

WINTHROP C. NEILSON (UNITED STATES) *v.* GERMANY

(April 21, 1926, pp. 670-674.)

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

The claim is put forward on behalf of Winthrop C. Neilson, an American national, who is alleged to have been the owner of the American Steamship *Mohegan*, which he claims was damaged while escaping from a German submarine off the coast of Virginia on August 6, 1918. From the record it appears, however, that only the naked legal title to this ship was in Neilson, who held it for and in the interest of the Republic Mining & Manufacturing Company, an American corporation, of which Neilson is president, the entire capital stock of which is, and in 1918 was, owned by the Aluminum Company of America. In view of the disposition which will be made of this case, this variance between the allegations and the proof as to the true ownership of the vessel is not material.

From the record as now presented, including the evidence filed on April 15, 1926, it appears that the *Mohegan* was a wooden vessel originally built in Michigan in 1894, rebuilt in 1917, and brought down from the Great Lakes and placed in the South American trade. On August 6, 1918, the *Mohegan*, while on her fifth voyage for claimant, bound from New York for Paramaribo, Dutch Guiana, heard firing not far from Diamond Shoals Lightship at 2.25 o'clock p. m. At 2.30 p. m. the *Mohegan* saw a steamer in ballast running toward the light vessel, which was about eight miles distant. The officers of the *Mohegan* then saw flashes from the submarine's guns but the outline of the submarine was very indistinct. The master of the *Mohegan* turned the ship instantly and increased her speed to the limit, starting for Cape Hatteras

and getting as close to the shoals as possible, intending to beach his ship rather than abandon her. About 2.45 p. m. the steamer in ballast which had been attacked by the submarine blew up and disappeared. Immediately thereafter two shells struck close to the *Mohegan*; about 15 shells were sent after her, the last about 3.10 p. m. The submarine could then be seen about three or four miles astern, pushing a great wake ahead of her. The *Mohegan* was then getting into shoal water, and the submarine evidently concluded that it could not safely pursue her farther. The *Mohegan* turned back and put into Norfolk, where temporary repairs were made by her crew; on the fourth day she resumed the voyage to Paramaribo, where the crew made other minor repairs; and she reached New York again in October, 1918.

The claim is made that in escaping from the submarine, which the record identifies as German Submarine U-140, it was necessary for the *Mohegan* to increase the speed of her engines from 64 revolutions per minute with a steam pressure of 135 pounds to 95 revolutions per minute with a steam pressure far beyond the point of safety and that as a result of the strain to which the engines, boilers, and in fact the whole vessel were subjected she was greatly damaged, her seaworthiness impaired, and her market value greatly reduced, to the claimant's damage in the sum of \$65,889.87.

The German Agent contends that the damage complained of can not be attributed to Germany's act as the proximate cause and hence that under the Treaty of Berlin, as heretofore construed by this Commission, Germany is not obligated to make compensation for such damage.

This contention is rejected. If the allegations with respect to damage are true, then the damage was a direct result of the act of the German U-boat in attacking the *Mohegan*. The fact that the U-boat failed to overhaul and destroy the *Mohegan* is immaterial. It is obvious that the master of the *Mohegan* exercised good judgment in running away in an attempt to save his ship, which proved successful, even though she may have been damaged in the attempt. Had one of the shells struck and damaged the *Mohegan*, it would not be contended that this damage did not result from Germany's act. By the same token, whatever damage the *Mohegan* sustained through strain in escaping from the pursuit of the German U-boat under a running fire of shells is clearly attributable to Germany's act.

The question remains, To what extent, if at all, was the *Mohegan* damaged in escaping from the German submarine?

The evidence first submitted on this issue was meager and unsatisfactory. The claim is made that the condition of the ship resulting from the strain imposed in escaping from the submarine was such as to necessitate extensive repairs and rather than incur these expenses the owner sold her in the latter part of 1918 for \$150,000.00. The difference between the selling price and the book value of the vessel prior to the damage complained of is the principal amount claimed. Obviously this does not meet any accepted rule for measuring damages. At the time of the sale of the *Mohegan* by the claimant, shortly after the signing of the Armistice, wooden ships, especially those of the age of this one, not equipped for trans-Atlantic service, were not in great demand. Her sale for \$150,000.00 does not in itself imply that she was in a damaged condition.

