MEMORANDUM

CONCERNING

A Request for Espousal by the United States, before the Mixed Claims Commission, of certain Claims enforceable by British and Canadian Assurance Companies, under the Law of Subrogation, for Damages to Property suffered by American Nationals through the destruction of the Black Tom Terminal of the Lehigh Valley Railroad in New York Harbor on 30 July 1916.

FOR THE BRITISH AMBASSADOR TO THE UNITED STATES.

Submitted, at Washington, on February 15, 1929, by

RUMSEY & MORGAN,

Attorneys for the Claimants.

The Evening Post Job Printing Office, Inc., 154 Fulton St., New York, N. Y.

CONTENTS.

MEMORANDUM

concerning

A Request for Espousal by the United States, before the Mixed Claims Commission, of certain Claims enforceable by British and Canadian Assurance Companies, under the Law of Subrogation, for Damages to Property suffered by American Nationals through the Destruction of the Black Tom Terminal of the Lehigh Valley Railroad in New York Harbor on 30 July 1916.

FOR THE BRITISH AMBASSADOR TO THE UNITED STATES.

Preliminary Statement.

Nineteen British and Canadian assurance companies have filed with the Mixed Claims Commission claims for out of pocket losses amounting to $1,156,818.90. These losses were suffered through the destruction, on 30 July 1916, by fire and explosion, of the Black Tom Terminal of the Lehigh Valley Railroad, in New York Harbor, one of the most important points in the United States for the export of munitions to countries at war with Germany.

None of the property for the destruction of which the underwriters have filed claims, however, consisted of munitions. It all consisted of warehouses at Black Tom and of merchandise other than munitions stored in such warehouses; and it was all owned by American nationals. The destruction of this American owned, non-contraband property resulted incidentally from the destruction of the munitions which, at the time, were being exported from Black Tom to countries at war with Germany. The American owners were largely insured by British and Canadian companies.

At the time of the destruction of Black Tom the United States was at peace with Germany, yet the act-

decree filed with the Commission in support of the claims seems to leave no reasonable doubt that the destruction was in fact accomplished by Germany, through agents acting directly or indirectly under general and specific instructions* issued by the German government to further one of the openly avowed German policy of the time to prevent or restrict the export of munitions from the United States to countries at war with Germany. The evidence to establish this fact, including admissions by two men who said that they themselves had set the fire, is disclosed at length in the Underwriters' briefs filed with the Commission.

* One of these instructions dated 28 January 1915, issued by the Quartermaster General Staff of the Army, in Berlin, and transmitted to Washington through the German Foreign Office, after approval by the head of the American Section thereof, specifically provided (according to the translation of the decoded message on file in the State Department) that

"In the United States sabotage may be carried out against all kinds of factories which supply war material".

Germany now claims that these instructions were not complied with; but in his War Speech to Congress on 2 April 1917, the President said:

"Since the very outset of the present war [in Europe] it [the Imperial German Government] has filled our unsuspecting communities and even our offices of government, with spies and set criminal intrigues everywhere afoot against our peace within and without, our industries and our commerce. Indeed it is . . . a fact proved in our courts of justice that the intrigues . . . have been carried on at the instigation, with the support, and even under the personal direction of official agents of the Imperial Government accredited to the Government of the United States."

Again, in his Flag Day address, on 14 June 1917, the President said:

"The military masters of Germany . . . filled our communities everywhere with vicious spies and conspirators . . . and some of these agents were connected with the official embassy of the German Government itself here in our own Capital.

"They sought by violence to destroy our industries and arrest our commerce" . . .

And it will be remembered that recently, while negotiations, which were reported to the State Department, were being had for settlement with Germany of the sabotage claims before the Commission, including the Black Tom claims, the sum named and agreed upon as the sum which Germany was willing to pay in the event of settlement was a very large one. The failure of the negotiations was due to considerations of policy and honorability, but not to the magnitude of the sum involved, or to a question of Germany's legal obligation.

To meet this evidence Germany, after long negotiations for a settlement, filed an answer, affidavits and a brief. These contain hardly more than general denials, instructions by German agents of statements formerly made by them, omission of some of the material points in the evidence, lengthy discussions of minor points, frequent resorts to sarcasm and occasionally even to abusive language in lieu of argument, and other of the usual indicia of an effort to cloud rather than to clarify the issues. None of the documents demanded from Germany has been produced, but all are reported to have been destroyed or not found, and no affirmative disproof of claimants' evidence has been offered.

An extended discussion of the evidence would here be out of place, but reference to its general nature, sufficient to point the belief that the claims are meritorious, and are well founded, is made to emphasize the fact that this memorandum, which concerns the right of the British and Canadian Companies to share in recovery, is not presented merely as a formal assertion of technical right, but for the protection of a valuable interest.

The evidence has been collected for and presented to the Commission not solely by American underwriters. Of the total amount paid by underwriters for property damages at Black Tom, slightly less than 65½% was paid by American companies, and slightly more than 35% was paid by British and Canadian companies.* The American and the British and Canadian companies, therefore, acted together throughout in the collection and presentation of the evidence.

The American Agent before the Commission, however, because of lack of authority from the State Department

* The remaining 0½% was paid by six companies, of which two were German, two French, one Swedish and one Dutch. The two German companies were taken over, during the war, by the Alien Property Custodian, who has not entered, on their behalf, claims (amounting to $49,058.20) based on the wrongdoing of their enemies. The claims of the French, Swedish, and Dutch companies together total only $34,233.52, or about .0072% of the total amount of losses paid.

so to do, has not as yet espoused the claims of the British and Canadian companies; and from this it results that the evidence presented to the Commission, largely collected by the British and Canadian companies, has not as yet been presented to the Commission for the benefit of the British and Canadian companies, or otherwise than for the sole benefit of the American companies.

A question having been raised in the State Department as to whether the American Agent might be authorized by it to espouse the claims of the British and Canadian companies, and so to urge upon the Commission a consideration of the evidence for their benefit, this memorandum on that subject has been prepared. It appears that if the American Agent be authorized to espouse the claims, it is probable that no question concerning the jurisdiction of the Commission in the matter will be raised by Germany, for counsel for the companies have discussed the legal questions with the German Agent, and the latter has said that he, for his part, will not raise a jurisdictional question based on the nationality of the claims.

