
American Commissioner

Dated March 29, 1935.

Opinion of Dr. Huecking, the German Commissioner

Although I very much should like to confine myself strictly to the two reasons which induce me to vote against the admission of this petition I am afraid such attitude might be misconstrued to mean that I accept the *status causae et controversiae* given by the American Commissioner. This I do not. I think that it contains many things that are not and leaves out some things that are essential, and that it interprets some acts of the procedure in this case differently from what I think was their real significance.

For that reason I will set out under I) the features of the case which I hold to be the essential ones; under II) some remarks about " admissions " which the American Commissioner finds in this case, whereas I do not; under III) the juridical reasons which in my opinion lead to a dismissal of this petition.

I

(1) Claimant, an American national through her second marriage, had been the owner of a landed estate in Saxony.

She lost this ownership through the fact that an attorney of hers (Rost) transferred it to one Mittag. (She says that in acting so the attorney misused his powers, a contention not upheld by the domestic courts.)

The transfer of the ownership took place on May 10, 1920, that is to say: *after the war* (armistice: November 11, 1918; coming into force of the Versailles treaty in Europe: January 10, 1920; as to America vide p. 625 [p. 1] [1] cons. Ed. of Dec. and op.).

In order to make the German government responsible for these events and to bring them under the Versailles Treaty, Claimant relies on the fact that during the war (May 10, 1918) compulsory administration of the estate had been ordered. This compulsory administration lasted until January 26th 1920, so that it was no longer in existence when the transfer of the property was carried out; but Claimant adds that her attorney had made the contract of

[1] *Note by the Secretariat*, Vol. VII, p. 21.

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sale on November 21st 1919 (during the armistice) and that at the time the compulsory administrator and the Ministry had assented to this contract. Claimant thinks, they ought not to have done so, because half a year or so earlier she had informed the Ministry and the administrator that it was not her intention to sell the estate. (The exact date of this conversation is not stated by the Claimant, but it was before she gave her attorney the powers on the strength of which he made the contract.)

In the Claimant's eyes the attitude of the Ministry and the administrator, as described above, amounts to an exceptional war measure, which had the effect of removing from the proprietor the power of disposition over his property (art. 297, e Versailles Treaty) and to this attitude she traces back the loss of her property.

(2) While and after unsuccessfully suing her attorney and the purchaser before the domestic courts Claimant approached this Commission. She alleges that the price at which her attorney sold the property (570,000 Mark, equalling about $12,000 at the then prevailing rate of exchange) did not correspond to the actual value of the property. In a statement sworn to March 9, 1923 she says that her damage is $500,000 and today she declares it to be one million dollars.

She obtained two awards from this Commission and is now seeking a third.

a) First award:

In the fall of 1924 the claim had become the object of negotiations for an amicable settlement in Berlin between the counsel of the two agencies, attorney for Claimant and Claimant personally being present at some of the conferences. As a result of these negotiations an agreed statement, signed on September 4, 1924, granted a compensation of $48,000 to the Claimant.

An award for $48,000 with interest from January 5, 1920, was thereupon handed down by the Commission on January 14, 1925. On August 1, 1928, capital and interest (totalling $68,782.70) were paid in full.

b) Second award:

Four years later (March 19, 1929) a " Motion for an additional award " was filed on behalf of the Claimant.

She alleged that the award of January 14, 1925, covered only a small part of the total damages, leaving a claim for about $940,000. In support of her statement that the value of the estate was in 1920 a million dollars Claimant filed a number of exhibits (copy of which her attorney had handed to the German agent on June 1, 1927, together with a query what further evidence, if any, might be necessary).

The motion further asserted that when the settlement of September 19, 1924, was arrived at, Claimant reserved the right to take the matter up once more before the Commission in the event that her claims before the German courts should be rejected.

The German Agent answered the Motion by a short Memorandum, the wording of which shall be discussed later. Claimant and her attorney had several talks with the American Commissioner.

Thereupon, under date of April 5, 1929, the commission handed down an award in the amount of $250,000 with interest at 5% from May 10, 1918, on which Claimant received payments in accordance with the provisions of the War Claims Settlements Act 1928.

c) Three and a half years later (November 18, 1932) the present " petition for further award " was filed in which Claimant prays the Commission to increase the award to a sum corresponding " to the undisputed proof of loss"

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(i. e. $1,000,000 less the two awards totalling $298,000). She alleges that the awards made were juridically wrong since the Commission had no authority to depart from the figures shown as value of her property by undisputed proof.

She further says that she did not accept the award as a full compensation, and that in the pertinent discussions she had protested accordingly and reserved the right to bring her claim once more before the Commission or some other court.

II

In every stage of this law suit (first award, second award, present proceedings) the American Commissioner finds a German " admission " where I see none. As he draws practical consequences from his view I am compelled to discuss it.

a) First award (applies to the later proceedings similarly):

The American Commissioner is under the impression that the German side in this procedure admitted and admits liability under art. 297, e Versailles Treaty. The answer would be: The fact that a compromise was made, involves by no means an admission of liability, very often it is just the uncertainty as to the principal issue which leads to a compromise. This is true quite generally; but moreover in the present case I am borne out by the Claimant herself, who states (relying on an affidavit of Mr. Otis, p. 14 printed Memorandum Brief January 6, 1933)

" At the time the agreement was made the liability of the German government had been warmly disputed by the representatives of the German Agent and while Mr. Otis regarded the liability as duly established, he was uncertain of what the result would be in a contest before the Commission in which this liability would be at issue. If there had been no question of liability and this liability were admitted by the German Agent before the question of damage was considered, Mr. Otis would have felt that the amount recommended for award in favor of Mrs. Drier was wholly insufficient * * * "

The consequence is: Even if according to the American Commissioner's view this case should be reopened and the second award should be set aside, we cannot come to his present conclusion, *viz.* to fix a time limit for the presentation of evidence regarding the value; the right conclusion only could be: to decide the law suit first " in quali ", (with respect to the principle involved).

b) Second award:

The German Agent had answered the Claimant's Motion for a second award verbally in the following form:

" I. The German Agent will not object to the admission of the Motion by the Commission.

II. It will not be disputed that Claimant in accepting the compromise, which formed the basis of the award of January 14, 1925, reserved the right to pursue her claim against Mittag and Rost and, in the event of failure to recover from them, to apply again to the Commission for an additional award.

III. The facts as set forth in the Motion will not be contested.

IV. The German Agent has no knowledge or information sufficient to form a belief as to the actual value of the estate, the equipment of the castle, etc. at the time of sale."

The question is: Does paragraph IV mean an admission?

The American Commissioner apparently holds it does. For when he states " he did not expressly admit " the idea is necessarily conveyed to the reader that the *tacitly* admitted, which idea is still reinforced when the American

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Commissioner speaks of " the admissions of the German Agent as to the undisputed status of the evidence " and when he says that the American Agent " disposed " of the German Agent's point, that the evidence as to the value was not undisputed.

My interpretation is:

When the German Agent in paragraph IV expressed himself this way: " he had not sufficient information or knowledge to form a belief as to the actual value of the estate " the first thing to be borne in mind should be that it is a German lawyer who is speaking here. He is trained on the basis of the German Civil Code [Code of Civil Procedure], the article 138 of which rules that each party has to answer in detail the allegations of the other side, but which continues:

" If facts are alleged against a party which are neither own acts of that party himself nor witnessed by him personally, he is allowed to answer that he does not know them."