There was submitted, however, the report of a survey made by Cox & Stevens under date of October 25, 1918, reciting that "the vessel is not in seaworthy condition, and could not be put in such shape without very considerable expense, if at all". There has lately been submitted a recent affidavit of Irving Cox, of the firm of Cox & Stevens, giving an estimate of the cost of placing the vessel in a seaworthy condition and expressing the opinion as an

expert that the condition of the vessel in October, 1918, might to a material extent be due to strains incurred while escaping from the submarine. There is also in the record a statement from one Peter Baumer, a lawyer, that "After the vessel returned to New York a survey was held, and it was found that it would cost more than \$50,000 to put the vessel in the same condition she was in before she was chased by the submarine, and that it would take more than two months to make the said repairs." The record is significantly silent with respect to the name and address of the individual making this survey and the report thereof is not in the record and its absence is unaccounted for.

It does not appear that the claimant made any material repairs to the *Mohegan* between August 6, 1918 (the date of her encounter with the submarine), and the date of her sale by him; nor does it appear that the Northland Navigation Company, Incorporated, the purchaser of this vessel from the claimant, made any substantial repairs to her subsequent to her purchase and prior to her sailing from New York on her last voyage. She was placed by her purchaser in the South American trade and on her first voyage out of New York was burned in the harbor of Rio de Janeiro in August, 1919, becoming a total loss. At the time of her loss she was insured, and her owners became involved in litigation over this insurance in the courts of New York (see *Northland Navigation Company, Inc., v. American Merchant Marine Insurance Company of New York* (1925), 214 N. Y. App. Div. 571). The evidence taken in that litigation throws a flood of light on the condition of the *Mohegan* following her escape from the German submarine. Her master testified that when the ship left New York she was "to all appearances in first-class condition"; that after the ship sailed from New York for Rio de Janeiro she encountered heavy weather and as a result sprung a leak and was compelled to put in to Paramaribo for repairs. The chief engineer, who was also chief engineer at the time of the *Mohegan's* encounter with the German submarine, testified that when near Trinidad the ship ran into a hurricane and turned about and went with the weather for something like 36 or 37 hours. In his testimony he referred to the ship's experience with the German submarine as follows: "When we came down to the Virginia Capes, a German submarine chased us, and we got back into Newport News again. \* \* \* We laid in there something like six or seven days, until the coast was clear, and then we started off again". There is not a suggestion here that the ship suffered any damage as a result of her encounter with the submarine.

John W. Brewster, a marine surveyor and appraiser of New York, testified to having made a survey of this vessel on December 11, 1918, prior to her sale by the present claimant, and to having found her "in A-1 condition for a ship of her age, and she did not show any strain". He stated unequivocally that she was then in a seaworthy condition.

The marine protest made by the master and signed also by the first officer, the chief engineer, and the boatswain, before the American Consular Agent at Paramaribo on February 24, 1919, when she was on her last voyage, recites that when she sailed from New York "the said ship was then tight, staunch, and strong" and so forth. A similar recital is found in the marine protest made before the United States Consul at Rio de Janeiro.

After carefully weighing all of the testimony presented, the Umpire decides that the claimant has failed to discharge the burden resting upon him to prove that the *Mohegan* sustained any damage from the attempt to escape from the German submarine on August 6, 1918.

Wherefore the Commission decrees that the Government of Germany is not obligated to pay to the Government of the United States any amount on behalf of Winthrop C. Neilson, the claimant herein, or on behalf of the

Republic Mining and Manufacturing Company, for whose account and benefit he held title to the *Mohegan*, because of the damages alleged to have been sustained by the *Mohegan*.

Done at Washington April 21, 1926.

Edwin B. PARKER  
*Umpire*

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