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Edward A. Hilson (United States) v. Germany

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Government of Germany is obligated to pay to the Government of the United States on behalf of Mary Barchard Williams the sum of ten thousand dollars ($10,000.00) with interest thereon at the rate of five per cent per annum from November 1, 1923.

Done at Washington March 11, 1925.

Edwin B. PARKER
Umpire

EDWARD A. HILSON (UNITED STATES) *v.* GERMANY

(April 22, 1925, pp. 236-242; Certificate of Disagreement by the National Commissioners, February 21, 1925, pp. 231-236.)

NATIONALITY OF CLAIMS: AT ORIGIN.—AMERICAN NATIONAL: DEFINITION.—NATURALIZATION: EFFECT OF DECLARATION OF INTENTION TO BECOME AMERICAN CITIZEN, OF DIPLOMATIC PROTECTION OF FOREIGNERS AS AMERICAN CITIZENS.—INTERPRETATION OF MUNICIPAL LAW.—INTERPRETATION OF TREATIES: ORDINARY AND OBVIOUS MEANING.—WAR: RESPONSIBILITY UNDER GENERAL INTERNATIONAL LAW, TREATY OF BERLIN. Claim on behalf of American seaman, naturalized on July 5, 1918, for damage through sinking of American merchant vessel by German submarine on November 8, 1916, when claimant, still British national, had already made formal declaration of intention to become American citizen and, under United States statutes, was entitled to protection as such. *Held* (1) that claim does not fall within Treaty of Berlin: damage not suffered by American national (definition), claimant owed *temporary*, not *permanent* allegiance to United States at time of damage (reference made to Administrative Decisions Nos. V and I, pp. 119 and 21 *supra*); under United States statutes, neither declaration of intention to become American citizen, nor extension to foreigners of same measure of protection as to American citizens change nationality of foreigners; interpretation of treaties: ordinary and obvious meaning; and (2) that, though under general international law claim properly presentable, Commission only concerned with claims falling within Treaty of Berlin.

Cross-references: A.J.I.L., Vol. 19 (1925), pp. 810-815; Annual Digest, 1925-26, pp. 269-271; Kiesselbach, *Probleme*, pp. 350-354 (German text); Witenberg, Vol. II, pp. 84-90 (French text).

Bibliography: Annual Digest, 1925-26, p. 271; Borchard, pp. 73-74; Kiesselbach, *Probleme*, pp. 12, 36-55.

Certificate of disagreement by the National Commissioners

The American Commissioner and the German Commissioner have been unable to agree upon the jurisdiction of the Commission over the claim of Edward A. Hilson, Docket No. 26, and hereby certify that question to the Umpire for decision.

This is a claim of a nationalized American citizen who, before he became nationalized but after he had become a declarant, and while he was serving as a seaman on an American vessel, suffered the damage for which the claim is made. The facts in the case are briefly as follows:

The claimant was a radio operator on the American Steamship *Columbian* when she was stopped and sunk by a German submarine on or about Novem-

ber 7, 1916. The claimant, with the others members of the ship's crew, was temporarily transferred, by order of the commander of the submarine, to the Steamship *Balto* and later to another vessel, which also had been seized by the submarine, and on November 11 was ordered, with other members of the crew, into a rowboat in which they finally reached the coast of Spain, after rowing some twenty or twenty-five miles through a rough sea in stormy winter weather.

As a result of the treatment and exposure experienced by the claimant, he alleges that his health was seriously and permanently injured, and for this injury he claims $10,000.00 damages. He also claims for lost personal property valued at $809.30.

At the date of these occurrences the claimant was a British subject, but he contends that his claim was of American nationality in its origin and continuously thereafter on the following grounds:

On December 6, 1915, he made formal declaration of his intention to become an American citizen and received his first papers.

In May, 1914, he became a member of the crew of the *Columbian*, as appears from the petition, and he continued to hold that rating until January 2, 1917, as shown by his "Certificate of Seaman's Service" issued by the Department of Commerce Shipping Service February 16, 1922.

The personal injury suffered by him through the treatment experienced at the time of the sinking of the *Columbian* interrupted his subsequent employment in the American merchant marine.

On July 5, 1918, the claimant became a naturalized citizen of the United States, and he ever since has maintained that status.

