ARTHUR SEWALL AND COMPANY *ET AL.* (UNITED STATES) *v.* GERMANY

(April 21, 1926, pp. 681-685; Certificate of Disagreement by the National Commissioners, February 17, 1926, pp. 674-681.)

Certificate of disagreement by the National Commissioners

The Agent of the United States and the Agent of Germany have submitted to the Commission for its determination the claim in this case for loss of freight in the sum of $39,759.54, and the American Commissioner and the German Commissioner, having been unable to agree on the question of the liability of Germany for this loss or any part of it under the Treaty of Berlin, hereby certify that question to the Umpire for decision.

The facts upon which this question arises are briefly as follows:

On November 19, 1925, the Agents of the two Governments joined in a request to the Commission which reads as follows:

"The Agent of the United States and the Agent of Germany respectfully request that the Honorable Commission reconsider the award entered under date of October 30, 1925, in the amount of $91,450.00, with interest thereon at the rate of five per cent per annum from January 27, 1915, in a claim of the United States of America on behalf of Arthur Sewall and Company, a co-partnership, individually

and as attorneys in fact for the remaining claimants, v. Germany, Docket No. 6070, List No. 11,113, in order that the Commission may determine whether the Government of Germany is liable for the additional sum of $39,759.54, for loss to the claimants of freight monies, the payment of which was controlled by the terms of an existing charter party.

"The award entered as of October 30, 1925, was premised upon an agreed statement presented to the Commission, in which there was set forth only the facts relating to the loss of the Ship *William P. Frye*, but did not present to the Commission the facts relating to the claim for the loss of the freight monies claimed."

It appears from the agreed statement of facts submitted by the two Agents that:

"The claimants had executed a charter party dated October 13, 1914, for a voyage from Tacoma or Seattle, in the State of Washington, to a port in England, with a cargo of wheat, which in part provided as follows: i.e. 'Freight payable in cash without discount, on true and faithful delivery of cargo at port of discharge per ton of 2,240 lbs., English gross weight delivered.'

"There was loaded upon the ship *William P. Frye* a cargo of approximately 5,034 tons of wheat which, upon completion of the voyage, would have secured to the claimants the payment of $39,759.54 as freight monies".

It further appears from the record in this case and from the agreed statement of facts that the ship *William P. Frye* sailed from Seattle in the State of Washington on or about the 4th day of November, 1914, and that:

"On or about the 27th day of January, 1915, the *William P. Frye*, while proceeding upon a private, peaceful, commercial voyage, and when approximately in Latitude 29° 53′ S., Longitude 26° 47′ W., she was sunk by a cruiser of the German Navy and became a total loss."

The German Government admits liability for the fair market value of the *William P. Frye* at the date of loss. The award of the Commission in this case, entered October 30, 1925, is based on a valuation of $150,000.00 as the "fair market value of the *William P. Frye*, at the date of loss", but in making that award as stated in the above-quoted joint request of the two Agents the Commission did not have before it the present claim and it was not taken into consideration by the Agents in presenting their agreed statement of facts nor by the Commission in making its award.

On the facts above stated, the German Commissioner is of the opinion that this additional claim must be dismissed because he considers that Administrative Decision No. VII applies to it and that under that decision Germany is not liable for freight charges which were not due, as in this case, until the arrival of the vessel at the port of destination and therefore not due at the time the vessel was sunk.

In support of this contention the German Commissioner points out that one of the questions certified to the Umpire on May 12, 1925, by the two National Commissioners and which was decided by the Umpire in Administrative Decision No. VII is whether or not Germany is liable under the Treaty of Berlin for "claims for loss of *earnings* or *profits* of persons or *property* and for loss or damage in respect of intangible property".

The German Commissioner further points out that this question was decided by the Umpire adversely to the present claim, as appears from the following extracts from Administrative Decision No. VII:

" * * * The Umpire further decides that, save in certain excepted cases, the provisions of the Treaty of Berlin dealing with damage to property are limited to physical or material damage to tangible things." (Page 308.)[a]

[a] *Note by the Secretariat*, this volume, p. 228 *supra*.