The reason for this is that though the British and Canadian companies are, of course, foreigners before the Commission, yet the claims which they seek to enforce are not foreign, but American, being subrogation claims*; and it has been held by the Commission that its juris-

*"Subrogation is simply acting somebody in the right of another" (Goldsmith v. Stewart, 45 Ark. 149, 154). "It is the machinery by which the equity of one man is worked out through the legal rights of another" (Clark v. Oliver, 38 Ark. 401, 412). It applies generally in any instance where "one party is required to pay a debt for which another is primarily liable, and which, in equity and good conscience, ought to be discharged by the latter" (Johnson v. Terrell, 147 Ind. 271, 284)—as where insurance companies have been required to pay losses caused by acts of sabotage directed by the German government. It is the "mode which equity adopts to compel the ultimate payment of a debt by anyone who in justice, equity, and good conscience, ought to pay it" (Sheldon on Subrogation, 2), quoted with approval again and again in a long line of decisions, as in Cobb v. Cridenden, 131 Fed. 831, 835). It [illegible] like [illegible] a surety or an insurer, "[illegible] the creditor would ask to pay" (McCormick v. Irwin, 35 Penn. St. 111, 117). It

diction depends on the nationality of claims, not on the nationality of the persons who seek to enforce them (Administrative Decision No. V, pp. 175-194).

The American Nationality of the Claims, under the Law of Subrogation.

The claims are American, not foreign, because they are for the enforcement of the rights of American nationals. The British and Canadian companies do not seek recovery in their own right, but only in the right of their assureds, the American nationals whose property was destroyed. The claims are merely subrogation claims, which means this very thing, and recovery is sought only under the law of subrogation, the principles of which are recognized and applied in German jurisprudence (*Schuster on Principles of German Civil Law*) as well as in the jurisprudence of the United States and

enables one who has paid a loss, as insurer, to enforce the rights of him who has suffered the loss.

In *Sheldon on Subrogation* (2nd Ed.) it is said:

"It is not an independent right of action in the insurers themselves" (p. 330); "subrogation has been defined as that change by which another person is put into the place of a creditor, so that the rights and securities of the creditor pass to the person who, being subrogated to him, enters into his right . . . . The party who is subrogated is regarded as entitled to the same rights, and indeed as constituting one and the same person with the creditor whom he succeeds" (p. 3).

In *Germania Ins. Co. v. R. R.* (72 N. Y. 90, 93) it was said:

"The plaintiffs [the insurers] claim, not in their own right, but through him [the insured]."

In *Hall & Long v. R. R.*, 13 Wall. (80 U. S.) 367, it was said:

"In respect to the ownership of the goods, and the risk incident thereto, the owner and the insurer are considered but one person, having together the beneficial right to the indemnity due from the [person primarily liable] . . . . Standing thus as the insurer does, practically, in the position of a surety he is entitled to all the means of indemnity which the satisfied owner held against the person primarily liable . . . . *involved* *not* *through the right of the creditor or owner*" (p. 370).

An "underwriter, who has paid a loss, is entitled to recover what he has paid by a suit in *the name of the assured*" . . . . (p. 371).

"There is . . . . no reason for the subrogation of insurers by marine policies . . . . which does not exist in support of

of Raphael. At the outset, therefore, it is thought important to emphasize the fact that the British and Canadian companies do not appear before the Commission for the enforcement of foreign rights.

And since it is established by the municipal laws of both the nations which are parties before the Commissions (Germany and the United States), as well as by the municipal law of claimants' nation, that the claims are not for the enforcement of the rights of the assurance companies, but only for the enforcement of the rights of the persons whose property was destroyed, it follows that the action is not subject to personal estoppels existing against the companies, but only to such personal estoppels, if any, as may exist against their assureds.

In Hudson on Subrogation it is said (p. 330):

"This subrogation of the insurers to the remedy against a wrongdoer who has caused the loss which the insurers have satisfied is only to the remedies and rights of action which were vested in the assured, . . . subject to all the liabilities and duties which rested on the insured . . . ; it is not an independent right of action in the insurers themselves and will not be subject to any personal estoppel existing against the insurers in their own right.

---

a like subrogation in case of an insurance against fire or hail" (p. 371).

In *Hall* v. *Abeel*, 31 Miss. 75, 84, it was said:

"The general rule is that if a party wrongfully breaks, pays for the particular article, then the rule [of subrogation] springs up . . . In such cases, the party advancing the money is to be placed in the shoes of him whose right . . . has been . . . paid off."

In *Liverpool Ins. Co.* v. *Phenix Ins. Co.*, 129 U. S. 397, 402, it was said:

". . . The insurer by paying to the assured the amount of a total or partial, of the goods insured, becomes . . . subrogated to a corresponding measure to the assured's right of action against the . . . person responsible for the loss."

In *Providence Inst. Co.* v. *Engineering Co.*, 194 Fed. 403, it was said:

"The rule is well settled, in the insurance as well as in marine insurance, that the insurer upon paying to the insured the amount of a loss on the property insured, is subrogated to a corresponding amount in the assured's right of action against any other person responsible for the loss; this right . . . enforceable in [the name of] right only."

In *Wilkeson* v. *Hays* (61 Hun, 393), the Phenix Insurance Company had paid a marine loss to Parsons & Lord, their assured. An action for recovery was brought by the assignee of the Phenix Insurance Company against Hays, the person who had caused the loss. The plaintiff did not sue in the name of Parsons & Lord, the assured, but in his own name, as assignee of the Phenix Insurance Company. In a previous action between this defendant, Hays, and the Phenix Insurance Company, concerning the same accident, judgment had been for Hays. The court said:

"Undoubtedly, a recovery by the defendant in his action against the Phenix Insurance Company . . . is a bar against the insurance company from setting up, in its own right, any claim against the defendant because of the loss of the vessel. . . . But the plaintiff in this action does not represent any claim which the insurance company had as against the defendant, but that which Parsons & Lord [the assured] had.

"Said being the case, . . . the judgment in no way operated as an estoppel against Parsons & Lord . . . .

"It being, therefore, the claim of Parsons & Lord which is sought to be enforced in this action, . . . the plaintiff . . . would seem to be entitled to all the rights which they could have enforced against the defendant. . . . (*Memerna* v. *Pennell*, 19 *N. Y.* 109)."