And such a declaration given in a case where it is admissible (as in the instant case it would be) means juridically that the allegations are *contested* (as may be gathered from *any* German lawbook, there is unanimity about that).

It stands to reason that utterances of a professional lawyer must be read and construed in the light of his training and profession.

But quite apart from this, general reasons would lead to the same result. Considering what is meant by " undisputed evidence " in the sense here relevant and why it should not be ignored by the Court, the essential element is the *tacit assent*. It is the *assent* that will not easily be disregarded by the Judge. Now, I have explained: in the instant case there is even *contradiction;* but to put it at the *highest* the German Agent's declaration amounts to no more than a statement that he refrains from forming an opinion; on no account can it be construed to mean assent. And should still some doubt persist, the last vestige of it would be removed by contrasting the above quoted paragraph IV with the preceding paragraph III of the same Memorandum. Paragraph III says:

" The facts as set forth in the Motion are *not contested*."

and then follows immediately paragraph IV, which says that as far as the *value of the estate* etc. is concerned, the German Agent — for want of sufficient knowledge and information — *can not form a belief*. The distinction leaps to the eyes; it is clearly an intentional one and justifies the *argumentum e contrario:* just *because* the words " not contested " could and should *not* apply to the alleged value of the estate, a fresh paragraph was framed using a different term. Whatever the meaning of that term might be, *one* meaning cannot be attributed to it: the meaning " not contested " or its synonym chosen by the Claimant " not disputed ". (The same argument applies, when paragraph II and paragraph IV are contrasted: in paragraph II " not disputed " as a technical term in its technical meaning, in paragraph IV " no knowledge etc.")

The best way to define the meaning of the paragraph will probably be to put it as a question of responsibility: The Agent speaks to the Commission; and he makes it quite clear that *he* will not shoulder the responsibility for the value to be assessed, especially for the figure given by the Claimant; and (though refraining from submitting further material) he leaves that responsibility with the Commission, thus obliging them to form a judgment of their own with respect to the probative value of the evidence submitted.

c) Present proceedings:

In the present proceedings the German Agent makes it his first plea that he holds a judgment which has acquired force of *res judicata*. His point is

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that such a judgment answers fully any evidence and relieves him from any necessity or even advisability to put in counter-evidence (until he should be overruled on this preliminary point).

I will not discuss here whether that attitude is well founded; but at least it is perfectly logical and logically it renders impossible any attempt to deduce from his omission any consequences unfavorable to him. But the American Commissioner draws such consequences. It is true that he does not exactly say which, but to him the omission has " an important bearing on the questions to be considered " and as he couples this point with his discussion of the " admissions " made before the second award, it seems here again he sees some sort of admission which I, according to what I have said, must deny. It is here the place to discuss the American Commissioner's request, that from the German Agent's Reply part should be stricken out. The facts as I see them are:

The German Agent evidently feared, that a certain tendency on the American side to construe anything that was said or done or not said and not done by the German Agent as an admission might lead to his attitude in the present stage of the proceedings again being misconstrued. He expected to hear (and he is borne out by the subsequent development) " you do not submit any evidence — so you admit having none ". He answered in advance:) *have evidence* but I will not submit it because I have a good preliminary plea. Needless to say that such reference to unproduced evidence (it is this that the American Commissioner protests against) is not expected by the Agent himself to have any probative value with the Commission but merely serves the absolutely legitimate purpose to protect him who prefers it against misinterpretation.

III

I now advert to the juridical principles which I suggest should govern this case.

I think that two such principles stand in the way of the Claimant's petition: The principle of *res judicata* and the principle that what is granted as a whole cannot be accepted otherwise than as a whole. I shall deal with these two points separately.

A. Claimant is fully aware of the juridical nature of the judgment rendered in April 1929. She says herself that the judgment was not a partial judgment and was meant and understood by everyone concerned to dispose definitely of the case. In other words: all are agreed that to the positive effect of the judgment (award of a certain sum) a negative effect corresponds: denial of the surplus asked for. The claim as now preferred was *dismissed* in 1929 and that dismissal has acquired force of *res judicata*.

Thus the question arises: On what grounds is a reopening asked for? If I understand the American Commissioner aright, he sees two such grounds: A manifest error, committed by the Commission and reservation to claim for more, made by the Claimant, when she obtained the second award.

a) Manifest Error:

The contention seems to be that the amount awarded was unrelated to the evidence although that evidence was undisputed.

But the estimate based on the evidence was not undisputed: and the relation between the amount awarded and the claim and the Claimant's evidence is simply established by the award itself, the award by its nature being the Commission's answer to the Claimants' demand, partly granting partly denying it. What is really meant by the argument from the American side seems to be: The Commission had no power to deviate from the Claimant's estimate taken together with the German Agent's remarks in par. IV of his memorandum.

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One may rightly wonder, first, why, if such was the situation, the American Commissioner foreshadowed the possibility that the Umpire, if the case went before him, " eventually might not make a larger award than the National Commissioners were prepared to make ". (P. 18 [p. 1047, this print] [1] of the American Commissioner's opinion.)

Is not that possibility alone which the American Commissioner upholds even today the clearest denial of any " manifest error " in making the award?

As a matter of fact, there was no error at all and even less a manifest error. Was the Commission ignorant of the contents of the record? What else but the contents of the record did the Claimant's attorney in at least two conferences impress on the American Commissioner's mind and the American Commissioner in at least two conferences on the German Commissioner's mind, before the award was made? The Commission decided they had power to make an estimate of their own as to a certain value. Whether — in our opinion today — they were right or wrong in deciding so does not matter, for *they* were called upon to decide that question, not we. And when I say " it does not matter whether they were right or wrong " I hope I shall not hear " So you admit that they were wrong ". To avoid any such misunderstanding I expressly state that moreover in my view they were perfectly right. Any judge quite legitimately may deduce from any evidence submitted to him that the evidence itself conveys the idea that the estimates contained in it are exaggerated. I do not want in the least, to deal with the merits in this case; but to show that without any manifest error the Commission might very well gather an impression of exaggeration from the evidence submitted I may mention that one of the experts appearing in the evidence (1) speaks of " affection value " never accepted by this Commission as a basis of claims; another (2) reaches his final figures by stating the prices of wood for a series of years and then selecting for his subsequent multiplication not an average but the highest figure appearing in the series; a housekeeper (3) testifies to the value of paintings and expresses herself this way: " The invaluable — according to my mind — paintings that had been bought at the highest prices from noted artists "; her husband, a farmer, speaks (4) of hypothetical returns of hundred thousand yearly in this form " There were also great water supplies on the estates that might be exploited and which raised the value of the estate by hundred thousand yearly . . ." another expert (5) arrives at an estimate of a very considerable sum with respect to a long list of objects of art without any substantiation and without even stating that he ever saw the objects of which he speaks.

(1) Mr. Spaltholz, Exhibit B, 2, of the Motion for an additional award 19th March 1929 " especially an adequate relative affection value ".

(2) Mr. Heger, Exhibit E to the same Motion, " the price . . . culminates in the year 1921. Taking the prices of this year as the bases * * * ".

(3) Mrs. Langhammer, letter d. d. Biensdorf 17/12/1926 Exhibit to the same Motion.

(4) Mr. Ernst Langhammer, letter d. d. Biensdorf 17/12/1926 Exhibit to the same Motion.

(5) Mr. Leonhard Messow, Exhibit F to the same Motion.

As I said before I do not infer in any way from this that the value as estimated by the Claimant is excessive, but I do infer that it not implies any manifest error or error at all, if the Commission on the strength of this evidence arrived at a figure different from the Claimant's.