" * * * This does not change the rule that so far as Germany is concerned her obligation is limited to making compensation for the tangible property destroyed—the ship—and that such compensation is measured by the reasonable market value of the ship at the time and place of its destruction plus interest thereon computed in accordance with the rules announced in Administrative Decision No. III." (Page 337.)[b]

"Germany is not obligated to pay on behalf of the owner of a destroyed ship—
* * *

"*(e)* the amount he would have earned *under pending contracts* of affreightment, or under an existing charter-party, which amount represents prospective profits lost to him by the destruction of the ship". (Page 344.)[c]

The German Commissioner further states that although he concurs with the Umpire's decision that in determining the market value of a ship its "earning power and the then value of [its] use" has to be taken into account, he cannot concur with the American Commissioner that the item of a specific charter, as such, can have a bearing on the ship's valuation. He further does not admit that a distinction should be drawn between a case where the ship chartered and lost has started on the voyage and a case where such a start has not been made. In both cases the freight is not earned until after the full and final completion of the voyage, subject of course to an agreement of the parties altering this rule. Both cases, therefore, in the German Commissioner's opinion are covered by the Umpire's decision that "In arriving at the market value of the whole ship, it is *a free ship* that is valued, and no account is taken of the independent market value *of any charter* that may exist thereon" (page 337),[d] and that the "amount of Germany's obligations * * * is *not affected by the existence of a charter* or charters" (page 338).[e]

The German Commissioner points out that under the law of all civilized nations, and especially under American law as laid down by the Supreme Court of the United States, "the net freight pending at the time of the collision" (see Mr. Justice Brown in the *Iberia* case, cited at page 53 of the American Brief in the claim on behalf of the West India Steamship Co., Docket No. 24) does not constitute an item to be taken into account in determining the *market value* of the ship, but is an independent item to be compensated for *besides* the value of the ship, that is, besides the material damage as such (see the decisions cited at page 40 of the American Brief).

The German Commissioner, referring to his Opinion dealing with claims for loss of earnings or profits, etc , Decisions and Opinions, pages 292-93,[f] therefore, argues that, since under the provisions of the Treaty of Berlin and under Administrative Decision No. VII Germany's liability is *restricted* to the material damage, the pending net freight could not be added to the value of the ship.

The American Commissioner, on the other hand, is of the opinion that the question here presented is not a question of prospective earnings or profits, but merely a question of the measure of damages to be applied in ascertaining the market value of the *William P. Frye* at the time she was sunk, for which Germany's liability under the Treaty of Berlin is admitted, and the American Commissioner is further of the opinion that this question of the measure of damages is not one of the questions certified for the decision of the Umpire in Administrative Decision No. VII.

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[b] *Note by the Secretariat*, this volume, p. 246 *supra*.
[c] *Note by the Secretariat*, this volume, p. 251 *supra*.
[d] *Note by the Secretariat*, this volume, p. 247 *supra*.
[e] *Note by the Secretariat*, this volume, p. 247 *supra*.
[f] *Note by the Secretariat*, this volume, pp. 217-218 *supra*.

Furthermore, even if Administrative Decision No. VII should be applied in this case, the opinion expressed by the Umpire in that decision supports the contention of the American Commissioner in this case.

The Umpire stated in that decision:

"The Umpire decides that, save in certain excepted cases, Germany is not obligated under the Treaty of Berlin to make compensation for loss by American nationals (1) of prospective personal earnings as such or (2) of prospective profits as such growing out of the destruction of property, but holds that the earning power and the then value of the use of the property destroyed may be taken into account with numerous other factors in determining the reasonable market value of such property at the time and place of destruction, which value, with interest thereon as heretofore prescribed by this Commission, is the measure of Germany's liability." (Page 308.)[g]

As above stated, the present question does not concern prospective profits or earnings, but merely the market value of the property destroyed—the *William P. Frye*—at the time and place of destruction. The American Commissioner's contention is that although the freight charges for the *William P. Frye* cargo were not payable under the charter until delivery at the port of destination, nevertheless a substantial part of the charges had been earned before the vessel was sunk, consequently, if the vessel had been sold the day before she was sunk, the proportion of the freight charges earned up to that time would have been added to the hull value of the vessel in fixing the purchase price, and accordingly should be now added in determining the market value of the vessel.