As in *Wilkeson* v. *Hays*, so in this action, the claims have not been filed by or in the names of the persons whose property was destroyed, but by and in the names of the assurance companies which paid the losses, and it is important to note that this fact in nowise affects the rights to be determined. Notwithstanding that the claims have been filed by the assurance companies, the rights to be determined are not those of the assurance companies, but are still those of the persons whose property was

damaged. An insurance company, as such, has no rights at law against a tort-feasor, except the right to enforce against him the rights of the assureds. The insurance company has not been directly damaged by the tort-feasor and so has, in law, no personal right against him, for there is no privity between them, nor any relationship in tort. It is the assured who has been directly damaged by the tort-feasor, and it is he alone who, at law, has a claim for damages against the tort-feasor. The right of the insurance company is merely a right to enforce, against the tort-feasor, the right of its assured.

So definite is this rule that, at common law, the insurer might not bring the action in his own name, but was required to bring it in the name of the assured (*Mason v. Sainsbury*, 3 Doug. 61; *London Ass. Co. v. Sainsbury*, id., 245; *Mayor of New York v. Pentz*, 24 Wend. 668; *Rockingham Ins. Co. v. Bosher*, 39 Me. 253; *Hobbs v. N. E. Co.*, 13 Met. 99). It is only by comparatively recent statutes governing procedure that the insurer has been permitted to elect, in some jurisdictions, to bring the action in its own name, and in other jurisdictions has been required to do so (*Liverpool Co. v. Phenix Ins. Co.*, 129 U. S. 397; *Conn. Ins. Co. v. Ry.*, 73 N. Y. 399; *Washington Ins. Co. v. Ry.*, 66 Wis. 58; *Ry. v. Fire Assn.*, 55 Ark. 163; *Sheldon on Subrogation*, p. 344).

Under the practice of the Mixed Claims Commission it was necessary to file the claims in the names of the insurers.* But that does not affect the nature of the rights. Whether the action be in the names of the assureds or in the names of the insurers, it still remains true that the rights of the assureds, not those of the insurers, are the rights to be determined.

The whole theory of the equitable doctrine of subrogation is that a tort-feasor may not escape his primary liability for a wrongful act by showing that his obligation to the injured person has been paid by another who is

* Had the practice of the Commission permitted the filing of these claims in the names of the assureds, and if this had been done, it would have been no defense to show that the claims had previously been paid, in whole or in part, by the underwriters, for, under the law of subrogation, Germany would have been estopped from setting up that its obligation to the assureds had been paid by third persons secondarily liable. In *Sheldon on Subrogation* it is said (p. 394): "The rule [the tort-feasor] . . . in an action brought against him in the name of the insured set up the insurers' payment to the plaintiff as a defence, either wholly or pro tanto. In *Hall & Long v. Ry.* (13 Wall. 367, 370) it was said by the Supreme Court of the United States: "It has often been ruled that an insurer, who has paid a loss, may sue in the name of the assured in an action to obtain redress from the carrier whose failure of duty caused the loss." And in *Clark v. Wilson* (103 Mass. 219, 221-2; 227), citing English cases, it was said:

"Mr. Justice Buller, in 1 D. & E. 62, treated the law as settled that . . . the owner might recover from the underwriters first, and afterwards sue the authors of the damage in his own name for the benefit of the underwriters.

"In Yates v. Whyte, 4 Bing. N. C. 272; S. C. 5 Scott, 640, the owner of a ship maintained an action in his own name against the owner of another ship, for the full amount of the damages occasioned by a collision, without deducting the amount paid him by the underwriters; and Chief Justice Tindal said: 'If the plaintiff cannot recover, the wrongdoer pays nothing, and takes all the benefit of a policy of insurance without paying the premium.' . . .

"In *Dickenson v. Jardine*, Law Rep. 3 C. P. 639, Mr. *Justice Willes* said that the underwriters, after paying in the first instance the amount claimed for general average, would then be entitled to use the names of the assured, and proceed against the other parties liable . . . .

"The result is, that . . . payment of a total loss [by the insurers to the owners] . . . did not defeat the right to bring an action at law in the name of the plaintiffs [the owners] for the tort previously committed against them. The question whether the damages recovered will belong to them or to the insurers is a question in which the defendant has no interest" . . .

Thus an assured, notwithstanding that his claim has already been paid by an insurer, may nevertheless proceed to recover it again from the person primarily liable, who is estopped from setting up that his obligation has been discharged by a third person—for he himself is liable, and it is inequitable that he should not pay. But when the assured recovers from the person primarily liable, he receives the money in trust for the insurer by whom he has previously been paid. "Where an insurance company pays the insured for a loss by fire occasioned by the fault of a railroad company, and the insured afterwards recovers from the railroad company the amount in satisfaction of his damages, he holds this in trust for the insurer." (Sheldon, *supra*, pp. 345-6, citing *Monmouth Fire Ins. Co. v. Hutchinson*, 21 N. J. Eq. 107). Also see *Randal v. Cockran*, 1 Vesey Sr., 98.

only secondarily liable therefor.* When an assurance company pays to its assured either the whole or a part of his damages, the assurance company becomes subrogated, *pro tanto*, to the rights of the assured against the person who caused the damage. If the assured could have recovered against the person who caused the damage, then the assurance company can do so—to the extent to which it has satisfied the claim of the assured. Its legal rights are measured by his. It stands in his shoes. It is, in the eye of the law, as stated by the Supreme Court of the United States, "one person" with the assured (*Hall & Long v. Ry.*, 13 Wall. 367); or, as stated in *Sheldon on Subrogation* (p. 3), "one and the same person" as the assured (*Liverpool Co. v. Phenix Co.*, 129 U. S. 397; *Travelers Ins. Co. v. Engineering Co.*, 184 Fed. 420; *The Livingstone*, 130 Fed. 746, 749; *Federal Co. v. Detroit Co.*, 202 Fed. 648, 651; *St. Louis Ry. v. Commercial Co.*, 139 U. S. 222, 235; *Palmer v. Navigation Co.*, 208 Fed. 666, 667; *Joyce on Insurance*, Vol. 5, p. 5890; Richards on Insurance, 612, 61). Thus, if the action be not brought by the assured, then the assurer, who has paid his claim, may bring it;† for, upon paying the claim, the assurer becomes *substituted for the assured* and is permitted to assert the rights of the assured against the person primarily liable, not otherwise than as if the assurer were himself the assured (*Cobb v. Cottrealan*, 161 Fed. 510, 518; *Aetna Life Ins. Co. v. Middleport*, 124 U. S. 534, 549; *Swarts v. Siegel*, 117 Fed. 13, 18; *Conn. Mut. Life Ins. Co. v. Cromwell*, 72 Hun 398, 401; *Weaver v. Sherman*, 88 Iowa 255, 259, and cases above cited).