[1] *Note by the Secretariat,* this volume, p. 135.

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b) Reservation by the Claimant:

The contention seems to be that the Claimant was dissatisfied with the award, reserved her right to ask for more and that the American Commissioner clearly understood her this do to.

This in the American Commissioner's Opinion is sufficient to reopen the case now.

To appreciate what this means I suggest that for one moment this situation be looked upon from the German Commissioner's point of view:

The German Commissioner held the claim to be excessive as far as it went beyond $250,000 and voted for its dismissal. The American Commissioner agreed. The award was framed accordingly and handed down; there is *res judicata*. Now the German Commissioner learns that at the time in a talk with the party the American Commissioner clearly understood her to reserve the right to ask for more. This fact and this fact alone is said to be sufficient to set aside a judgment having acquired the force of *chose jugée*. And the German Commissioner is invited to accept this as the law of this Commission and as the natural fate of judgments to which he was a party.

The reasons for which a " reservation " as alleged by the Claimant would be wholly irrelevant seem quite obvious to me. First, as the Claimant puts if herself " this Commission is not a board of mediation " but a Tribunal. As a party you can make no pacts with it.

Second: if you could, you would have to make them with the Commission not with one member of it. The American member is not " the Commission ".

And here again I should like to add, that if I declare the " reservation " to be irrelevant, this does not mean any commitment of mine as to the facts as alleged by the Claimant.

Only subsidiarily I want to raise a second point which in my opinion stands in the way of the Claimants' petition.

From her *own* point of view she was not entitled to *accept* the award and the sums paid to her and now to sue for more without even offering to repay the amounts received if, on a reopening of the case it should be found that her claim was not worth even the $48,000 and $250,000 granted to her. She says she had (on the strength of what the American Commissioner told her) a choice between either taking her chance and going to the Umpire (which meant a certain lapse of time and uncertainty) or she might accept $250,000 and have it at once. Now if she made her choice, she would be bound by it now. How can she take the advantage and repudiate the disadvantage when it was clear and plain that she was to receive the advantage (partial grant at once), *because and if* she was ready to put up with the disadvantage (reduction of the claim)?

Nor would even in this connection her " reservation " be of any avail to her. In this connection it would be met by the German Agent's point who speaks of a *protestatio facto contraria*. When a person does certain acts that carry necessary consequences, he cannot escape liability for these consequences by mere verbal protestations that are in contradiction with the acts: When I enter a Parlor Car and ride in it from Washington to Baltimore, I have to pay the Parlor Car fee and should I put up the defence:

" Before the train started, I told the legal representative of the Company, who happened to be sitting beside me, that I declined to pay the fee and would not have any contract with them; thus there is no contract, although I admit having done the ride ",

the Judge would answer me " your acts take precedence of your words ". (The Roman version would be: "*facta loquuntur* ".)

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Claimant admits having received $250,000 on the strength of a judgment which, she admits that too, was not meant to be a partial judgment. Thus she did an act, which necessarily *de lege* entailed the consequence of barring further claims and entailed these consequences equally on the strength of what she says she had been told by the American Commissioner. What use is it that she says, she protested against the consequences but accepted the money, when it was clear that anyway accepting the award was incompatible with reservations? How could she have her cake and eat it? In the record she explains her attitude by a plea of duress, saying that her acquiescence, if any, was due to destitution and starvation. As the American Commissioner does not discuss this point, I may dispense with it too.

The same consideration practically applies to a last additional point *viz.* the question whether the Claimant may rely on that in connection with the efforts to terminate this Commission's work a tentative but abortive agreement was made to settle this claim by compromise. The fact of course neither does bar the German Agent from insisting on his plea of *res judicata* nor from his plea that any additional award would be unjustifiable. The American Commissioner, who in this respect merely refers to the record, evidently himself does not think that there is a compromise in this case otherwise he would not vote in his conclusion for a time limit to take evidence but would have to vote for an award granting Claimant the amount of that compromise and *dismissing the amount exceeding that.* Here again I find traces of the error which pervades so many allegations in this matter *viz.* the belief that in a procedure you may one-sidedly profit from any happenings or situation without allowing yourself to be bound in whatsoever way to reciprocity.

Washington, D.C., May 16th, 1935.

Dr. Victor L. F. H. Huecking
German Commissioner

Supplemental Opinion of Mr. Anderson, the American Commissioner

An examination of the Opinion of the German Commissioner in the Drier case discloses a number of points which call for critical comment.

In part I of the German Commissioner's Opinion, subdivision (1), the claimant is described as " an American national through her second marriage ". This statement does not fairly present her American nationality status. As appears from the record, she is a native born American national. She lost her American citizenship through her marriage in May, 1899, to her first husband, a German national, Baron Georg von Rosenberg. Upon his death she regained her American nationality status through her marriage to her second husband, John C. L. Drier, a native born American national and then a member of the United States Consular service stationed at Dresden, and she has since maintained that status.

In the same subdivision of the German Commissioner's Opinion he makes the point that the transfer of the ownership of the claimant's property took place on May 10, 1920, which was after the War, the importance of which in his Opinion he emphasizes by italicizing the words " after the war ". He, accordingly, contends that as the German legislation imposing compulsory administration upon the estate had been repealed on January 10, 1920, her property was not subject to it when this transfer was made.

In taking this position, the German Commissioner seems to have overlooked the fact that so far as concerns the relations between Germany and the United States a technical state of war existed until July 2, 1921, and it must be remem-

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bered that the Commission has specifically held that although the effect of the ratification of the Treaty of Versailles was to repeal exceptional War legislation as of January 10, 1920, nevertheless, American claimants are entitled to recover when it can be shown that, as in this instance, exceptional War legislation was applied to American property after January 10, 1920.

Rule 13 of the Rules of the Commission adopted under the Order of May 7, 1925, relating to debts, bank deposits, bonds, etc., reads in part as follows:

" 13. Although all exceptional war measures of Germany then in force were repealed by law on January 11, 1920, a claimant nevertheless will be entitled to establish by evidence that his property, rights and interests were subject to measures in the nature of exceptional war measures in German territory, as defined in paragraph 11 hereof, * * * after January 11, 1920, and in the event that he establishes such fact Germany will be responsible for any damage that the evidence shows he sustained by the application of such measures."

The facts in the record show that shortly before the entry of the United States into the War the claimant and her husband left Germany, and that in May, 1918, her property involved in this claim was placed under compulsory sequestration pursuant to German war legislation, thus removing from claimant all control thereover.

In November, 1919, while the property was still under compulsory administration, the unauthorized contract was entered into covering its sale to one Mittag. An attempt was made on January 5, 1920, to secure the approval of the Court for this sale.

Promptly on learning of this proposed sale, claimant notified Rost, who held a power of attorney from her, of her refuasl to be a party to such a disposition and of her desire to retain title to the property for her own occupancy. She, accordingly, did all that she could to prohibit the sale.

These facts are established by the letter dated October 23, 1922, from Dr. Spiess, the compulsory administrator appointed by the German authorities, addressed to claimant. Dr. Spiess says:

" I did everything it was possible for me to do to preserve your ownership-rights in the properties. I myself had no power to prevent the sale, as, so long as compulsory administration was in force, the right of consent was vested in the Ministry of Commerce & Trade and in that office solely, moreover the transfer had only been arranged for provided compulsory administration were withdrawn." (Copy of letter filed in Docket No. 4712.)

