

HARRISS, IRBY & VOSE (UNITED STATES) *v.* GERMANY

(*August 31, 1926, pp. 822-827.*)

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

It is put forward by the United States on behalf of Harriss, Irby & Vose, claimants, a copartnership which in December, 1914, was and ever since has been composed of American nationals. An award is sought for the value of the American Steamship *Evelyn*, alleged to have been destroyed off the Dutch coast on February 19, 1915, by contact with a submerged mine planted by Germany. The *Evelyn* was an iron steamship, 32 years old at the time of loss, of 2,800 deadweight tons registered at the port of New York. She was in excellent condition and had a classification of *100 A-1 Lloyd's Register. The Agents of the United States and of Germany have agreed, confirmed by the National Commissioners, that the fair market value of this ship at the date of loss was \$210,000. At that time her owners carried war-risk insurance on her to the amount of \$100,000 which was collected in full, deducting which from the agreed market value leaves a net loss to the claimants of \$110,000.

Germany's liability is denied by the German Agent because as alleged by him (1) it is not established that the mine which destroyed the *Evelyn* was planted by Germany and (2) the planting of the mine was not the proximate cause of the loss, which he alleges was proximately caused by the intervening negligence of the claimants and/or the master and/or the pilot of the vessel.

Much testimony has been introduced and much speculation indulged in by both Agents with respect to the exact location of the *Evelyn* when sunk and the nationality of the mine or mines which worked her destruction.

Without undertaking to review this testimony in detail, the facts as disclosed by the record are briefly these:

(1) From the report of Lieutenant-Commander v. Wallenberg of the German Navy of February 23, 1915, it appears that Captain Smith, master of the *Evelyn*, was very young but skillful.

(2) This was Captain Smith's first voyage on the *Evelyn*. Before sailing from New York on January 29, 1915, with a cargo of cotton for Bremen, he made inquiries from his owner's chartering agents and others and was advised by a master of one of the Savannah Line steamers who had just returned from a trip to Germany that he had taken the course via the coast of Holland in safety.

(3) Captain Smith also sought information as to the course at the office of the German Consul in New York, who sent him to some shipping agents where he was shown a copy of instructions issued by the German Admiralty on November 4, 1914, which prescribed that "All merchant ships bound for the Eider, Elbe, Weser and Jade must first steer towards Listertief-buoy. Ships bound for the Ems must steer directly toward the Ems." and that "Ships, to insure their own safety, are obliged, after leaving the Listertief-buoy, to be piloted." A previous notice gave the "approximate position of the Listertief-buoy" as 55° 3-3/4' N. and 8° 17-1/2' E.

(4) Captain Smith testifies that he was shown and had no instructions as to what route to follow to Listertief. He says he knew there were two routes, one up the east coast of England and via the Nase of Norway, and the other via the coast of Holland. He concluded to make inquiries from time to time and get all the information and advice he could from every available source; and testifies that he had no reason to believe that the instructions of the German Admiralty were permanent but considered that conditions might change by the time he reached the English Channel.

(5) He made careful inquiry of the British boarding officer at the Downs in the English Channel, where he arrived on February 15, and was shown two routes, one up the coast of England via Farn Island, the other across the Channel to the coast of Holland. The British boarding officer declined to recommend either as the safer course but did state that most American vessels bound for Germany had gone via Holland.

(6) Captain Smith made inquiries of the masters of steamers which were in the Downs at the time bound for Germany and all of them were taking the Holland route. He states that he considered that he could get the latest and most authentic information at Rotterdam with respect to the safest route to Bremen and could there obtain a Dutch pilot to take him if not to Bremen at least to the German line. He had in mind the provisions of the German Admiralty instructions of November 4 to the effect that ships bound for the Ems must steer directly toward the Ems and considered that he would be safe off the Dutch coast as far as the German boundary line.

(7) At Rotterdam, where he arrived February 15, he made inquiries of persons in the steamship business and secured a Dutch pilot who held himself out as an experienced North Sea pilot. This pilot laid a course along the Dutch coast to Bremen and stated that several other ships had taken this route

in safety. Captain Smith determined to rely on the judgment of this pilot as far as the trip along the Dutch coast was concerned, the pilot assuring him that they were almost certain to pick up a German patrol boat off the German coast and could obtain from it definite instructions about reaching Bremen. In the light of the information he had procured from various sources he concluded that the notice to steer for Listertief-buoy was for the purpose of there securing pilots, and as he had secured what he believed to be a competent pilot he did not believe it necessary to go so far north only to lay a course due south to the mouth of the Weser.