* In *Hall & Long v. Ry.* (13 Wall. 367) it was said:

"It is too well settled by the authorities to admit of question that . . . the liability to the owner . . . is primarily upon the carrier, while the liability of the insurer is only secondary."

† "If the railroad company [the person primarily liable] has not paid the insured . . . [the insurance company] may maintain a suit at law against the railroad company, in the name of the insured, even against his consent, . . . and a release given by the insured to the railroad company would be no defense to this suit" (*Sheldon*, *supra*, p. 248, citing *Monmouth Ins. Co. v. Hutchinson*, *supra*. And see *Ocean S. S. Corp. v. [illegible] Elec. Co.*, 240 N. Y. 37).

The Law of Subrogation Applies to International Claims.

The applicability of this doctrine of subrogation to international claims has been determined by the United States Court of Claims in several opinions rendered with respect to the so-called French Spoliation Claims.

In *Holbrook, Administrator v. United States* (21 Ct. of Claims, 434), an American vessel had been seized by a French privateer and with her cargo was condemned as a prize by a French tribunal, when the United States was at peace with France. The assurers sued in their own names. The court said:

> "The only interest the Government appears to have in a question of this kind is, that there shall not be a double payment . . . , so that in effect we have but to settle the rights of the owners and insurers as between themselves . . . (p. 737).
>
> "When . . . the insurance [is] paid the insurer stands in the place of the insured, and is entitled to all the advantages resulting from that situation, and this right relates back to the loss . . .
>
> 'When a loss of any kind, whether total or partial, has been paid the insurer so far stands in the place of the assured that he is entitled to recover whatever compensation for the loss the assured may be able to recover from any third party' . . . (p. 438).
>
> "The authorities are entirely united on this point, and there can be no doubt of the validity of claims made by insurers who have paid loss by illegal capture" . . . (p. 440).
>
> "The insurer stands in the place of the insured to this extent, that he can recover indemnity or satisfaction; that is, what he paid under his contract. He has the right to be made whole, but nothing further" (p. 441).

The case of *Hopkins, Administrator v. United States* (23 Ct. of Claims, 201), also a French Spoliation Claims case decided by the same court, is of great interest to illustrate the point that an insurer may recover only in the right of his assured, not in his own right. In that case

also an American vessel had been illegally seized by a French privateer and with its cargo was condemned by a French tribunal. The cargo, however, though insured by American citizens, was owned by a subject of Great Britain, wherefore the American assurers could not recover in his right. Had the cargo been American owned, and the assurers British, the claim would have been like the claims of the British assurers in this case, and recovery by the British assurers must have been allowed under the same rule which denied recovery by the American assurers in the case actually presented.

The Claims are Not for Losses Indirectly Suffered by the Assurers, but for Losses Directly Suffered by the Assureds.

Under section 5 of the Treaty of Berlin, Germany is liable not only for losses suffered directly by American nationals, but also for losses suffered indirectly by them; or, as stated in a decision by the Commission (Ad. Dec. No. I, p. 2): "The financial obligations of Germany embrace ..... all losses .... suffered directly or indirectly during the war period." Under this provision American insurance companies have been entitled to enforce, in *their own right* before the Commission, claims for insurance losses paid by them, for they were indirectly damaged by Germany's destruction of the property of their assureds.* In many instances, therefore, it has not been necessary for American insurance companies to confine themselves, under the law of subrogation, to the enforcement only of the rights of their assureds. On the contrary, American insurance companies have been enabled to recover in their own right in instances where

* Insurance is a contract for personal indemnity. It is the owner of the property who is insured; the property itself is not insured ([illegible] v. [illegible] Fire Assur. Co. [illegible] N. Y. [illegible]; [illegible] v. Board of Education [illegible] N. Y. [illegible]). The insurer, therefore, has no right in the property, and so suffers no direct loss through its damage or destruction; his loss is only indirect, being suffered through indemnification of the owner of the property.

their assureds had no rights before the Commission, as where American companies had insured foreign property owners, or reinsured foreign assurers.

The enforcement of these extra legal treaty rights is not, of course, inconsistent with the enforcement of subrogation rights, and the law of subrogation has in fact been applied by the Commission. The fact that the claims in question are filed in the names of the companies, however, may lead to some confusion, for it might seem therefrom that the companies themselves are seeking recovery, in their own right, for losses indirectly suffered. No such right is claimed. It is recognized that the British and Canadian companies may not recover in their own right before the Commission. They assert, as their only legal basis for recovery, the fact that they represent, stand in the shoes of, and, in the eye of the law, constitute the same persons as, and enforce only the rights of, American nationals whose property was destroyed.

The Claims Meet the Test for American Nationality Laid Down by the Commission, for they have Never been Assigned, or otherwise transferred out of American ownership. The Rule Against Assignments does Not Apply to Subrogation.

The test for American nationality of claims as laid down by the Commission in Administrative Decision No. V, is as follows:

> "Such claims . . . . as . . . . were impressed with American nationality both
>
> (a) on the date when the loss, damage or injury occurred and
>
> (b) on November 11, 1921, when the Treaty of Berlin became effective,
>
> are . . . . . . within the jurisdiction of this Commission.

These claims meet the legal requirements of this test. They were impressed with American nationality in their origin, at the time of the loss, because they are for the destruction of property owned at that time by American nationals; and they were impressed with American nationality on November 11, 1921, and still are, because the rights to be enforced are still the rights of American nationals, never having been transferred out of American ownership.