He claims that on these facts, by virtue of the laws of the United States, as well as under international law, he was entitled to the protection of the United States Government at the time the claim accrued, and that the Government of the United States is entitled to claim damages on his behalf against Germany for injuries suffered by him in consequence of the acts of the German Government or its agents in sinking the American Steamship *Columbian* while the United States was a neutral in the war.

It has long been the custom and policy of the Government of the United States to espouse and present diplomatically claims of this character as shown by paragraph 5 of the "General Instructions for Claimants" issued by the Department of State of the United States, which defines such a claim as one of American nationality, entitled to receive the protection of the United States. This paragraph reads as follows:

"Nationality of Claim.—The Government of the United States can interpose effectively through diplomatic channels only on behalf of itself, or of claimants (1) who have American nationality (such as citizens of the United States, including companies and corporations, Indians and members of other aboriginal tribes or native peoples of the United States or its territories or possessions, etc.), or (2) who are otherwise entitled to American protection in certain cases (*such as certain classes of seamen on American vessels*, members of the military or naval forces of the United States, etc.). Unless, therefore, the claimant can bring himself within one of these classes of claimants, the Government can not undertake to present his claim to a foreign Government. For example, the declaration of intention to become a citizen of the United States is insufficient to establish the right to protection by the United States *except in case of American seamen.*"

Paragraph 6 of these instructions distinctly distinguishes between claims of this character and claims of foreigners who were not entitled to the protection of the United States until "*after* the claims accrued".

The right thus asserted by the Government of the United States to protect against a foreign government an alien seaman employed on an American vessel, if he has declared his intention to become a citizen, is recognized by American municipal law as well as by the State Department's instructions. Section 2174 of the Revised Statutes of the United States provides that such seaman before he has become naturalized "shall, for all purposes of protection as an American citizen, be deemed such, after the filing of his declaration of intention to become such citizen".

In the opinion of the American Commissioner, claims of this character are recognized under international law as properly presentable internationally, and under the laws of the United States this claim, on the facts stated, must be treated as a claim of American nationality at the time of its origin.

Considering that an injury to a seaman on a vessel may impede the operation of the vessel and adversely affect the interests of the owner and interfere with the government of the flag under which the seaman serves, and on the other hand that by accepting employment on a vessel under the American flag the seaman is entitled to the protection of that flag against aggression by foreign agencies, it follows that a national interest is involved and that the government concerned may justly assert an international right to protect the seaman under its flag on that ground.

For these reasons the action of Congress and of the Department of State in asserting this right to give an alien seaman who has taken out his first citizenship papers the status of an American citizen for the purpose of protecting him against acts of foreign governments may properly be regarded as merely declaratory of an existing international right based on the recognized principles of international law.

Inasmuch as this claim was a claim of American nationality from its inception, under American law and under the policy and tradition of the Government of the United States, based upon recognized international custom and the rules of international law, and inasmuch as the claimant had become an American citizen by naturalization prior to the adoption of the Knox-Porter Resolution on July 2, 1921, it follows that Congress, in adopting that resolution, undoubtedly intended that its provisions should include this claim.

It also follows that the United States intended to include this claim and other similar claims in the Treaty of Berlin by incorporating in that Treaty the provisions of the Knox-Porter Resolution which cover such claims, and in the circumstances it must be presumed that Germany understood and acquiesced in this intention of the United States.

In the opinion of the American Commissioner, therefore, this claim was impressed with American nationality at the date of its origin and must be treated as coming within the jurisdiction of this Commission, under the terms of the Treaty of Berlin, as interpreted in Administrative Decision No. V on the nationality status of claims.

The German Commissioner disagrees with the American Commissioner in his conclusion that the claim at issue here comes within the jurisdiction of this Commission.

As already discussed in his Opinion in the nationality question, the instructions of the Department of State show that they distinguish between two classes of possible claimants. One class comprehends those claimants who are termed in the language of the Treaty "persons, wheresoever domiciled, who owe *permanent* allegiance to the United States". The other class comprises claimants who do *not* owe such permanent allegiance. To this second class the claimant belonged at the time of the origin of his claim.

Under Administrative Decision V (page 193, Decisions and Opinions),[a] a claimant must have belonged to class one not only on November 11, 1921, when the Treaty of Berlin became effective, *but also* on the date when the loss or injury occurred.