Dr. Spiess enclosed with this letter a copy of his letter of January 10, 1920, to the Ministry of the Interior, Division of Commerce and Trade, in relation to this proposed sale, and said:

" Under these circumstances I suggest that for the time being no decision be arrived at relative to withdrawal of compulsory administration.

" I have just been informed that transfer of the property has already been arranged for on the 5th instant, assuming compulsory administration will be withdrawn and that Mrs. Drier complies with the conditions laid down by me and mentioned in my report of December 1st 1919." (Copy of letter filed on Docket No. 4712.)

Following claimant's futile efforts to prevent the sale of her property the matter was brought to the attention of the proper Saxon court, which court finally approved the sale to Mittag under the authority granted by the exceptional war legislation. This sale was not finally consummated until on or about May 10, 1920, and possession theoref turned over to Mittag.

This action of the Court, while taken subsequent to the theoretical repeal of exceptional war measures on January 10, 1920, the date of the ratification of the Treaty of Versailles by the Allied Powers, was merely consummating action

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with respect to claimant's property that had been initiated under such legislation and prior to January 10, 1920. If the Court had followed the suggestion of the compulsory administrator in his letter of January 10, 1920 (see *infra*), to the Ministry of the Interior, and compulsory administration had not been withdrawn, the sale could not have been effected.

It is not entirely clear what the German Commissioner means by the statement appearing in part I, subdivision (1) of his Opinion to the effect that claimant thinks they ought not to have sold her property

" because half a year or so earlier she had informed the Ministry and the administrator that it was not her intention to sell the estate. (The exact date of this conversation is not stated by the Claimant, but it was before she gave her attorney the powers on the strength of which he made the contract.) "

The only evidence to be found in the record on this point is the following excerpt from the letter dated October 23, 1922, from Dr. Spiess to claimant, in which he says:

" To make this matter clear I now beg to inform you of the following: On January 8, 1920 I received from you from Stockholm the following telegram of January 7th:

" 'Don't give assent for sale until I arrive within a few days subject to conditions of travel. Sale of my effects at warehouse absolutely illegal, I hold you responsible for same '

" I hereby heard for the first time that you objected to the sale of the properties and the furniture, and made enquiries in regard to the matter of notary Dr. Börner.

" The latter informed me, that Captain Rost holding your General Power of Attorney had already transferred the properties to Mittag on January 5, (that is to say before you dispatched your telegram) subject to the proviso of the state compulsory administration being withdrawn forthwith, as soon as the conditions of the Ministry of Commerce & Trade had been complied with." (Copy of letter filed in Docket No. 4712.)

With this letter to claimant Dr. Spiess enclosed a copy of his letter of January 10, 1920, to the Ministry of the Interior, Division of Commerce and Trade. In this letter Dr. Spiess tells the Ministry:

" I have communicated the contents of my application of December 1st 1919 addressed to the Ministry and the contents of the Ministry's communication of December 12 1919 to Mrs. Drier's representative. In reply thereto I, on the 8th instant, received a telegram from Mrs. Drier from Stockholm, reading as follows: [then follows telegram as above quoted].

" Under these circumstances I suggest that for the time being no decision be arrived at relative to withdrawal of compulsory administration.

" I have just been informed that transfer of the property has already been arranged for on the 5th instant, assuming compulsory administration will be withdrawn and that Mrs. Drier complies with the conditions laid down by me and mentioned in my report of December 1st, 1919." (Copy filed in Docket No. 4712.)

There was also filed in Docket No. 4712 a copy of affirmation dated October 23, 1922, of Max Gottlebe, Judge of the Court of Pirna, where the property was located and presumably the Court which had jurisdiction thereover. This affirmation contains the following information with respect to the efforts made by claimant to prevent the sale of her property:

" The real estate belonging to Mrs. Drier in Bonnewitz [the property that is the subject of this claim], Eschdorf and Wünschendorf having in 1918 been placed under government compulsory administration, I accompanied Mrs. Drier to the ministry of the interior at Dresden when she went there to discuss the matter of this compulsory administration.

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" In the Ministry of the Interior Mrs. Drier spoke to an official of the same, Dr. Hast. She was afraid that her above mentioned property might be sold, and told Dr. Hast, that she did not wish it to be sold, but would like to retain possession of this property.

" Thereupon Dr. Hast declared, that it was not the intention of the Ministry to sell the property."

Whether the interview referred to in this affirmation of Judge Gottlebe occurred early in 1920 on the occasion of claimant's return to Germany following the Armistice or at some earlier or later date, it is clear that it did occur sometime prior to May 10, 1920, when the sale of the property was finally consummated under the exceptional war legislation with the approval of the Saxon Court. Based on this interview claimant was certainly entitled to rely on a *statement of an official of the Ministry of the Interior that the Ministry did not intend to sell the property.* While claimant on or about January 25, 1919, gave Captain Rost a power of attorney for the purpose of looking after her business affairs in Germany she definitely forbade him in August, 1919, months before the contract of sale was negotiated, from making any sale of the estate, and clearly indicated her desire to keep the estate, where she intended to live during the winter of 1919-1920 (see page 5 of Brief filed January 9, 1933).

The sequence of events as outlined in the German Commissioner's Opinion would be more correctly stated as follows:

In March, 1922, claimant brought proceedings before the Dresden Court against Mittag, asking for a cancellation of the sale and the return of the property to her. This suit was dismissed by the Court in June, 1924, " upon the ground that Mittag had been without knowledge of Rost's lack of authority and was accordingly entitled to protection of the law as purchaser in good faith." In the meantime claimant, on November 29, 1922, executed her application for claim against the German Government to be espoused by the United States pursuant to the Treaty of Berlin. This claim was duly espoused and transmitted to the Agency for listing as a claim against Germany. Conferences with regard to the claim were then had in Germany in the summer of 1924 between the two Agencies and the representative of claimant, resulting in an Agreed Statement for an award with a reservation that claimant, if unsuccessful in the litigation in Germany seeking to recover possession of the property, was to again come before the Commission and obtain a further award. Suit was then filed by claimant in the Dresden courts against Rost in December, 1924, which suit was dismissed by the Court on May 8, 1925, " upon the ground that claimant had not been able to prove that she expressly forbade Rost " to make the sale before November 21, 1919 (page 12 of Brief filed January 9, 1933).

In part II of the German Commissioner's Opinion he states that the " American Commissioner is under the impression that the German side in this procedure admitted and admits liability under article 297 *e* " of the Treaty of Versailles. In reply to this he points out that no admission of liability can be found on the part of Germany in the entry of the first award in this case because that was a compromise mutually agreed upon. The American Commissioner is not disposed to dispute this argument as applied to the first award, but, on the other hand, it cannot be applied to the second award because that was in no way whatsoever based on a compromise agreement between the two Agents. It distinctly constituted a specific finding by the Commission that Germany was financially liable for the damages suffered under an application of Article 297 (*e*) of the Treaty. Moreover, it will be recalled that in the German Agent's Answer to the claimant's motion for the second award it was distinctly stated:

" (1) The German Agent will not object to the admission of the Motion by the Commission."

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In discussing the question of admissions on the part of Germany, the German Commissioner states that " the American Commissioner finds a German ' admission ' where I see none ". In discussing this question, the German Commissioner, in part II of his opinion, quotes from Article 138 of the " German Civil Code ". This reference is unquestionably erroneous as the quotation is clearly a translation of paragraph 3 of Article 138 of the *German Code of Civil Procedure* as distinguished from the German Civil Code.