To impress these claims with a foreign nationality it would have to appear that ownership thereof had been transferred from the assureds to the assurers; but this does not appear, because subrogation does not transfer ownership. The losses of the assureds were paid by the assurers, but there resulted no transfer of rights. Subrogation is not assignment. "Subrogation is . . . a very different thing from an assignment. It is the act of the law, and the creature of a court of equity, depending not upon contract, but upon principles of equity and justice. It presupposes an actual payment and satisfaction of the debt" by a person secondarily liable therefor ([illegible] v. Gatewood, 75 Va. 407, 411; [illegible] v. *Lockwood*, 42 N. Y. 80, 97). The assignment of a claim is a transfer of it, under contract, by the owner to another who voluntarily takes over the claim as his own, usually for less than its face value and with a view to profit. But subrogation takes place independently of contract, or of any other voluntary act (*[illegible]* v. *[illegible]*, 1 Peters, 193; *Norris* v. *Phoenix Ins. Co.*, 1 Wash. C. C., 400); it takes place by operation of law. Unlike assignment, subrogation transfers no rights, no ownership; it does not permit the person subrogated to assert the claim as his own, but merely enables him to assert it in the right of another, without profit to himself. One who is subrogated to the rights of another can recover only as much as he has previously paid out to the person to whose rights he is subrogated, wherefore it is impos-

sible that he can derive a profit* (*Liverpool Co.* v. *Phenix Co.*, 129 U. S. 397; *Travelers Ins. Co.* v. *Eng. Co.*, 184 Fed. 420; *Bailey* v. *Warner*, 28 Vt. 87; *Mallory* v. *Dunbar*, 82 Ky. 239; *Martin* v. *Kelly*, 59 Miss. 652; *Gibbons* v. *Cornell*, 16 S. C. 113; 44 Cent. Dig. 3019-20, § 99—"*Subrogation Proportionate to Payment*").

The fact that subrogation permits of no profit to the person subrogated, wherefore it cannot result in profit to the person subrogated or substituted for the creditor, is important. It eliminates the reason which underlies the rule against assignment of claims against Government, such as these claims are, and takes subrogation out of the operation of that rule. The reason for the rule against assignments lies in the unwillingness of governments to permit speculation or traffic in claims against themselves, for it would be intolerable that any person who might think himself to be in a favored position should be permitted to purchase claims against Government while the amounts recoverable thereunder were in any wise speculative. The rule applies to forbid assignments because assignments permit of speculative transactions through the purchase of claims for less than their face value. But the rule does not apply to forbid the enforcement of subrogation claims, because subrogation occurs by operation of law, independently of and without any transaction had between the parties, and only in cases where the debt has been paid by a person secondarily liable therefor (*Aetna Life Ins. Co.* v. *Middleport*, 124 U. S. 534, 549), who can recover only the exact amount which he has previously paid out. Thus subrogation permits of no speculation in claims, for, as stated, it is impossible that the person subrogated can make a profit. The reason for

* Suppose the purchase of a chose in action by a third person, a stranger to the instrument, with delivery of possession of the instrument. This would be an equitable assignment. In such case the third person could recover from the debtor the whole face of the debt, although he had purchased it for a lesser sum. But suppose the settlement of the debt, for less than its full amount, by a third person secondarily liable thereon. This would result in subrogation. In such case the third person could recover from the debtor only the amount for which the debt had been settled.

the rule against assignments and other transfers of claims cannot be advanced as a reason for a rule against subrogation. In the case of subrogation both the reason and the rule are lacking.

Under the laws of the United States, for example, an insurer might be subrogated to the rights of a claimant against Government, although "transfers and assignments" of claims against Government (prior to the time when the amounts recoverable have been finally fixed) is expressly prohibited by R. S. 3477. R. S. 3477, however, contains no prohibition against the payment of a claim against Government to someone other than the original claimant; the prohibition is merely against "transfers and assignments" of claims while the amounts recoverable are still speculative."

Similarly, the Treaty of Berlin does not prohibit the payment of a claim against Germany to someone other than the original creditor, or to a foreigner. It merely limits the jurisdiction of the Commission to claims, originally American owned, which have not been assigned or otherwise transferred to foreigners prior to 11 November 1921, or, as stated by the Commission (Ad. Dec. No. V, p. 187): "Claims to fall within the Treaty must have possessed the status of American nationality, both in origin and at the time the Treaty became effective . . . A subsequent change in their nationality, through succession, assignment, or otherwise, can not operate to discharge [Germany's] obligations". In other words, a foreigner may recover, before the Commission, on a claim assigned to him after 11 November 1921, provided the American nationality of the claim was fixed on that date.

The question concerning the nationality with which these claims are impressed, therefore, does not concern the nationality of the persons to whom the claims may ultimately be paid, but is merely a question as to whether to payments made by the insurers, prior to 11 November 1921, of the losses occasioned by Germany to American nationals on 30 July 1930, operated as a transfer of the claims themselves. But the law in this regard is very definite. Subrogation means substitution. It is not, as has been pointed out, a transfer of claim or right, but a substitution of persons. The claim must be asserted in the right of the original creditor. Subrogation merely permits a third person who has paid a debt due by another, for which he was secondarily liable, to be substituted for and to stand in the shoes of the creditor, for the purpose of enforcing the creditor's claim against the person primarily liable. He can enforce it only to the extent to which he has paid the creditor's claim. He can not enforce the claim as his own, or in his own right. To say that there has been a transfer of claim or right in a case where the only rights to be considered are those of the original creditor, would be a contradiction in terms. And inasmuch as the claim itself is American, it is immaterial that it is enforceable by a foreigner. This is, indeed, the very holdement of the 5th Administrative Decision.

In stating the rule for continuity of the original nationality of claims, from that of origin to some fixed time thereafter, the Commission pointed out that there was an internal reason for the rule, either in international law or in justice, but any fixed practice under the rule, but that the practice of every mixed arbitral tribunal in this regard must be determined by the special pro-

* R. S. 3477 reads in part as follows (italics ours): "All transfers and assignments made of any claim upon the United States . . . shall be absolutely null and void unless they are freely made . . . after the allowance of such a claim, the ascertainment of the amount due and the issuing of a warrant for the payment thereof." And in Goltra v. Weeks (271 U. S. 536, 546) it was said: "Section 3477, it is clear . . . simply forbids the assignment of such claims before their allowance."