As this second prerequisite does not obtain on behalf of this claimant as to the time the claim accrued, his claim is not within the jurisdiction of this Commission.

It is therefore immaterial whether under American municipal law or under international law claimant could be entitled to protection.

That claims of that kind are mentioned in the instructions of the Department of State has in the opinion of the German Commissioner no bearing on the Commission's decision. As justly stated by the American Commissioner in his opinion on the nationality question (page 156),[b] the instructions "were not intended to be, or understood as, a statement of a settled rule of international law, but merely as a statement of the policy which 'as a rule' the Department would follow in dealing with international claims". And the expression "as a rule" was defined by the American Commissioner as *not* meaning "a rule of international law" but "the usual practice of the Department of State, *which was subject to changes and exceptions in its discretion*". As the instructions show, this interpretation is, with regard to the question at issue, in harmony with their wording, saying that "The Government of the United States *can* interpose * * *".

Now, these instructions, which seem to have been drafted in May, 1919, and which were "revised" on January 30, 1920, were never brought to Germany's knowledge and were, as already explained by the German Commissioner in his Opinion cited above (page 159),[c] not binding upon Germany.

But even if the Government of the United States had made the instructions an official part of its negotiations with Germany, the only conclusion Germany could have drawn from the knowledge of them would have been that under the wording of the Treaty of Berlin the United States made use of its undoubted right to make changes and exceptions.

Although "the requirements of international law with respect to the nationality status of claims may be changed by mutual agreement in a claims treaty between the governments concerned", as the American Commissioner justly points out on page 147 of his Opinion on the nationality question,[d] nevertheless such changes may consist in what one of the powers concerned considers a restriction on its usual practice and policy in the interposition of claims.

The presumption that Germany "understood and acquiesced in" the intention of the United States to bring this claim within the provisions of the Treaty of Berlin is therefore not correct.

Even if the Government of the United States had had such an intention—though this has never been made known to the German Government—this would be without consequence, since the wording of the Treaty does not express but rather contradicts such intention.

In the opinion of the German Commissioner, therefore, this claim must be dismissed under conclusions I and II of Administrative Decision No. V.

The National Commissioners have also disagreed as to the amount of damages suffered, and if the Umpire should decide that this claim comes

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[a] *Note by the Secretariat*, this volume, p. 154 *supra*.
[b] *Note by the Secretariat*, this volume, p. 128 *supra*.
[c] *Note by the Secretariat*, this volume, p. 130 *supra*.
[d] *Note by the Secretariat*, this volume, p. 122 *supra*.

within the jurisdiction of the Commission the National Commissioners also certify to the Umpire for decision the question of the amount to be awarded.

Done at Washington February 21, 1925.

Chandler P. ANDERSON
American Commissioner
W. KIESSELBACH
German Commissioner

Decision

PARKER, *Umpire*, rendered the decision of the Commission.

This case is before the Umpire for decision on a certificate of the National Commissioners certifying their disagreement.

The record discloses that Edward A. Hilson, a British national, was employed as a radio operator on the American Steamship *Columbian* when she was captured by a German submarine on November 7, 1916, and on the following day torpedoed and sunk. He with other members of the ship's crew eventually reached the coast of Spain after rowing in an open boat some twenty or twenty-five miles through a rough sea. A claim is put forward by the United States on claimant's behalf for personal injuries alleged to have been suffered by him through exposure to the elements and also for the value of his personal effects lost when the *Columbian* was sunk.

Prior thereto the claimant had, in pursuance of the naturalization statutes of the United States, made formal declaration of his intention to become an American citizen, but this intention had not matured into citizenship and he remained a citizen and subject of Great Britain. Section 2174 of the Revised Statutes of the United States, in effect at that time and the substance of which is in effect now, provides that "Every seaman, *being a foreigner*, who declares his intention of becoming a citizen of the United States" shall be admitted to citizenship after three years' service on board a merchant vessel of the United States subsequent to such declaration "but such seaman shall, *for all purposes of protection* as an American citizen, be deemed such, after the filing of his declaration of intention to become such citizen". [1]

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[1] It will be noted that this statute (the full text of which is quoted below) is carefully phrased to describe the measure of protection owing by the Government of the United States to an alien seaman serving on an American ship, without conferring on him American citizenship, even temporarily, and without entitling him to any of the privileges of American citizenship save that of protection during his term of service as an alien seaman. This protection was extended to him not as an American national but as an alien seaman and was limited to the duration of his service on an American ship.