So far as at present ascertained no translation in English of the German Code of Civil Procedure has ever appeared. However, the Translating Bureau of the Department of State has made a translation of Section 138 of the Code of Civil Procedure together with the comments thereon by Adolf Baumbach, published in Berlin in 1931. The translation of the entire Article 138 reads as follows:

" Section 138. I. Each party must make a statement concerning the facts alleged by the opposing party.

" II. Facts which are not expressly disputed are to be considered as admitted, unless the intention of disputing them is evidenced from the other statements of the party.

" III. A statement without knowledge of the facts is admissible only in regard to facts that were neither the party's own acts nor the object of his or her own observation."

It will be noted that while there is no material variance between this translation of Paragraph III and the translation thereof in the Opinion of the German Commissioner, the Department's translation would seem more clearly to convey the American conception of the provisions of the paragraph.

The following commentary is made by Baumbach on the provisions of Paragraphs II and III of Article 138 as translated:

" (2) Undisputed facts II: the effect of failure to object (the affirmative acceptance of objection) takes place only when the objection is neither express nor is the result of decisive acts. Simple objection is sufficient only when more detailed statements are not to be expected from the party; the necessity of a substantiated objection, i.e. submitting a positive statement in opposition (for example also Stein J I 2 with other justification) follows regularly from the obligation to expedite (principle, *supra* 2, Sec. 128); this applies in particular to argument against ' the whole allegation ', or all items of an account RGJW 11, 184.— It does not matter whether the party states that the allegations ' cannot be disputed ', or that ' he does not wish to dispute them '; the meaning is the same in both cases in view of the carelessness of everyday speech. There is no avowal in this case (to the contrary Stein J, Sec. 288 II 2 in a highly artificial interpretation). A fictitious avowal within the meaning of Section 138 II occurs only when the exercise of the judge's duty of questioning has not led to any *debate*. In that case, however, there is an avowal within the meaning of Section 290. The conclusion of the last oral hearing is, however, authoritative for this purpose. Up to that time, therefore, debate is permissible, even in the second instance; the conclusion is reached, moreover, only after a bilateral hearing, RG JW 01, 749, and not if the official rule applies. Another question is, whether the statements of a party do not contain a real (not merely a fictitious) avowal, within the meaning of Sec. 290.

" (3) *Statement without knowledge of the facts.* III: must be distinguished from refusal to make a declaration, which is justified, where legal time limits are not observed (for example, Secs. 132, 262; debate not allowed in that case, see number 2 before Sec. 128). Permissible only where the matter does not relate to (*a*) a party's own acts, or (*b*) first-hand observations of the party or his legal representative. Effect: (*a*) where permissible: like debate, unless the whole case leads to a different conclusion; (*b*) where not permissible; a fictitious avowal, as in the case of Sec. 138 II." (German Code Civil Procedure by Adolf Baumbach, Berlin, 1931, pp. 351, 352.)

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It would seem to the American Commissioner, who, however, does not claim expert knowledge of German civil procedure, that the Answer of the German Agent to the Petition for Additional Award filed in the Drier claim March 20, 1929, follows Paragraph II of Article 138 rather than Paragraph III thereof, particularly as these paragraphs are construed by the German legal authority Baumbach.

Paragraph III of Article 138 only applies, as said by Baumbach, where the subject matter thereof " does not relate to (*a*) a party's own acts, or (*b*) first-hand observations of the party or his legal representative ".

In our case the acts referred to were acts carried out pursuant to the exceptional war legislation of Germany, against which Government the claim was brought, and were accordingly defendant's own acts and were based on first-hand observations of the defendant (Germany) or its legal representatives (the court officials authorizing the acts).

Accordingly, it seems to the American Commissioner that the effect of the statements in the fourth paragraph of the German Agent's Memorandum filed March 20, 1929, that he

" has no knowledge or information sufficient to form a belief as to the actual value of the estate, the equipment of the castle etc. at the time of the sale "

is clearly to leave the claimant's evidence as to this valuation entirely undisputed, as we contend. This is particularly so in view of the fact that all of her evidence had been submitted to the German Agent over twenty months prior to the filing of his Memorandum. Such a period of time was assuredly ample for the German Agent to have satisfied himself both as to the probity and sufficiency of such evidence, particularly as all of the evidence came from parties at all times within the jurisdiction of Germany.

The German Commissioner is in error in assuming that the claimant contends that the effect of Paragraph IV of the Memorandum of the German Agent filed March 20, 1929, was to " be construed to mean assent " by him to the valuation as indicated by the evidence we filed.

Claimant's contention on this point, on the other hand, is very clearly and concisely set out in the American Commissioner's Opinion.

Here we have a very good example of the application of Paragraph II of Section 138 of the German Code of Civil Procedure as interpreted in the commentary by Baumbach, who says that under this paragraph " simple objection is sufficient only when more detailed statements are not to be expected from the party; the necessity of a substantiated objection, *i. e.* submitting a positive statement in opposition * * * follows regularly from the obligation to expedite ".

This is particularly true where the German Agent, representing his Government in a claim arising out of governmental acts, is fully advised for over twenty months as to claimant's evidence of the damages suffered as the direct result of these governmental acts and does not see fit to place any evidence whatsoever in the record in opposition to the claimant's evidence, particularly where all of the claimant's evidence comes from parties at all times under the immediate jurisdiction of his own Government.

In part III of the German Commissioner's Opinion he lists some of the evidence presented as to the contention and valuation of the claimant's property, but he omits to make any reference to the important statement bearing date December 22, 1926, of Carl Adolfo von Carlowitz, Chamberlain to the King of Saxony. This witness, who had been familiar with the property involved all of his life and has always taken a special interest therein as it originally

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" belonged to one of my ancestors ", expresses the opinion, after looking through the various documents, that:

" the immovable and movable property mentioned in the beforesaid documents must have had a value of from five to six million gold marks in the year 1919." (Ex. G, filed March 19, 1929, being one of the documents turned over to the German Agent June 1, 1927.)

This Opinion, coming from a neighbor who held the rank of Chamberlain to the King of Saxony, is assuredly entitled to material weight, particularly as there has never been made any suggestion, either directly or indirectly, as to his incompetency.

In part III of the German Commissioner's Opinion, subdivision (*b*), he discusses the subject of the claimant's reservation of her right to ask for more than was granted by the second award. The position there taken by the German Commissioner seems to the American Commissioner to be fully met and disposed of by the following statement found at page 11 of the American Reply in this proceeding, filed August 15, 1934:

" As to the contention of the German Agent that an award does not require the consent of the claimant, we may fully agree, but from such a premise it surely cannot be argued that a definite assertion of the refusal of an award in full settlement (as here shown) can as a matter of law or fact be considered acquiescence. And such broader grounds defeat the contention of the German Agent that even acquiescence of a claimant, if it existed, as is not here the case, could endow the Commission with power to make awards contrary to or unsupported by any evidence or law, which is the inevitable conclusion and irrefutable fact in the instant case."

In the same subdivision of his Opinion the German Commissioner puts forward an illustration in which he assumes that the claimant's position corresponds to that of a passenger in a Pullman car, who refuses to pay for his ticket after he has made use of it. The American Commissioner does not consider that this Pullman car illustration presents a parallel case to the case under consideration. Theoretical illustrations are worthless unless the assumed facts are on all fours with the facts in the case under consideration, and even then they simply amount to a re-statement of the original problem in a form which leaves the question exactly where it was before.