(8) The Dutch pilot testified that he told Captain Smith that Listertief-buoy was only the steering point for ships from the north, that is, for ships taking the alternative route which Captain Smith did not take, up the east coast of England and via the Nase of Norway, but that it was not necessary for ships taking the route along the coast of Holland to go up to Listertief and then down again to the mouth of the Weser.

(9) At 4:05 a. m. on February 19, when the *Evelyn* was still off the Dutch coast and some miles west of a prolongation of the German-Dutch boundary line and the mouth of the Ems, she struck a floating mine. Captain Smith was in the pilothouse at the time, having been up all night. He at once caused the boats to be lowered and all members of the crew to take their places therein. He was just leaving with the owner's money, ship papers, and some blankets, being the last to leave the ship, when at 4:20 the second explosion came. The first explosion was right ahead, the second on the starboard side.

(10) The ship settled and shortly thereafter sank. This was in latitude 53° 50' N. longitude 6° 20' E. or about ten miles E. N. E. of the position of Borkum Lightship.

(11) The evidence strongly indicates and the Umpire finds that the *Evelyn* was destroyed by floating mines which had been torn loose from their anchorage by storms or other mishaps or from rust. The heavy storms of January and the first part of February had caused mines to be torn from their moorings.

(12) There is much confusion in the record concerning a British minefield lying a short distance north of the point where the *Evelyn* was sunk and also a German barrage lying immediately south of this point. It now appears, however, that the British mines were not planted until long after February, 1915, and the German barrage was not planted until about October 1, 1915. Manifestly the destruction of the *Evelyn* cannot be attributed to either of these minefields.

(13) Sometime prior to the loss of the *Evelyn* the German Admiralty had planted and there then existed an extensive barrage beginning at a point west of Helgoland and extending in a general southerly and southwesterly direction toward but not reaching the mouth of the Ems. This minefield was nearer than any other to the point where the *Evelyn* was destroyed. The strong probabilities are and the Umpire finds that the mines which destroyed the *Evelyn* were floating German mines that had been torn loose from their moorings.

(14) It will serve no useful purpose to detail the evidence offered by the German Agent in support of his contention that the claimants were guilty of negligence in placing in command of the *Evelyn* an inexperienced master; that the master was guilty of negligence in disregarding warnings given by Germany to the shipping world and failing to follow the route prescribed by Germany in entering the German port to which the *Evelyn* was destined and in employing at Rotterdam an inexperienced pilot; that the pilot was guilty of negligence; and that the negligence of the claimants and their agents was the intervening and proximate cause of the destruction of the ship rather than the planting of the mine or mines. There is evidence tending to support these contentions.

It seems probable that had the *Evelyn* set her course along the east coast of Great Britain and the Nase of Norway and thence via Listertief to the mouth of the Weser she would have arrived in safety. Or it may well be that had she laid a true course for Listertief of 51° from Terschelling Lightship off the Dutch coast she would have reached there in safety, and after there taking on a German pilot have landed her cargo at Bremen by this roundabout course. Certain it is that it was to the interest of Germany that the *Evelyn* and her cargo should reach her destination. Viewing the acts of the claimants and their agents in retrospect, it is easy to point out measures which they might have taken, and which they failed to take, to insure greater safety in the navigation of the ship. But for obvious reasons it was extremely difficult at that time to procure dependable information with respect to shipping conditions. There is evidence in this record suggesting that the master of the *Evelyn* was wilfully misinformed and sent into a zone of danger by the enemies of Germany. Be this as it may, the master, after making diligent inquiry from time to time, was compelled to act upon his own judgment and responsibility. The Umpire finds that the evidence falls short of establishing the contention that under all the circumstances and conditions existing at the time the claimants and their agents failed to exercise that care which a reasonably prudent man similarly situated would have exercised in manning and navigating the ship.

Therefore the Umpire holds that Germany's act in planting the mine or mines which he finds destroyed the *Evelyn* was the proximate cause of her loss.

The question discussed by counsel dealing with the legality of the act of Germany in planting mines off the Dutch coast and beyond the limits of her territorial waters is not material here. As this Commission has frequently held, Germany's liability is determined by the provisions of the Treaty of Berlin rather than by the legality or illegality of her acts as measured by rules of international law.

Based on the foregoing findings of fact and the agreement of the Agents of the United States and of Germany, confirmed by the National Commissioners, with respect to the fair market value of the Steamship *Evelyn*, 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 Harriss, Irby & Vose, the claimants herein, the sum of one hundred ten thousand dollars (\$110,000.00) with interest thereon at the rate of five per cent per annum from February 19, 1915.

Done at Washington August 31, 1926.

Edwin B. PARKER
Umpire