"SEC. 2174. Every seaman, being a foreigner, who declares his intention of becoming a citizen of the United States in any competent court, and shall have served three years on board of a merchant-vessel of the United States subsequent to the date of such declaration, may, on his application to any competent court, and the production of his certificate of discharge and good conduct during that time, together with the certificate of his declaration of intention to become a citizen, be admitted a citizen of the United States; and every seaman, being a foreigner, shall, after his declaration of intention to become a citizen of the United States, and after he shall have served such three years, be deemed a citizen of the United States for the purpose of manning and serving on board any merchant-vessel of the United States, anything to the contrary in any act of Congress notwithstanding; but such seaman shall, for all purposes of protection as an American

The claimant on July 5, 1918, became through naturalization and has since remained an American citizen. The question presented is the narrow one, Is Germany under the terms of the Treaty of Berlin obligated to pay such damages as may have been suffered by claimant during November, 1916?

It will be constantly borne in mind that the Treaty of Berlin constitutes a contract by which Germany accorded to the United States, as one of the conditions of peace, rights on behalf of *American nationals*. Many of the claims against Germany arising under the reparation provisions of the Treaty of Versailles and presented to this Commission by the United States on behalf of its nationals could not have been maintained under the rules of international law but were created by and are based exclusively on the contract terms of the Treaty of Berlin. The obligations thus assumed by Germany, and the reparation claims with which this Commission is empowered to deal, are manifestly limited to such as are embraced within the Treaty terms, which are enumerated in this Commission's Administrative Decision No. I. As heretofore pointed out [2] it results from that decision that no claim "falls within the Treaty unless it is based on a loss, damage, or injury *suffered by* an American national—that is, it must be American in its origin".

The term American national as used in the Treaty and the decisions of this Commission has been defined by this Commission in its Administrative Decision No. I as "a person wheresoever domiciled owing permanent allegiance to the United States of America". The decision was concurred in by the American Commissioner, and while the German Commissioner did not concur in the decision as a whole he and the Government of Germany did concur in this definition and he and the Government of Germany have accepted the decision as a whole as binding on both Governments.

This definition of an American national is taken from that part of the Joint Resolution of the Congress of the United States approved July 2, 1921, which is carried into and forms the basis of the Treaty of Berlin. There the claims, for the satisfaction of which it is stipulated that Germany shall make suitable provision, are limited to those "of all persons, wheresoever domiciled, who owe permanent allegiance to the United States of America and who have suffered * * * loss, damage, or injury to their persons or property", etc. The phrase "who owe permanent allegiance to the United States of America" was manifestly used advisedly. It has a well defined meaning in American jurisprudence. It broadens the term "American citizens" to embrace, not only citizens of the United States, but Indians [3] and members of other aboriginal tribes or native peoples of the United States and of its territories and possessions. [4]

(Footnote continued from page 180.)

citizen, be deemed such, after the filing of his declaration of intention to become such citizen."

SEC. 2174 of the Revised Statutes was repealed by section 2 of the naturalization act approved May 9, 1918, 40 Statutes at Large 542, after its provisions, with some modifications, had been incorporated in the 7th and 8th subdivisions in section 1 thereof, still in force.

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[2] See Administrative Decision No. V, dealing with "Nationality of Claims", Decisions and Opinions, at page 185. *(Note by the Secretariat,* this volume, p. 148 *supra.)*

[3] Not until June 2, 1924 (43 Statutes at Large 253), were all non-citizen Indians born within its territorial limits made citizens of the United States.

[4] See Gonzales *v.* Williams, 1904, 192 U.S. 1, at page 13, holding that a citizen of Porto Rico owed permanent allegiance to the United States without deciding the question with respect to the American citizenship of the individual in question.

The distinction between absolute or permanent allegiance and temporary allegiance has long been recognized by the Supreme Court of the United States:

But on the other hand it *expressly limits* American citizenship for all purposes of the Treaty to those who owed *permanent allegiance* to the United States.