In the instant claim claimant was lawfully pursuing a right given by a treaty between two sovereign governments, one of the highest rights that may be conferred on a mere individual. As the Commission said in its decision of December 15, 1933, where it was construing the remedy provided by the two Governments, where the Commission misinterprets the evidence and hands down an award not justified by the record, then it is the duty of the Commission to modify its award in accordance with the proper interpretation of the evidence. Claimant assuredly cannot be criticized for pursuing her remedy solemnly given her by the two Governments to a final conclusion. It is by no means an apt comparison to compare such a claimant following this legitimate course to a thief or a robber who by force pure and simple takes certain action to the detriment of the lawful owner of property.

In discussing the attempt to settle this claim by a compromise agreement for an additional sum of $160,000, with interest, the German Commissioner refers to this agreement as " tentative but abortive ", which he seems to think completely disposes of it. Nevertheless his discussion amounts in effect to a plea of confession and avoidance, as it would be termed in our domestic practice.

In so far as claimant was concerned, the ratification by the Foreign Office of the tentative agreement reached between the two Agents was conclusive.

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The only condition attached to a final consummation of the agreement was that it was dependent on the final consummation of a number of other agreements negotiated at about the same time in order that the work of the Commission might be brought to a close.

The understanding on which these negotiations in February, 1933, were conditioned is fully set out in the American Commissioner's cable of February 23, 1933, to the German Commissioner sent following a conference with the German Agent and the Counsel for the American Agent. This cable reads:

" Your government has notified my government that it desires to dispose of all claims now pending before Commission as soon as possible Stop Accordingly the German Agent suggests to American Agent that they agree upon following arrangements for disposing of remaining claims

" He will ask his government for authority to sign agreed statements with the American Agent recommending awards in certain of the claims on understanding that American Agent will be satisfied with the decisions of Commission in remaining pending claims Stop Agreed statements to be signed in claims [then follows a list of claims, including the Drier claim]

" It is further understood that when this arrangement has been carried out the Commission will enter an order reciting that all pending claims have been thus disposed of and also authorizing the American Commissioner to enter any further orders on joint motion of both Agents and reciting further that Germany continues to pay its share of joint expense so far as necessary until June thirty in order to permit proper disposition of Commissions and Agencys files and joint property and preparation of reports by American Commissioner and Agent to their government Stop

" This proposed arrangement satisfactory to me and in furtherance of it I am prepared to accept your view that claims of [then follows a descriptive list of four claims] should be dismissed on present state of record unless American Agent submits further information before March first changing situation.

" American Agent has advised German Agent that he understands that this procedure does not affect one way or other question of filing before the final termination of Commission petitions for rehearing in claims heretofore decided if situation warrants.

" German Agent on other hand takes the position that the final disposition of all claims before Commission will preclude the filing of any further claims or petitions for rehearing without the consent of both Governments."

It will be noted that this cable was sent prior to the negotiations resulting in the tentative settlement of the Drier claim.

The fact remains that all of the agreements mentioned in the cable and negotiated at that time with the sole exception of the Drier agreement were finally consummated in accordance with the exchange of notes between the two Governments on May 7, 1934. [1] No adequate reason has ever been given, except the possibility of producing new evidence discrediting the evidence of record, as to why the Drier agreement should not have been consummated at the same time. The note of the German Ambassador of May 7, 1934, recites that his Government was not willing to consummate the Drier agreement because recent investigations tended to cast suspicion on some of claimant's evidence. This position, however, is in no sense new, as the same suggestions had been made to the Counsel for the American Agent by the German Agent at their first preliminary conference in February, 1933, some days prior to the conference that resulted in the tentative agreement approved by the Foreign Office.

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[1] For notes, see Appendix. (*Note by the Secretariat*, this volume, Appendix IV (B), p. 491.)

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There would have been much more justification for the stand now taken by the German Agent with respect to the Drier claim had none of the tentative agreements of February, 1933, been finally consummated.

Washington, D.C., June 7, 1935.

Chandler P. ANDERSON
American Commissioner

Supplemental Opinion of Dr. Huecking, the German Commissioner

My main object is to prevent the discussion from slipping away from its real subject and not to allow a great mass of details to drown the only question of juridical interest, *viz*, the question: Can this case be reopened in the face of two final judgments already rendered? Thus, if on the following pages I only deal with some individual points made in the American Commissioner's Supplemental Opinion leaving others unanswered this ought not to be construed as meaning that there is an agreement as to the topics not mentioned. I found only two points of minor importance regarding which I wish to amend or clarify my Original Opinion.

First: I am quite agreeable that when the Claimant's status as a citizen is discussed, it may be particularly mentioned that she is American-born; was later a German in consequence of her first, and is now again an American in consequence of her second marriage.

Second: When I quoted in my Original Opinion Paragraph 138 of " The German Civil Code " it was indeed a slip of the pen and what was meant was: " the German Code of Civil *Procedure* ".

As to the rest, I abide by my Original Opinion confining myself to the following observations:

I

Germany's liability under art. 297, *e* of the Versailles Treaty

I carefully avoided to do what I am said to have done " to contend that as the German legislation imposing compulsory administration upon (Claimant's) estate had been repealed on January 10th, 1920 her property was not subject to it when this transfer was made ".

Because juridically we are only concerned with the question: Must the case be reopened? I have not defined my attitude regarding the question whether art. 297, *e*, Versailles Treaty would be applicable in this case.

What I did, is thoroughly different: I called attention to the fact *that this question is still open;* and I was compelled to do so because the American Commissioner in his Opinion evidently considered the question to be a settled one. Thus I stressed certain facts and dates which, in my view, had been left in the background; quite properly, if the question really had been a settled one; but wrongly, if the question was open.

When in this connection I emphasized that the transfer of Claimant's property had taken place " after the war " it was the actual warfare, the cessation of hostilities and war acts, including war legislation what was meant by me (I hoped to avoid a misunderstanding by expressly adding " in Europe, etc."). There is no contradiction, when the American Commissioner points to the fact that technically and juridically the state of war lasted much longer, a fact dealt with in Rule 13 of this Commission. I only want to *complete* this statement in the present case by mentioning that on May 10th, 1920, when Claimant lost her property which on this day was transferred by her attorney to another person, the (actual) war had ceased, war legislation had been repealed and the

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compulsory administration of Claimant's estate had been removed since January 26th, 1920.

Now again I refrain from discussing the juridical consequences; the American Commissioner enters this field by stating there was merely consummating action with respect to Claimant's property that had been initiated under war legislation. I should not be supposed to agree to this, if I do not discuss it.

From what I have said it will be clear that I may leave this point without dealing with the considerable volume of details mentioned by the American Commissioner's Supplemental Opinion; only for regularity's sake I beg to point out a doubt arising as to a certain date when a letter of Dr. Spiess' is quoted on p. 3 [p. 1060, this print] [1] as bearing the (same date —") date of October 23rd, 1922; the date being according to p. 5 [p. 1062, this print] [2] the 10th of January 1920. Similarly I may mention that the date which I started from in my Original Opinion as being the date of Claimant's warning to Dr. Hast and Dr. Spiess not to sell the property, was gathered by me from the American Commissioner's Original Opinion p. 4 [p. 1039, this print] [3] (*verbis* " she returned . . . to . . . Dr. Spiess ".) Should the date be a different one, of course it may be rectified.

II

Was it *admitted* that Germany is liable under art. 297, *e*, Versailles Treaty?

In my Opinion I stated that the " German side " by which expression I meant Germany as a party to these proceedings had up to now not admitted liability.

It is no answer to this statement, when the American Commissioner replies that *this Commission* held Germany liable.

