

EISENBACH BROTHERS AND COMPANY (UNITED STATES) *v.*
GERMANY

(May 13, 1925, pp. 269-272; Certificate of Disagreement by the National Commissioners, May 12, 1925, p. 267; Opinion of German Commissioner, April 20, 1925, pp. 268-269.)

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 Harry Eisenbach et al., Docket No. 5257, and accordingly, on their respective oral opinions and on the written memorandum of the German Commissioner dated April 20, 1925, they hereby certify to the Umpire for decision the question of the jurisdiction of this Commission over this claim.

The National Commissioners have agreed that in case the Umpire decides that Germany is financially liable for this claim under the terms of the Treaty of Berlin damages should be awarded to the amount of fifteen thousand two hundred fifty dollars (\$15,250.00), the invoice value of the property lost, together with interest thereon from December 1, 1919, the date of the loss, until the date of payment at the rate of five per cent per annum.

Done at Washington May 12, 1925.

Chandler P. ANDERSON
American Commissioner

W. KIESELBACH
German Commissioner

Opinion of Dr. Kiesselbach, the German Commissioner

Claimants were owners of one case and two bales of raw furs shipped to Germany on the Steamship *Kerwood*. On December 1, 1919, the *Kerwood* came in contact with a mine in the North Sea, planted by either the German Government or one of the Allied Powers. The ship and its cargo were destroyed.

The question is whether Germany is liable for this loss under the provisions of the Treaty of Berlin.

As the mine had been planted before the Armistice (November 11, 1918), and as Germany is liable for all damage directly in consequence of hostilities or of any operations of war caused by the act of *any* belligerent power (see clause 9 of Annex I following Article 244 and Administrative Decision No. I under (B) (3) (a)), and as the planting of the mine was an act of hostility or an operation of war, I consider it immaterial whether the mine was planted by the German Government or by the Allied Powers.

The only point at issue is whether the destruction of the *Kerwood* and its cargo through the contact with that mine is a "damage *directly* in consequence of" the act of *planting* the mine.

In deciding that point it must be borne in mind that the accident happened on December 1, 1919, that is, more than a year after the Armistice.

Now, as the German Agent justly argues, under the provisions of the Armistice Germany was prevented not only from the upkeep of her mine fields in order to make navigation outside the fields safe but also from sweeping the fields and from taking steps to protect shipping in the North Sea against floating mines either German or British or French.

It was left to the absolute discretion of the Allied Powers to protect the navigation in the North Sea and to control and clear the waters when and how they saw fit.

Germany was expressly forbidden to use the few ships left her on the high seas and any German ship found there was subject to capture.

Under those particular circumstances it is the interference of the Allied Powers, in that they prevented Germany from either sweeping the mine fields or keeping them in such order that the mines could not get afloat, which brought about the perilous conditions in the North Sea one year after the cessation of hostilities and which caused the accident.

A man who is forcibly prevented from closing a knife opened by him cannot be liable for a damage caused through such knife to him who prevented the closing. And the Allied and Associated Powers certainly did not intend to make Germany liable for the consequences of an act which they had expressly forbidden Germany to redress.

A loss caused under such circumstances cannot be "clearly, unmistakably, and definitely traced, link by link, to Germany's act" (Administrative Decision No. II, page 13),^a and therefore said mine explosion was not a direct consequence of an act of hostility or an operation of war.

For this reason the claim should be dismissed.

W. KIESELBACH

April 20, 1925.

Decision

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

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

From the Agreed Statement of the American and German Agents and the record herein it appears:

Harry Eisenbach and Alfred Eisenbach, composing the copartnership of Eisenbach Brothers and Company, long prior to the war were naturalized as citizens of the United States and have since remained such. On or about October 31, 1919, this firm shipped by the American Steamship *Kerwood* on consignment to their agent in Leipzig, Germany, one case and two bales of raw furs, invoiced at and of the reasonable market value of \$15,250. On December 1, 1919, the *Kerwood* and her cargo, including the shipment of furs belonging to claimants, were destroyed by the ship's coming in contact with a submarine mine, the location of which was not known and could not, in the exercise of reasonable diligence, have been discovered by her navigator, officers, and crew. The mine in question was planted during the war and prior to November 11, 1918, either by Germany or by one of the opposing group of belligerents. The claimants carried marine insurance covering the entire value of the shipment of furs, but this insurance did not cover mine risks. The

^a *Note by the Secretariat*, this volume. pp. 29-30 *supra*.

shipment was not covered by war-risk insurance and the claimants have not been reimbursed or in any way indemnified in whole or in part for its loss.