† The claims must be American in their origin, for otherwise foreigners whose property had been destroyed by Germany might assign their claims to American nationals whose rights also, as fixed on 11 November 1921, had to be enforced by the Commission. As stated by the Commission (Ad. Dec. No. V, pp. 176-71): "Any other rule would open wide the door for abuses and would result in converting a mixed claims into a claims agency on behalf of those who after suffering injuries should assign their claims to its nationals or avail themselves of its naturalization laws for the purpose of procuring the espousal of their claims."

statute of the particular treaty establishing the tribunal and limiting its jurisdiction. The Commission said (Ad Doc. No. V, p. 179): "As the rule in its application necessarily works injustice, it may well be doubted whether it has or should have a place among the established rules of international law." The Commission, accordingly, refused to require that claims presented to it should have been continuously American up to the time of presentation, and held that under the Treaty of Berlin, the Commission had jurisdiction of claims continuously American up to 11 November 1924, even if they should subsequently have been transferred to foreigners before presentation. But feeling that even the application of this modified rule for continuous American nationality of claims might work injustice, the Commission said (p. 184): "Wherever either Agent is of the opinion that the peculiar facts of any case take it out of the rule here announced such facts, with the differentiation believed to exist, will be called to the attention of the Commission in the presentation of that case." Under these circumstances it would be a strange reversal of idea to hold, for the purpose of supporting these claims with a foreign nationality, that the equitable principles of the law of subrogation, common to the jurisprudence both of Germany and of the United States, should be disregarded.

If these claims were espoused, therefore, there could hardly be a doubt but that they would be allowed by the Commission as claims of American nationality.

The Moral Considerations for Espousal of the Claims.

The foregoing discussion has been merely of the legal reasons for believing that these claims are meritorious, and would be allowed if presented. But there are other and higher reasons for asking the State Department to authorize its Agent before the Commission to espouse these claims.

The British companies, nationals of a friendly power, an ally of the United States in the war, were admitted by the United States to do business within the United States under equal protection of the laws of the United States, and under that permission and guaranty paid losses suffered by citizens of the United States through destruction of their property by Germany at a time when the United States was at peace with Germany. The American citizens had, and still have, under principles of municipal law which obtain both in the United States and in Germany, a right, which is enforceable only before the Commission, to recover their losses from Germany. Had these American citizens been insured by American companies, as some of them were, the enforcement of their legal right by their American insurers would, as has been done, have been espoused by the United States before the Commission. In a letter dated 8 June, 1927, written by the Honorable Robert E. Olds, formerly Assistant Secretary of State, to the Honorable Robert W. Bonynge, the Agent of the United States before the Commission, he said: "The Department realizes that under municipal law the doctrine of subrogation may properly be invoked regardless of the nationality of the corporation claiming its benefit, and as a matter of policy it invokes the same doctrine in international arbitrations where the result is to benefit American nationals." But the same law operates for the benefit of British and Canadian companies admitted to do business in the United States, and a denial to them of the benefit of this law would deprive them of equal protection under the laws of the United States, and would constitute a discrimination against British and Canadian companies. If the United States will invoke its municipal law of subrogation for the protection of American companies before international arbitrations, it would seem clear that it should do the same for British and Canadian companies doing business in the United States. For the United States to permit American companies to seek enforcement of the rights of their assureds before the Com-

mission, but not to permit British and Canadian companies to do the same, the rights to be enforced being in both cases the rights of American nationals, would be a discrimination.

Moreover, a refusal by the United States to espouse these claims would be a refusal by the United States to seek redress from Germany for the destruction of American property, on American soil, as an act of war in time of peace. It would be tantamount to a determination that a foreign nation may with impunity, short of a recourse by the United States to war, destroy American property on American soil if the owners of the property happen to be insured by foreign insurers—that damages will be demanded only if the owners happen not to be insured, or if they happen to be insured by American insurers.

But this would seem to be impossible. Indeed, as will appear from the Alabama Claims cases to be cited below, damages have heretofore been demanded (notwithstanding the decision in the Dorticos case, supra) for destructions of property protected by the American flag, even when the property under that protection was not within the territory of the United States but on the high seas, and even when the property was not American owned but foreign owned. And in those cases awards were made to foreign owners.

It seems clear that the United States should not absolve Germany from liability for her wrongdoing, at the expense of the nationals of a friendly power and formerly, unless compelled thereto by treaty obligation.

No Inhibition Against Espousal is Contained in the Treaty.

Because of all the foregoing considerations, the United States may properly be asked to lend its aid for the espousal of the present claims against Germany, for there appears to be no inhibition in that regard contained in the provisions of the Treaty of Berlin, or in the provisions

of those portions of the Treaty of Versailles which were adopted by the Treaty of Berlin, or in the provisions of the Agreement made by the United States with Germany for the establishment of the Mixed Claims Commission.

The provisions contained in those documents, applicable to these claims, are as follows:

Treaty of Versailles:

Part VIII, Section I, Article 232:

"... Germany undertakes that she will make compensation for all damage done to the civilian population of the Allied and Associated Powers and to their property during the period of belligerency."

Part VIII, Annex I:

"Compensation may be claimed from Germany under Article 232 above in respect of ...

"(9) Damage in respect of all property wheresoever situate belonging to any of the Allied or Associated States or their nationals, with the exception of naval and military works or materials, which has been ... injured or destroyed by the acts of Germany ... in consequence of hostilities or of any operations of war."

Treaty of Berlin:

Section 5 provides for

"the satisfaction of all claims ... of all persons, wheresoever domiciled, who owe allegiance to the United States of America and who have suffered ... since July 31, 1914, loss, damage, or injury to their persons or property, directly or indirectly, ... in consequence of hostilities or of any operations of war."

Agreement for Mixed Claims Commission:

Article I:

"The commission shall pass upon the following ...

"(1) Claims of American citizens, arising since July 31, 1914, in respect of damage to ... their property."

That the present claims must be deemed to be the claims of American citizens, within the meaning of the Agreement, necessarily follows from the fact, above stated, that they are recognized as such by the municipal laws of both the high contracting parties to the Agreement. According to those laws the claims were American in origin, have never been transferred out of American ownership, and are still for the enforcement of the rights of American citizens. And it has been determined by the Commission, in its 5th Administrative decision, that under the provisions of the Agreement and of Treaty of Berlin, the jurisdiction of the Commission does not depend on the nationality of the persons to whom claims are ultimately payable, but on the nationality of the claims themselves.