With respect to the latter point be it stated additionally:

The American Commissioner admits that the first award does not represent a finding against Germany. He thinks the second does. But it is just that second one which the Claimant tries to reverse in these proceedings. Could she really be allowed to reverse it and to rely on it at the same time?

III

Art. 138 German Code of Civil Procedure

I have never suggested that art. 138 of the German Code should or could be directly or indirectly applied to the *case*. So I need not answer any of the arguments that go in that direction.

What I have suggested is: Art. 138 should be taken in consideration when certain technical terms are used by a German Jurist; for he is trained on the basis of the German Code.

In this connection I said:

First: The words (in English) used by the German Agent in this case are the exact equivalent of the words and conceptions (in German) in paragraph 3 of art. 138. This seems to be admitted or, if it is not, I simply refer to the text.

Second: Now, when according to art. 138 a party avails himself of the permission to answer " I know not ", this means (not that he admits but on the contrary) that he *disputes* the pertinent allegation.

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[1] *Note by the Secretariat,* this volume, p. 144.
[2] *Note by the Secretariat,* this volume, p. 145.
[3] *Note by the Secretariat,* this volume, p. 129.

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I said any German lawbook would show this. The American Commissioner quotes one, and indeed it bears me out. The answer is to be found in the four words p. 11 [p. 1065, this print] [1] " where permissible like debate ", the only words of relevancy in the whole quotation. Their meaning is: " if a party is permitted to say: I know not, and does so, the effect is the same as when he disputes it ". (The exceptionally poor translation uses the word " to debate " in the place of " to dispute " but when the very same German word " bestreiten " appears some lines earlier in this very same quotation the translator renders it quite correctly by " to dispute "!)

IV

Valuation by Carl von Carlowitz

It is said I omitted a valuation of Carl von Carlowitz, when I mentioned some other valuations submitted by Claimant in these proceedings. The answer is simple:

I was not and I am not concerned in this Reopening-pleadings with the probative value of any evidence. What I tried to show was:

Although there are no particularized findings of the Commission in its second award, this is no proof at all that the Commission did not form an Opinion on the evidence and further: it was quite possible that after examination the evidence was found so poor that a sensible reduction of the amount asked for was deemed indispensable.

I illustrated this by instances and thus was not bound to be exhaustive. But I am quite ready to extend the argument to the valuation Carlowitz. I do not say it is worthless; but I say it is quite imaginable that the Commission may have thought it worthless; it would be neither illogical nor arbitrary to say *for instance*, that a sweeping statement without the slightest attempt to particularize it by any palpable data, dealing in one single sentence with " five to six million gold marks " coming from a neighbour whose impartiality just for this very quality is not a matter of course, the testimony being given without any juridical guarantee (oath or the like) cannot suffice to accept the figures contained therein at their face value.

V

Abortive attempt to compromise

That I rightly style the attempt made in 1933 to settle this claim an abortive one is evidenced *(inter alia)* by the very cablegram on which the American Commissioner's Supplemental Opinion relies.

At the then time hope prevailed that it would be possible to determine this Commission's work in the first half of 1933. See the cablegram (*verbis* " it is further understood . . . to their government "). The same cablegram, last paragraph, makes it clear that the German Agent's assent (and only *his* attitude matters here, because *his* unconditional assent must be shown), was dependent on a preclusion of further petitions for rehearing, a condition which, as we all know, did not materialize. The following official utterances go the same way:

In their Memorandum of the 18th of March 1933, the United States Government confirm, speaking *inter alia* of the settlement here under discussion, that " the German Government still desire that the giving of finality to these

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[1] *Note by the Secretariat*, this volume, p. 147.

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settlements *shall await* the making of a joint statement by the two Governments that the work of the Commission is thereby brought to a close; The Government of the United States regrets that the German Government has seen fit to *attach a condition* to the tentative settlements a. s. o." And even the note of May 7, 1934, quoted by the Claimant admits: " no condition was stated *except* that the work of the Commission be promptly closed ", and calls the settlement a *tentative* one;

In other words: The German Government has a financial interest to see this Commission *functa officio* and was ready to make concessions for that. From which follows that this tentative settlement, which never became final, cannot mean anything in the present law suit.

I fail to see how the fact that *other* tentative settlements were confirmed afterwards in spite of the fact that the condition on which they were based had lapsed, can confer any right on the Claimant, that the failing condition should not be pleaded against her.

Washington, D.C., June 15, 1935.

Dr. Victor L. F. H. HUECKING
German Commissioner

For the reasons stated in the foregoing Opinions, the National Commissioners have disagreed on the questions at issue, and, accordingly, certify them to the Umpire for decision.

Done at Washington, D.C., this 18 day of June, 1935.

Chandler P. ANDERSON
American Commissioner

Dr. Victor L. F. H. HUECKING
German Commissioner

Decision of the Commission

This case comes before the Umpire for decision upon a certificate of disagreement by the National Commissioners, to which they have appended their respective opinions and supplemental opinions. I attach hereto the certificate and the opinions mentioned.

The question for decision arises upon a petition for a further award by Katharine M. Drier and a reply on behalf of Germany. The petition for further award was filed November 18, 1932, and the answer July 2, 1934. Upon these pleadings issue is made as to the power of the Commission to reopen the case and rehear the merits on the amount of damages properly to be awarded to the plaintiff. For an understanding of the present status of the case it will be necessary to summarize the history of the proceeding.

The claimant is an American National who inherited through a prior marriage to a German National an estate situate near Dresden known as " Bonnewitz ". This estate consisted of a castle, its furnishings, a park, garden, farm, and certain appurtenances. The claimant and her husband left Germany shortly before the entry of the United States into the War, and her property was placed under compulsory sequestration by the German Government. In November, 1919, while the property was still under compulsory administration, an attorney in fact entered into a contract, which the plaintiff says was unauthorized, selling " Bonnewitz " to one Mittag. An attempt was made January 5, 1920, to secure the approval of the Court for this sale. Upon learning the facts the claimant protested, taking the position that she had

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always forbidden her attorney to sell the property. In spite of alleged notice not to do so, the compulsory administrator gave his consent to the sale, and it was consummated, as a result of that consent, on May 10, 1920. The claim is that it was sold for a ridiculously, inadequate consideration, and that Germany is answerable for the difference between the sum so received and the fair value of the estate as of the year 1919.

As a result of negotiations had in 1924 between the claimant, her counsel, and representatives of the American and German Agents, an agreed statement was filed before the Commission, Docket Number 4712, List Number 11,290, in which the Agents stated that the amount demanded by the claimant was $500,000.00, that she had received about $12,000.00 in cash and a mortgage worth about $8,000.00 from the sale of the property, that as a result of assessments of value and evidence taken orally by representatives of the American and German Agents and the attorneys for the claimant, and by conferences between said representatives and the claimant herself, the actual damages in excess of the amount received by the claimant were ascertained to be $48,000.00. The Agents jointly recommended an award in that amount, with interest at 5% from January 5, 1920. An award was accordingly entered January 14, 1925. The amount paid August 1, 1928, including interest, was $68,782.70.

Confessedly, this award was not final. All parties to the negotiation understood and agreed that the claimant reserved the right to pursue her claim against her alleged defaulting attorney and the purchaser, and, in the event of failure to recover from them, to apply again to the Commission for an additional award. She did bring suit in Germany and was denied recovery. She thereupon, on March 19, 1929, filed a claim for an additional award in the amount of $948,600.00. In her affidavit she set forth the facts above summarized, and then detailed her alleged damage (the difference between the reasonable value of the estate at the time of sale and the sale price) referring for support to certain exhibits attached to her affidavit, setting values upon the estate without the forest and equipment, the forest separately and the equipment separately totalling approximately $1,000,000.00, from which she admitted should be deducted the amount received from the purchaser Mittag $3400.00, and the partial award above mentioned of $48,000.00. In reply to the motion for an additional award, the German Agent filed a memorandum in words following:

I

The German Agent will not object to the admission of the motion by the Commission.