The damage for which claim is here made was suffered by American nationals during the period of belligerency. The sole question presented, therefore, is, Was the planting of the mine by a belligerent power during the war period and prior to the Armistice the proximate cause of the sinking of the *Kerwood* on December 1, 1919, and was her sinking a "damage directly in consequence of hostilities or of any operations of war" within the meaning of that phrase as used in paragraph 9 of Annex I to Section I of Part VIII of the Treaty of Versailles, which constitutes a part of the Treaty of Berlin, and on which is based paragraph (B) (3) (a) of this Commission's Administrative Decision No. I, in part defining Germany's liability under the last-named Treaty?

If this question be answered in the affirmative, then, under that Treaty, Germany is obligated to make compensation for the damage suffered by claimants irrespective of which group of belligerents or what belligerent planted the mine. If the question be answered in the negative, then, under the Treaty, Germany is not obligated to make such compensation.

The German Agent contends that a negative answer must be given to this question. (1) because the Armistice Agreement of November 11, 1918, provided for "Immediate cessation of all hostilities at sea", hence no act occurring thereafter can be considered as an act of hostility or an operation of war, and also (2) because the immediate and proximate cause of the sinking of the *Kerwood* was the failure of the Allied Powers to sweep the mine fields clear of mines, which task, following the Armistice, was undertaken by them.

Under the Treaty of Berlin Germany is obligated to make compensation for "all damages suffered by American nationals during the period of belligerency caused by *any belligerent*" and which was "directly in consequence of hostilities or of any operations of war in respect of all property (with the exception of naval and military works or materials) wherever situated" (paragraph (B) (3) (a), Administrative Decision No. I). This is a fixed contract obligation of Germany and in no wise dependent on the quality, the legality, or the illegality of the act causing the damage or the existence or lack of existence at the time of the particular damage of an intent to cause it. The mine was planted by a belligerent during the period of belligerency for the purpose of destroying shipping. Planting the mine was an act of hostility and an operation of war. At the time it was planted the mine was impressed with a hostile and belligerent character. The signing of the Armistice and the change in the hostile attitude and intent of the belligerents did not change the hostile character of the mine or the nature of the cause of the damage suffered by claimants. The act of a belligerent in planting it, while remote in time from the damage which it caused, is not remote in natural and normal sequence. On the contrary, the mine effectively performed the very function it was intended to perform—the destruction of shipping—and the change in the attitude of the belligerents, as expressed in the Armistice Agreement, which provided for the "Immediate cessation of all hostilities at sea", did not and could not operate on the mine to prevent its performing this hostile function. The damage wrought was directly attributable to the hostile act of planting the mine and was directly in consequence of hostilities within the meaning of the Treaty of Berlin.

But the German Agent contends that the immediate and proximate cause of the sinking of the *Kerwood* more than one year after the signing of the Armistice was the failure of the Allied Powers effectively to perform the task undertaken by them to sweep the mine fields clear of mines. He insists that

under the provisions of the Armistice Germany was required to deliver up to the Allied Powers most of her shipping and was deprived both of the facilities and the privilege of removing mines which were a menace to shipping, and hence Germany should not be held liable for the damage resulting from such failure. But the record is barren of proof of any act or omission on the part of the Allied Powers or anyone else calculated in legal contemplation to break the causal connection between the hostile act of planting the mine and the damage here complained of. It may be that cases will be presented in which such causal connection has been broken through negligence on the part of the one suffering the damage or his agents, or by some other intervening cause, which in turn constitutes the proximate cause of the damage. If there be any such cases pending before this Commission the facts should be fully developed and presented on submission. But this is not such a case. As the damage here complained of was suffered by American nationals during the period of belligerency and was directly in consequence of hostilities, Germany is obligated to make compensation therefor.

The Commission decrees that under the Treaty of Berlin of August 25, 1921, and in accordance with its terms the Government of Germany is obligated to pay to the Government of the United States on behalf of Harry Eisenbach and Alfred Eisenbach, composing the copartnership of Eisenbach Brothers and Company, the sum of fifteen thousand two hundred fifty dollars (\$15,250.00), with interest thereon at the rate of five per cent per annum from December 1, 1919.

Done at Washington May 13, 1925.

Edwin B. PARKER
Umpire