No Precedent Against Allowance of the Claims is to be found in the Decisions of the Commission.

The claims of foreign assurers, as such, have been disallowed by the Commission. Those disallowances, however, do not establish precedents for the present claims. These claims are based on different grounds. It is thought that the enforceability of the rights of American nationals under the law of subrogation, by foreign assurers who have paid American losses occasioned by Germany, being secondarily liable therefor in the conduct of their business within and under the jurisdiction of the laws of the United States, is a matter which has not heretofore been specifically or fully argued before or passed upon by the Commission. In *U. S. v. Germany (No. 8), U. S. on behalf of Bennett Trading Co. et al. (No. 95)*, and *U. S. on behalf of National Fire & Marine Insurance Co. (No. 208)*, rights of this kind existed, but they were not presented by the American agent for the consideration of the Commission, which therefore did not pass upon them. Claims of foreign assurers were presented to the Commission in a case espoused by the United States "on behalf of foreign insurance companies that have . . . been lawfully admitted to do business within the United States," but that case was not presented for the enforcement of subrogation rights. The foreign assurers did not seek to have their claims "worked out through the right of the creditor or owner" (*Hall & Long v. Ry.*, supra, p. 370), but sought to enforce the claims in their own right. They argued that "American branches of foreign insurance companies by their many acts of allegiance have acquired a commercial domicile in the United States with the result that they should be included in the term 'national' of the United States," wherefore they should be entitled to recover, in their own right, as nationals of the United States. The decision of the Commission was merely a denial of that proposition.

In that case the claims for American marine losses, paid by American and by foreign assurers, were presented together. The claims for the losses paid by the foreign assurers, presented on the theory aforesaid, were disallowed as aforesaid. The claims for the losses paid by the American assurers were not tried, but settled. In the agreement of settlement, signed by the two agents as well as by attorneys for the underwriters, it was stated:

> "As the basis of settlement, the actual net out of pocket payments of the American underwriters, including the Veterans Bureau, have been established after deducting all sums, if any, received by such underwriters under policies of re-insurance written by corporations, other than those under the laws of the United States or any State or possession thereof, and partnerships and/or individuals other than such as were permanent allegiance to the United States."
>
> * * * * * *
>
> "In arriving at this settlement, as above outlined, it is the understanding of the American Agent and of the German Agent that there is no financial liability on the part of the Government of Germany, under the Treaty aforesaid, to make compensation

for the claims included in the lists heretofore notified to the Commission on behalf of foreign underwriters only authorized under the laws of the United States or of the several States to write insurance within the United States of the character involved in this agreement, or on behalf of ship owners or cargo owners, so far as the losses have been compensated by insurance."

And each award handed down by the Commission for these claims reads as follows:

"This cause having come before the Commission for decision, the American Agent and the German Agent having been heard, the cause having been finally submitted and due consideration having been had, and the Commission having determined that the United States is not entitled under the Treaty of Berlin of August 25, 1921, to present claims on behalf of foreign corporations, associations, partnerships, or individuals, and the amount due the claimant herein having been established in the amount stated below after deducting all sums, if any, received by it from foreign corporations, associations, partnerships, or individuals reinsuring risks taken by claimant, the Commission decrees that under the Treaty of Berlin aforesaid, and in accordance with its terms, the Government of Germany is obligated to pay to the Government of the United States on behalf of the sum of Dollars ($), with interest thereon at the rate of five per cent. per annum from November 11, 1918, to the date of payment."

The nature of that settlement, and the wording of the awards made under it, have here been stated at length because it has been suggested that, in some way, they establish a precedent. But it seems clear that, in general, a settlement effected in one case, with a stipulation as to the form in which the awards to be made under it should read, cannot foreclose the rights of other parties in other cases; and that, in particular, the basis agreed upon for settlement of the claims of certain American marine insurers, for property destroyed on the high seas,

cannot constitute a precedent precluding foreign insurers from enforcing the rights of Americans, for property losses suffered by Americans, on American soil. Nor can a decision that foreign insurers admitted to do business within the United States are not American nationals, and so cannot enforce claims before the Commission in their own right, be considered as a decision that foreign insurers may not, under the law of subrogation, enforce the rights of their American assureds. The fact that the Commission has disallowed the claims of foreign insurers as such, does not preclude the allowance of these claims on the ground that the claims themselves are impressed with American nationality. And for these reasons it is said that there is no precedent under the decisions of the Commission which applies to the present claims.

The Policy of the United States in the Past, and the Precedents Established by other Arbitral Tribunals, Call for Espousal and Allowance of these Claims.

It has been suggested that it would be contrary to the policy of the United States to espouse claims which would not in any way inure, directly or indirectly, to the benefit of American nationals. But the first question which naturally arises in this connection is as to whether or not these claims are of that nature. The American nationals whose property was destroyed were paid their losses by the insurance companies. They obtained their insurance partly because of the protection afforded to their assureds by the law of subrogation. Can it be said that, after payment of their losses, the assureds have no remaining interest of any kind, moral or legal, direct or indirect, in the discharge of the obligation by the person primarily liable? The law says otherwise; for source of equity have decreed that the assureds, notwithstanding that they have received payment of their losses, may still in their own right sue the person primarily liable, for the

enforcement of his obligation (see footnote on pp. 5-9 above); and that, if the awards do not themselves do this, they may not take any step to prevent their assignees from enforcing their right so to do (*Monmouth Ins. Co. v. Hutchinson*, 21 N. J. Eq. 107; *Owens A. & S. Corp. v. Hunter*, 248 S. W. 27).

It is clear, therefore, that these claims are not claims in which American nationals have an interest, legal or equitable, direct or remote. It is true, which is quite a different thing, that they are claims the payment of which would not result in present, or immediately ascertainable, pecuniary benefit to American nationals; but it has not been the policy of the United States to refuse espousal of claims on that ground, or because the payments would inure only to the pecuniary benefit of foreigners.

The Commission, as stated above, has ruled to effect that it has jurisdiction of claims continuously American up to the time when the Treaty of Berlin became effective, on 11 November 1923, even though, earlier a subsequent change of ownership, the claims should be presented to the Commission by foreigners who would be the sole beneficiaries of the awards.