II

It will not be disputed that claimant in accepting the compromise, which formed the basis of the award of January 14, 1925, reserved the right to pursue her claims against Mittag and Rost and, in the event of failure to recover from them, to apply again to the Commission for an additional award.

III

The facts as set forth in the motion will not be contested.

IV

The German Agent has no knowledge or information sufficient to form a belief as to the actual value of the estate, the equipment of the castle, *et cetera*, at the time of the sale.

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Thereupon the matter came before the National Commissioners for adjudication. It would appear that the German Commissioner was of opinion that the additional award to the claimant should not exceed $200,000.00, but that the American Commissioner favored a higher award. It appears further that the American Commissioner, in conference with the claimant and her attorney, explained the difference of view of the two Commissioners and stated the amount the German Commissioner was willing to award. The claimant asserted the sum to be wholly inadequate, and, apparently, as a result of her protestation, American Commissioner conferred further with his colleague. As a result he advised the claimant and her attorney, in a further interview, that the German Commissioner would be willing to sign an award of $250,000.00, with interest. The claimant, it appears, again protested that such an award would be inadequate and inquired of the American Commissioner what she could do in the premises. She was told that if the Commissioners disagreed, as would be probable, the matter would have to be referred to the Umpire, who might award more or less than $250,000.00, with interest, that the procedure might involve considerable delay. The claimant, in her present petition, hereafter to be more fully outlined, says that she stated the sum was inadequate but that on account of her destitute condition she would be compelled to accept it as a tentative award, but she reserved the right to pursue any remedy she might have before the Commission or through diplomatic channels for further compensation to reimburse her for her actual loss. In her present petition she avers, and the averment is not contradicted, that she made these statements to the American Commissioner in the presence of the German Agent. As a result of this conference the American Commissioner evidently agreed to an award of the amount in question and on April 5, 1929, the two National Commissioners signed an award for $250,000.00, with interest at 5% from May 10, 1918 to date of payment. Pursuant to that award a payment was made to the claimant in accordance with the War Claims Settlement Act of 1928.

On November 18, 1932, the claimant filed the present petition for a further award. The petition, if well founded in fact and law, seems to be timely. Adequate reasons for delay are stated, namely, the detention of the petitioner in Germany under proceedings against her there, and negotiations for a settlement of her claim for further allowance in this matter, and for her alleged illegal detention in Germany, which were pending during part of the period intervening between her second and third petitions.

In her petition the claimant recites that the first award was conditional, which is admitted. She further recites that the second award did not " purport to be, nor was it in fact in any way related to the amount of the loss proven by the evidence to have been suffered by the claimant ". The petition then recites the facts, to which reference has been above made, leading up to the execution of the award.

The grounds urged by the American Agent in support of the petition are:

1. That a grave injustice has been done and the claimant deprived of rights accorded her by the treaty of Berlin.

2. That the awards are contrary to the rulings of the Commission because they do not afford her the full measure of compensation recognized as due her.

3. That the awards are juridically wrong, because the Commission had no power to reduce them to an amount less than the sum shown by the undisputed proof to be the amount of loss suffered.

The first two reasons may be summarily dismissed. No power resides in the Commission to redress an alleged injustice inherent in its awards. There

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is nothing to show that the Commission did not intend to accord the petitioner the rights guaranteed to her by the treaty of Berlin. It was under that treaty that she proceeded and on the face of things it was under the provisions of that treaty that the award was made. The only reason which may now be considered is the third, which asserts manifest juridical error in the award.

It is to be noted that the present contention has to do solely with the measure of damage. That there should be an award in some amount the National Commissioners were evidently in agreement. The position which the American Agent now takes in briefs submitted is:

(*a*) That the Commission was bound to accept the estimates of value presented by the claimant at their face value, and

(*b*) That the failure of the German Agent to present answering evidence was, in effect, an admission of the validity of that offered by her.

In addition, it is now urged that the reservation under which the claimant accepted the second award and the effort to arrive at a settlement of her claim for an additional amount, Germany once having signified its willingness to pay $160,000.00 in settlement of this and other claims based upon her alleged wrongful detention, amounts to an estoppel to contest the present petition to reopen. It is said, without denial, that from sometime in the year 1927 the German Agent was in possession of the documents, which appear as exhibits to the petition for an additional award filed March 19, 1929, that inquiry was made of him by the American Agent what, if anything, further he deemed necessary to establish the amount of the claim, and to this inquiry he never replied. Stress is also placed upon the fact that in his answer to the petition the German Agent merely stated lack of knowledge or information sufficient to form a belief as to value.

In the light of these facts it is urged the National Commissioners were bound to award the full amount shown by the so-called expert evidence as to value. The error committed by the Commissioners, if error there was, was not an error as to a matter of law but of fact. In such cases as this the damages are at large. It is the burden of the plaintiff to convince the minds of the triers of fact of the amount of damage incurred. Judgment and discretion must be exercised in appraising the quality of evidence as to damage or loss. The Commission has no function to sit as a tribunal to grant new trials for errors of fact, particularly where those errors involve opinion as to value. There is no allegation that the National Commissioners were guilty of abuse, that they refused to consider the evidence, or that they did not in fact consider it. On the contrary, it would appear that both of them considered it and reached opposing conclusions as to the amount of damage shown by it. Of this the petitioner was apparently advised, and she apparently determined to accept the largest amount upon which the Commissioners could agree. She was informed of her right to have the Umpire pass upon a dispute as to the amount of the award and she elected not to have recourse to this remedy. It is inadmissible to say that in the absence of responding evidence this or any other tribunal is bound to award the full amount stated as the opinion of witnesses of the value of property lost or damaged. The fact that the German Agent had the claimant's evidence before him and elected not to put in answering evidence is of no legal significance in connection with the question of manifest error on the part of the Commission. The opinions of the Commissioners give much attention to the form of Paragraph IV of the German Agent's answer to the second petition. It seems entirely clear that this Paragraph does not amount to an admission of the validity of the claim of damage, nor agree that the appraisals attached to the petition are to be taken at their face value.

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From what has been said, it is evident that the award is regular upon its face, and that there does not appear upon the record any matter from which it can fairly be concluded that the Commissioners either abused their discretion in appraising the evidence or were guilty of manifest error in reaching the amount of their award.

It remains to deal with the claimant's reservation in accepting the award and with the effort to reach a settlement. Neither of these seems to me to be of legal significance. It must be obvious that a claimant cannot bargain with the Commission with respect to its judgment. Unless there be error in the proceedings sufficient to warrant a rehearing, a statement by a claimant that he accepts an award under protest and will apply further to the Commission is without legal force. The infirmity in the American Agent's position with respect to the purposed compromise with the claimant is that the record contains nothing with respect to it, and that, in any event, an effort to compromise with a claimant whose case is in judgment is necessarily extra judicial and cannot, in the nature of things, affect the validity of the antecedent judicial prcceeding.

For these reasons I am of opinion and decide that the proceedings may not be reopened and that the decision of the Commission as made must stand.

Done at Washington this 29th day of July, 1935.

Owen J. Roberts
Umpire

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