As stated by the Umpire in the extract above quoted from Administrative Decision No. VII:

"... the earning power and the then value of the use of the property destroyed may be taken into account with numerous other factors in determining the reasonable market value of such property at the time and place of destruction", etc.

The point is well illustrated by the custom which prevails both in Germany and in the United States of adding interest earned up to the date of purchase in fixing the market value of a bond, although under the bond contract itself the interest so earned is not due and payable until a later date.

In other words, in determining the market value of a bond, the market value of the current coupon attached to it must be included and the market value of the current coupon is always the proportion of the interest on the bond which has already been earned during the period covered by the coupon, although such interest is not payable until the end of that period.

In the present case the *William P. Frye* had earned at the time she was sunk the proportion of the freight charges which the distance traveled from Seattle, Washington, around Cape Horn to the place where she was sunk, bears to the total distance from Seattle to her port of destination. The American Commissioner is, accordingly, of the opinion that this proportionate part, which can be ascertained by computation, should be awarded to these claimants.

The American Commissioner is also of the opinion that a proportionate part of this claim should be sustained to the amount above indicated, because the freight earned up to the time the vessel was sunk represented a part ownership in the cargo by the owners of the vessel by reason of the lien

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[g] *Note by the Secretariat*, this volume, pp. 227-228 *supra*.

which was created and attached to the cargo upon the execution of the charter party and the issuance of the bills of lading.

Under the terms of the charter party possession of the cargo was not obtainable by anyone except and until payment had been made to the master —the agent of the owners—of the charter hire. This stipulation, as well as the maritime law, gave to the shipowners a lien upon the cargo, and thereby an interest in tangible property. Such property having been destroyed by an act of the German Government, the claimants have suffered a loss of property, which is measured by the rule above suggested.

The German Commissioner does not admit that a lien of the carrier was created and attached to the cargo already upon the execution of the charter party and the issuance of the bill of lading. The existence of a lien is premised upon the existence of a claim for freight. Under charter contracts of the character here under consideration freight is not earned step by step according to the performance of the voyage but solely and exclusively upon the completion of the transport. There existed, therefore, at the time of loss neither a claim for freight nor, consequently, a lien.

The German Commissioner further denies that, assuming that a lien existed at the time of loss, such lien would represent a part ownership in the cargo. Says Carver (Carriage of Goods by Sea, Sixth Edition, page 866): "[The lien] does not give the shipowner any property in the goods."

The opinion of the American Commissioner is, moreover, at variance with the leading idea of Administrative Decision No. VII. Under this decision the charterer's right to use the chartered vessel constitutes an asset (or a liability) chiefly through "the relation of the stipulated hire to the current market hire". Applying this principle, the carrier would have a recoverable asset in the cargo only if and to the extent he can show that the stipulated freight was below the current market rate.

Besides, recovery for freight as advised by the American Commissioner would operate to reintroduce the principle of compensation for loss of profit, which is expressly excluded by the Treaty as interpreted in Administrative Decision No. VII.

Compensation awarded for the reason of the loss of lien attached to a cargo would, finally, be wholly inconsistent with the practice of the Commission in cargo cases. A large number of American-owned cargoes were lost on board of foreign vessels. Under the American Commissioner's theory the claim for freight of the foreign carrier would constitute a part ownership in the cargo and would work a reduction of the value of the American interest therein. Nevertheless, the Commission has consistently awarded the full market value of the cargoes as of the time and place of loss, totally disregarding a possible alien interest.

Finally, the German Commissioner calls attention to the Commission's award on behalf of John W. deKay and Shaun Kelly as executors of the estate of Edmond Kelly, deceased, Docket No. 496, where, notwithstanding a lien of $40,000 held by the vendor, the American citizen John W. deKay, the formal award was to the full amount for the owner of the property only.