It is not contended that Hilson owed permanent allegiance to the United States at the time he suffered the damages complained of. On the contrary the very statute above quoted invoked to afford to him the protection of an American citizen describes the class to which he belonged as "every seaman, being a foreigner". He was at the time of the sinking of the *Columbian* a citizen and subject of Great Britain. He owed allegiance to the United States while serving on an American ship. But such allegiance was limited to the duration of his service and was of a temporary nature. [5] At the time of suffering the damages complained of the claimant was a British subject. The personal injuries of which he complains were injuries suffered by a British subject. The personal effects which he lost were impressed with his British nationality. The fact that the United States had through its statutes extended to claimant, an alien seaman, the same measure of protection for the duration of his service on an American ship as that extended to an American citizen does not change the nationality status of claimant, and Germany's obligations arising under the Treaty of Berlin are limited, so far as non-government-owned claims are concerned, to claims which were in point of origin suffered by American nationals.

An expression of an intention to become a citizen does not make such declarant a citizen. The status of a declarant has sometimes been described as "inchoate citizenship". The term between the filing of the declaration and the admission to citizenship has sometimes been referred to as "a probationary period". [6] But it has never been held that the mere declaration of an *intention* to become an American citizen constituted a tie *permanently* binding the declarant to the United States, to which he should thenceforth owe permanent allegiance. The allegiance which a declarant owes to the United States is at most of a temporary nature. His declaration is a step toward the transfer of his allegiance, which is completed only when he has matured his "intention" to become a citizen by complying with all the requirements of the statutes of the United States. [7] Then, but not until then, does his allegiance become permanent. The Congress of the United States in its act approved July 9, 1918, [8] recognized the soundness of the rule here announced by so amending the Selective Draft Act of May 18, 1917, as to provide—

(Footnote continued from page 181).

Carlisle *v.* United States, 1873, 16 Wallace (83 U. S.) 147, at page 154; United States *v.* Wong Kim Ark, 1898, 169 U. S. 649, at page 657.

Section 30 of the Naturalization Act of the Congress of the United States approved June 29, 1906, authorized "the admission to citizenship of all persons not citizens who owe permanent allegiance to the United States", etc.

The Attorney General of the United States in construing this act on July 10, 1908, said (27 Opinions of Attorneys General 13): "This describes exactly the status of inhabitants of the Philippine Islands. They are not aliens, for they are not subjects of, and do not owe allegiance to, any foreign sovereignty. They are not citizens, yet they 'owe permanent allegiance to the United States' ".

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[5] It was expressly held by the Supreme Court of the United States in Ross *v.* McIntyre, 1891, 140 U. S. 453, at page 472, that where a British subject took service on an American ship as an American seaman "He owes *for that time,* to the country to which the ship on which he is serving belongs, a *temporary allegiance,* and must be held to all its responsibilities".

[6] Foreign Relations of the United States 1890, page 695.

[7] See Ehlers' Case, III Moore's Arbitrations 2551.

[8] 40 Statutes at Large, at page 885.

"That a citizen or subject of a country neutral in the present war who has declared his intention to become a citizen of the United States shall be relieved from liability to military service upon his making a declaration, in accordance with such regulations as the President may prescribe, withdrawing his intention to become a citizen of the United States".

It will be noted that the Congress there treated such a declarant as still a citizen or subject of the neutral country. Had he owed permanent allegiance to the United States he would not have been permitted at his election to be relieved from the provisions of the draft law and from liability to military service at the price of withdrawing his declaration and being thenceforth forever debarred from becoming an American citizen.

It may well be that this statute suggests the reason for the provision of the Joint Resolution of the Congress of the United States in so far as it limits Germany's obligations to pay damages to such only as were suffered by those persons who owed permanent allegiance to the United States of America. The Treaty of Berlin is one "restoring friendly relations" following a war in which all the resources of both nations in men, money, and material were mobilized. The obligations assumed by Germany went far beyond those for which she would have been held liable under the rules of international law. In determining who should be protected by the terms of the Treaty, the Congress might well have concluded that it should apply only to those owing permanent allegiance to the United States during the period of war—those on whom it had a right to call for military service and who could not answer that call and be relieved of their *temporary allegiance* by the mere withdrawal of their declarations of *intention* to become citizens of the United States. And when America's need for military effort against Germany had happily passed and the two nations turned to the writing of a Treaty "restoring friendly relations," it would not be unnatural for the Congress of the United States to limit the protection to be accorded under the Treaty to those persons who owed it permanent allegiance at the time they were damaged and also at the time the Treaty became effective.