The policy of the United States in the past, moreover, has been in accordance with this theory of the inconsistability of the nationality of the persons who shall pecuniarily benefit by the awards, save when that question is made material by the provisions of the Treaty under which the awards are made. On page 178 of the 5th Administrative Decision of the Commission there are cited a number of cases in which other international tribunals have made awards to persons not nationals of the nations espousing their claims. Referring to *Weller v. Venezuela (No. 31, U. S. and Venezuela Claims Commission, Convention of 1866, III, Moore's Arbitrations 2354 and IV of 3745)*, wherein the United States espoused the claim of the Venezuelan heirs of an American decedent, and wherein it was held that the claim, being American in its origin, could be presented by the

administratrix "whatever may have been her own personal status", the Commission said: "The fact that the beneficial owners of the claim were of Venezuelan nationality does not appear to have given . . . any concern". That case is thought to be peculiarly in point because the administratrix, like the assignee in this case, represented or stood in the shoes of the original creditor and sought enforcement only of his rights, wherefore it was immaterial that she herself and her co-heirs were the sole persons who would benefit by payment of the claim.

Other cases cited by the Commission in this connection (citations given on p. 178 of 5th Ad. Dec.) are the *Alsop* case, wherein, according to the statement of the Commission, the United States espoused the claim of the heirs and creditors of deceased Americans, at least some of whom were Chilenas, and obtained an award handed down by King George V of Great Britain as "Amiable Compositeur", in 1911; the *Phelps* case, wherein Great Britain, under the convention of 1871, espoused the claim of an American assignee in bankruptcy of an English bankrupt, and obtained an award; and the *Donald* case, wherein France, under the French-Venezuelan convention of 1902, espoused the claim of the Venezuelan heirs of a deceased Frenchman, and obtained an award.

The Alabama Claims cases also are in point to show that, in the past, it has not been the policy of the United States to refuse espousal of claims which could not inure, directly or indirectly, to the pecuniary advantage of American nationals; for in those cases it was held that, under the legislation of Congress itself, reimbursement was due to foreigners whose property had been destroyed while under the protection of the American flag.

In 1872, the Geneva Arbitral Tribunal (established under the Treaty of Washington of 1871) determined that Great Britain was responsible,—because of "a want of vigilance, an inadequacy of exertion in particular cases, a mistake of law duties, and not a wanton or wilful act" (as was said later by the American "Court of Commissioners of Alabama Claims", in *Rabbell v. United*

Alabama, Case No. 2781,—for depredations on American shipping during the Civil War, by three confederate cruisers—the Alabama, the Florida, and the Shenandoah. After the award of the Tribunal for such depredations had been paid by Great Britain to the United States on 9 September 1869, in a lump sum, the Congress of the United States, by the Act of June 25, 1874 (18 Stats. 245), set up a Court of Commissioners of Alabama Claims, for the distribution of the money received from Great Britain. In Section 12 of that Act it was provided: "No claim shall be admissible or allowed by said court arising in favor of any person not entitled at the time of the loss to the protection of the United States in the premises." The court held, in many cases, that foreigners did not come within this inhibition, but that, on the contrary, as persons entitled to the protection of the United States in the premises, foreigners had a right to prosecute, before the court, claims for property losses.

In *Worth v. United States (No. 91)*, where the claimant was a Portugese, the Court said:

> "According to the provisions of the law under which this court exists we have no right to discriminate among those who were entitled to our protection in the premises. The public law of Christendom, and the municipal law of the land, declare that foreigners, whether domiciled or temporarily sojourning on our soil, or whether on the decks of our ships, trusting to the security of our flag upon the high seas, are equally entitled to our protection against a wrong from any foreign power, and equally entitled to sue for their rights in our courts. Therefore, on the ground of abstract justice and propriety, and upon the ground of legal right, we decide that foreigners, entitled to the protection of our flag in the premises, whether naturalized or not, have a right to share in the distribution of this fund."

In *Schroeder v. United States* (No. 736), the cargo of the Mariolen, captured by the Alabama on 21 December 1862, was owned by a German firm. This German claim was presented by the United States to the Geneva tribunal, and was not disputed by Great Britain, but was provided for in the lump sum award paid by Great Britain (see Hackett's "Geneva Award Acts," p. 89). When the claim was presented to the Claims Court, for an award to the German firm, the Court said:

> "Foreigners who have never resided in this country, yet who have laden their property on board American vessels, are entitled, as to such property, to protection in the premises, and may recover for its value if destroyed."

And Jewell, J., after referring to the decision in *Worth v. United States* (supra) as stating "a great principle for which our government has contended from its origin," said:

> "Since that decision, which was pronounced at a very early period in the sittings of the court, a large number of claims have been passed upon in which the claimants were persons of foreign birth, not naturalized, and in every case the court has entered judgment in their favor, . . . except in the cases of native-born subjects of Great Britain.
>
> "An examination of the judgments heretofore entered will show a very large number of cases of this sort, in no one of which was the question of the domicile of the claimant at the time of the loss made a subject of discussion."

The reason for excepting native-born subjects of Great Britain was stated in the opinion of Rayner, J.:

> "Congress meant to say, . . . you shall have regard to the power against whose protection is claimed. If a claimant who either in his person or his property might otherwise have been entitled to our protection, was a native-born subject of England, through whose negligence these losses occurred, you will not grant him redress. We did not engage to protect him as against the acts of his own government, even though as against all the rest of the world he was entitled to and would receive protection."

The Ultimate Situation.

The ultimate situation with respect to the present claims, when stripped of technicalities and the refinements of argument, is extremely simple. It is alleged that Germany, while at peace with the United States, ordered and violently effected the destruction of American property, on American soil. If this be so, it is impossible that Germany can, or that under the provisions of the Treaty of Berlin it was intended that Germany should, be enabled to avoid liability for this affront to the sovereignty of the United States. The offence is not mitigated, but rather increased, by the circumstance that, in some instances, underwriters of a foreign nation friendly to the United States, doing business at the time within the United States and under its protection, had insured the American nationals whose property was destroyed.

Respectfully submitted,

RICHARD R. MONTAGUE,
Attorneys for the Claimants.

February 15th, 1928.