As to this point the American Commissioner points out that the award on behalf of deKay was subject to the payment of the vendor's lien out of the amount awarded.

In certifying this question to the Umpire for decision, the National Commissioners agree that, whatever the decision of the Umpire, it is unnecessary to reopen the award entered under date of October 30, 1925, but if the Umpire should decide that Germany is liable for all or any part of the present claim

then a supplemental award should be entered in favor of the claimants for the amount fixed by the Umpire's decision.

Done at Washington February 17, 1926.

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 facts as disclosed by the record follow:

The claimants herein, all American nationals, were the owners of the *William P. Frye*, a steel, four-masted, square-rigged sailing ship duly licensed under the laws of the United States and registered at the port of Bath, Maine. On October 13, 1914, the owners of that ship entered into a contract of affreightment for the carriage of a cargo of wheat from Tacoma and/or Seattle, in the State of Washington, obligating them to proceed to Queenstown, Falmouth, or Plymouth "for orders * * * to discharge at a safe port in the United Kingdom * * * and there deliver the same and be paid freight, as herein provided". The charterparty further stipulated for the payment of freight to the claimants "in cash without discount, on true and faithful delivery of cargo at port of discharge". The cargo was loaded in accordance with the charterparty, the vessel cleared from Seattle November 4, 1914, and the voyage was more than one-half completed when, on January 27, 1915, the vessel with her cargo was captured and on the following morning sunk by the Cruiser *Prinz Eitel Friedrich* of the German Navy in the South Atlantic Ocean. Claimants received indemnification from American insurers under five war-risk insurance policies on the hull in amounts aggregating $58,550.00 and also received from a Canadian insurer $10,000.00 under a war-risk insurance policy as indemnity for the loss of freight.

On September 11, 1925, the American and German Agents filed with the Commission an agreed statement of facts, in which it was recited that "The fair market value of the *William P. Frye*, at the date of loss, was the sum of $150,000.00, and the claimants have therefore suffered a loss in the sum of $91,450.00", being the agreed fair market value of the vessel lost less the $58,550.00 which the war-risk insurers paid to claimants for the loss of the hull. On this agreed statement the National Commissioners on October 30, 1925, entered an award on behalf of the claimants in the sum of $91,450.00 with interest thereon at the rate of five per cent per annum from the date of the loss to the date of payment.

Thereafter, on November 19, 1925, the American and German Agents joined in a motion requesting this Commission to reconsider that award

> "... in order that the Commission may determine whether the Government of Germany is liable for the additional sum of $39,759.54, for loss to the claimants of freight monies, the payment of which was controlled by the terms of an existing charter party."

This motion was accompanied by a corrected agreed statement of the two Agents reciting that—

"There was loaded upon the ship *William P. Frye* a cargo of approximately 5,034 tons of wheat which, upon completion of the voyage, would have secured to the claimants, the payment of $39,759.54 as freight monies."

"The Agent of the United States and the Agent of Germany submit to the Commission for its determination, the claim for loss of freight in the sum of $39,759.54."

From that sum the $10,000 received from the Canadian insurer must be deducted.

In certifying to the Umpire for decision the question thus put by the two Agents, the National Commissioners stated that they have "been unable to agree on the question of the liability of Germany for this loss or any part of it under the Treaty of Berlin".

For the reasons fully set forth in Administrative Decision No. VII, this Commission has held that under the Treaty of Berlin Germany's liability arising out of the destruction of ships and their cargoes is limited to physical or material damage to tangible things and does not extend to consequential damages growing out of the frustration of contract obligations resulting from such destruction. In the case here presented the only tangible things destroyed by Germany's act were *(a)* the ship, its equipment and stores, all owned by claimants and for which an award equal to their fair market value as stipulated by the Agents has already been entered on claimants' behalf, and *(b)* the cargo of wheat, which was British-owned and for which no claim is here presented.

