

KATHARINE M. DRIER (UNITED STATES)
v. GERMANY

(January 29, 1936, pp. 1082-1083; Certificate of Disagreement by the two National Commissioners, December 4, 1935, p. 1081.)

Certificate of Disagreement by the Two National Commissioners

The American Commissioner and the German Commissioner have been unable to agree upon the action to be taken by the Commission on the petition filed by the American Agent on November 22, 1935, on behalf of the claimant, Katherine M. Drier, requesting that the decision of the Commission rendered by the Umpire on July 29, 1935, dismissing her petition for a rehearing be reopened and that the aforesaid petition for a further award be adjudicated on the grounds now urged.

The American Commissioner endorses and supports this pending petition on the grounds therein set forth, and as presented in the printed brief filed therewith by the American Agent.

The German Commissioner, on the other hand, opposes the granting of said petition on the grounds set forth in the reply thereto filed by the German Agent on December 2, 1935, wherein he requests that the petition be dismissed for the reasons therein set out.

Moreover, both Commissioners are agreed that inasmuch as this petition concerns a decision of the Umpire following the certification to him of this case for decision on an earlier petition, it seems a matter of orderly procedure that the Umpire should render the decision of the Commission on the present petition.

Accordingly, the National Commissioners hereby certify to the Umpire for decision the questions raised by the pending petition and the reply thereto in this case.

Chandler P. ANDERSON
American Commissioner

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

Washington, D.C., December 4, 1935.

*Opinion of the Commission upon the Petition for Rehearing Filed by the Claimant
November 22, 1935*

The claimant has filed a further petition for rehearing in the above numbers. ^a The respondent has filed a reply submitting the matter to the Commission and praying that the petition be dismissed. The national commissioners have certified their disagreement to me under date of December 4, 1935. The certificate is attached hereto.

By the supplemental pleading the claimant details certain negotiations which occurred between the filing of the petition for rehearing of November 18, 1932 and the filing of Germany's answer thereto on July 2, 1934. It is made to appear that, in an effort to end the labors of the Commission in the spring of 1933 negotiations were had between the parties looking to the entry, by agreement, of orders for additional award in certain cases theretofore determined and others then pending. The showing is that the two governments, by their authorized agents, orally agreed that this claim, amongst others, should be submitted to the Commission for a further award of \$160,000 but that the German Agent refrained from signing, and refused to sign, an agreed statement of facts for submission to the Commission in the premises.

The averment of the present petition is that the claimant, in consideration of the oral agreement between the governments, abandoned certain claims she was then prosecuting through diplomatic channels and changed her position for the worse. It is claimed that the agreement constituted an accord and satisfaction. In the opinion rendered upon the prior petition of November 18, 1932, reference was made to these negotiations in connection with claimant's arguments and they were referred to as abortive. It was also there stated that the record contained nothing concerning them or any agreement of compromise and that, in any event, a claim based upon an attempted compromise with the holder of a judgment was ineffectual to impeach the proceedings leading up to the judgment.

The position of the claimant in the present application is not clear. The relief asked is that the cause be reopened for a further hearing. In this respect this petition does not differ from its predecessor. If, however, the prayer

^a *Note by the Secretariat*, Original report: Docket Nos. 4712 and 11485, List Nos. 11290 and 19733.

should be granted the function of the Commission would be to reconsider upon the original record, or upon that record as it might now be supplemented, the question of the measure of damages to which the claimant is entitled. But if there has been an accord and satisfaction, as asserted in the petition, this could not be done. Upon the theory of accord and satisfaction the petitioner would be entitled to a judgment for \$160,000 but the Commission is, as I understand it, without the authority of a court to enforce agreements made between the diplomatic representatives of the two governments. Thus, if a new cause of action is asserted, based upon an agreement between the diplomatic representatives of the two governments, I think the Commission is entirely without authority to enter a decree based thereon. It can act only upon the agreements of the national agents accredited to represent the respective nations before it. On the other hand, if the matters now alleged are put forward as an additional basis in equity for the reopening of the former order of the Commission I find myself at a loss to know why, between March 1933 and July 1934 they were not placed in the record, for, during that entire period, it was open to the petitioner to supplement her pleading and to permit Germany to answer on the pleading so supplemented instead of answering only the original petition alleging other grounds for relief.

In either view, therefore, I think the Commission cannot consider the petition now under review and that it must be dismissed.

Done at Washington, D.C., January 29, 1936.

Owen J. ROBERTS
Umpire