But whatever may have been the reason of the rule adopted by the Congress of the United States and carried into the Treaty of Berlin, restricting Germany's obligations to pay damages to such as were suffered by persons owing permanent allegiance to the United States, the rule itself is clearly expressed and has been definitely followed by this Commission in its Administrative Decision No. I, which, as before pointed out, is the law of this case. The limitation is written into the Treaty, and must be so applied as to give its ordinary and obvious meaning full force and effect.

The American Commissioner expresses the opinion that claims of the character here dealt with "are recognized under international law as properly presentable internationally". This may be conceded. He expresses the further opinion that "under the laws of the United States this claim, on the facts stated, must be treated as a claim of American nationality at the time of its origin". This Commission is concerned only with claims falling within the terms of the Treaty of Berlin, and that Treaty does not deal with claims of *alien seamen* on American vessels which the United States had undertaken to protect, but only with claims of *American nationals* who were such when they suffered the loss, damage, or injury complained of. The sole question is what rights the United States may assert on behalf of its nationals under the Treaty, not what claims it might have presented internationally under the rules of international law.

This Commission can not in construing the Treaty give weight to any considerations of national policy or to the duty of protection owing by the United States to the claimant and others similarly situated as expressed by the

acts of the Congress or otherwise. This Commission can consider not what the Congress and the parties to the Treaty might or could have said or done but only what they did say and do. Germany's obligations are fixed by contract as expressed in the Treaty of Berlin. Her obligations to make compensation are by that contract limited to such damages as were suffered by those owing permanent allegiance to the United States. The sole question presented, therefore, is the narrow one, Did claimant owe permanent allegiance to the United States within the meaning of the Treaty of Berlin both at the time he suffered the damages complained of and at the time the Treaty became effective? Manifestly he did not. Therefore Germany is not obligated to compensate for the damages suffered by him.

Applying the rules in Administrative Decision No. V and in the other decisions of this Commission to the facts as disclosed by the record herein, the Commission decrees that under the Treaty of Berlin of August 25, 1921, and in accordance with its terms the Government of Germany is not obligated to pay to the Government of the United States any amount on behalf of the claimant herein.

Done at Washington April 22, 1925.

Edwin B. PARKER
Umpire

CHRISTIAN DAMSON (UNITED STATES) *v.* GERMANY

(April 22, 1925, pp. 258-265; Certificate of Disagreement by the National Commissioners, April 4, 1925, pp. 243-258.)

WAR: CIVILIANS AND CIVILIAN POPULATION AS DISTINCT FROM PERSONS WITH MILITARY STATUS; PERSONAL PROPERTY IMPRESSED WITH MILITARY CHARACTER; REQUISITION OF MERCHANT VESSELS; PUBLIC SHIPS.—INTERPRETATION OF TREATIES: (1) INEQUALITY, ARBITRARINESS IN APPLICATION, (2) TERMS, CONTEXT, OBVIOUS MEANING. Claim for damages on account of impairment of health suffered, and personal property lost, by American master of oil tanker, requisitioned by United States Shipping Board, operated by War Department as public ship, and sunk by German submarine on August 17, 1918, while engaged in transporting oil from United States to Europe for United States military forces. *Held* that claimant was not a "civilian" and, consequently, not a part of "civilian population" of United States, as those terms are used in Treaty of Versailles, Part VIII, Section I, Article 232, and Annex I, para. 1, as carried into Treaty of Berlin: (1) irrelevant whether under United States law claimant had or not "military status": use of national criteria would lead to inequality, arbitrariness in application of Treaty, (2) terms, read in context, obviously intended to describe class of nationals common to all Allied and Associated Powers and determined by individual's occupation at time of injury or damage, (3) nationals like claimant, whose activity aimed at direct furtherance of military operation against Germany or allies, were no "civilians" within meaning of Treaty (reference made to *United States, Garland Steamship Corporation, and Others* v. *Germany*, see p. 73 *supra*); and that claimant, therefore, not entitled to damages, neither for impaired health, nor for personal property lost (wearing apparel, personal effects, instruments used in navigation of ship), all of which was carried into war zone, served him in a military operation, and thus was impressed with military character of ship and himself.