It is urged that the claimants were by Germany's act in destroying the ship deprived of their right to continue with the voyage and thus completely to earn the freight money due them only on the completion of the voyage and delivery of the cargo. The argument advanced and the authorities cited by the counsel for both parties are interesting and would be pertinent if Germany's liability had to be determined either by rules of municipal law obtaining in the jurisdiction of the cases cited or by rules of international law in the absence of a treaty fixing the basis of liability. But, as has been repeatedly pointed out, Germany's obligations are fixed by the Treaty provisions without regard to the legality or illegality or the other qualities of the act resulting in the damage complained of. After very mature and painstaking consideration, this Commission has held that under the terms of the Treaty of Berlin, Germany's liability in a case of this nature is limited to the reasonable market value of the tangible property destroyed at the time and place of destruction with interest thereon.

But it is contended that the claimants (American nationals) had a lien on the cargo (which was impressed with the British nationality of its owners) for their freight money and that this claim was a property interest in the cargo itself, for the destruction of which the claimants can recover under the rule announced in Administrative Decision No. VII.

While there is no doubt that as between claimants and the owner of the cargo the former had a right to retain possession of the cargo pending the completion of the voyage and the payment of the freight, this was the extent of the claimants' rights. Under the express terms of the contract the freight was not earned or payable *pro rata itineris*. There never was a time when the claimants could demand the payment of the freight or any part of it. The contract was an entire contract under the terms of which the freight was to be earned and paid only on delivery of the cargo at destination.

The so-called lien for freight amounts to nothing more nor less than a right to hold the cargo until the freight *when earned* shall have been paid. Until so earned the lien to secure its payment does not mature. Such lien attaches only while the cargo remains in the possession of the shipowner. When it passes out of the shipowner's possession the lien does not follow the cargo, or inhere in it, or remain a charge upon it.

While, therefore, at the time the cargo involved in this case was destroyed, the claimants under their contract of affreightment had a right to possess it for the purpose of performing their contract and to collect the freight due thereunder, if, and when, that performance should be completed, further than this their interest in the cargo did not extend. The contract was frustrated by the destruction of the cargo. The freight was never earned and the lien to secure its payment never matured.

It is further contended on behalf of the claimants that in destroying the ship and the cargo Germany in effect stepped into the shoes of the cargo owner and accepted full delivery of the cargo at the place of destruction, and hence became liable to the claimants for the full amount of the freight stipulated for in the contract. Here again the rules for determining Germany's liability laid down in the Treaty of Berlin are lost sight of in an effort to apply rules prescribed by municipal law. Under the terms of the Treaty there is no room for the legal fiction that Germany accepted delivery of the cargo which she destroyed or that she assumed *cum onere* the contract which was frustrated by her act. Her liability is fixed by the terms of the Treaty as applied to the actual facts, not to legal fictions, and the facts are that Germany destroyed the cargo upon which the claimants' lien never matured and frustrated the contract which was never performed. The sole question presented is, Was Germany's act in destroying the British-owned cargo, which resulted in frustrating the claimants' contract to carry and deliver it to destination, a damage for which Germany is liable under the Treaty of Berlin? For the reasons pointed out in Administrative Decision No. VII this question must be answered in the negative.

Wherefore, as the American and German Agents have agreed that, measuring the damages suffered by claimants resulting from the act of Germany in sinking the *William P. Frye* on the basis of the fair market value of that vessel on the date of her destruction, the claimants herein have suffered damages in the sum of $91,450.00 and no more, and as the National Commissioners on October 30, 1925, entered an award herein on behalf of the claimants for that amount with interest thereon at the rate of five per cent per annum from the date of the loss to the date of payment, the Commission decrees that the said award be, and it is hereby, in all things confirmed; and the Commission further decrees that the Government of Germany is not obligated to pay to the Government of the United States any further or additional amount on behalf of the claimants herein because of any loss or damage alleged to have been sustained by them connected with or growing out of the destruction of the *William P. Frye*.

Done at Washington April 21, 1926.

Edwin B. PARKER
Umpire