

AMERICAN-HAWAIIAN STEAMSHIP COMPANY  
(UNITED STATES) *v.* GERMANY  
(September 30, 1926, pp. 843-848.)

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This case is put forward on behalf of the claimant, an American corporation, the owner of the American Steamship *Kansan*, to recover damages on two distinct counts, the first arising out of an injury to the hull of that vessel when she struck a German mine in December, 1916, and the second resulting from her destruction by a German torpedo in July, 1917.

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<sup>a</sup> References in this section are to publications referred to in the bibliography in Vol. VII, p. 7, to be augmented with Woolsey, L. H., "The Sabotage Claims against Germany", A.J.I.L., Vol. 34 (1940), pp. 23-35, and to the Annual Digest.

From the record it appears that the *Kansan* sailed from Boston on December 6, 1916, with a general cargo for St. Nazaire. On December 18, at a point about eight miles distant from St. Nazaire, she struck and was seriously damaged by a German mine. Temporary repairs were made at St. Nazaire which were completed and made permanent at New York. The vessel was again seaworthy and ready for use on June 22, 1917. The physical damage to the hull was fully covered by insurance and no claim is here made for the cost of repairs for which through such insurance the claimant has been fully reimbursed. A consequential damage suffered by the claimant was the loss of the use of the vessel for a period of 156 days and a claim is here put forward for approximately \$512,000, the amount of the alleged damage resulting therefrom.

On June 28, 1917, the *Kansan* with a general cargo sailed from the port of New York, again bound for St. Nazaire. On July 10 she was torpedoed and sunk by a German submarine off the French coast. The American and German agents have agreed that the fair market value of the *Kansan* at the time of her destruction was \$3,268,564; that the war-risk insurance received by the claimant on account of her loss was \$2,318,564; and that under the rules established by the decisions of this Commission the net amount of damage suffered by the claimant resulting from her loss is \$950,000 with interest thereon from November 11, 1918. This agreement has been confirmed by the National Commissioners as the basis of an award on this count.

There remains for consideration only the claim for the loss of the use of the vessel pending the repair of her physical injury. This clearly presents the question. Under the Treaty of Berlin is Germany liable for the loss of the use or enjoyment of property injured but not destroyed outside of German territory through an act of war? The Umpire holds that she is not. The reasons for this decision are fully developed and foreshadowed in Administrative Decision No. VII. Suffice it here to point out that (save in cases arising in German territory) the provisions of the Treaty of Berlin defining Germany's obligations to compensate for property injured or destroyed limit such obligations to physical or material damage to tangible things and do not extend them to damages in the nature of the loss of profit, the loss of use, or the loss of enjoyment of the physical property injured or destroyed. It is quite true that this treaty rule does not follow that established by the jurisprudence of England and of America to the effect that the loss of profit from or the use of a vessel pending repairs of injuries resulting from a maritime tort is a proper element of damage to be taken into account in determining the amount of the tortfeasor's liability. But the Treaty of Berlin is this Commission's charter, and its terms establish the rules which must be applied by this Commission to all cases presented to it. The exhaustive review of the American and English cases forcefully presented by able counsel in the briefs filed herein are not particularly helpful in arriving at the intention of the parties as expressed in the pertinent provisions of that Treaty. The soundness of such decisions is not questioned, and the principles they announce would be here applied 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 in the decisions of this Commission, the United States, as well as the other Allied and Associated Powers, recognized by the express terms of the Treaties that Germany's resources were inadequate to make complete reparation for all war damages, and her liability is limited to damages of the nature defined by the treaty terms, without regard to the legality or illegality or the other qualities of the acts resulting in the damages complained of. In Administrative Decision

No. VII this Commission held that the Treaty of Berlin does not place upon Germany a heavier burden with respect to damage or injury to the persons or property of American nationals than that placed upon her by the Treaty of Versailles.<sup>1</sup> The reasons leading to this conclusion were there fully set forth and it would not be profitable to repeat them here. But in arriving at the intention of the parties to the Treaty of Berlin the intention of the parties to the Treaty of Versailles in dealing with the same or similar matters, as that intention has been expressed by the Reparation Commission, the agency empowered to declare it,<sup>2</sup> may be profitably considered.

On March 4, 1921, the Reparation Commission, constituted under the provisions of the Treaty of Versailles, in an unanimous decision formally interpreting that Treaty held that while Germany was obligated to compensate for the value of property destroyed or converted, or for the cost of repairing a material injury short of destruction, where such destruction, conversion, or injury resulted from acts of Germany or her allies or directly in consequence of hostilities or of any operations of war by either group of belligerents, nevertheless Germany was not obligated to compensate for the loss of enjoyment of or profit from such property.<sup>3</sup> Applying this rule to the devastated regions of north and northeastern France, it results that Germany is not liable for the loss by the French nationals of the use of their factories and industrial plants in the "occupied territory" during the period of German occupation, or during the period of reconstruction following the Armistice, sometimes extending over several years; that Germany is not obligated to compensate for the loss of the use of their lands suffered by the French farmers in the devastated regions during the war and for the period thereafter required to bring them back to productivity through fertilization or otherwise; and that the compensation to be made by Germany for account of the landowners whose orchards, plantations, and vineyards were destroyed is limited to the cost of replanting, plus the shrinkage in value of the land after replanting as compared with its value had it not been damaged.<sup>4</sup> This rule applies to all devastated regions of France, Belgium, Italy, and elsewhere.

The shipping losses, which constitute a substantial portion of the Allied Reparation Claim against Germany, as originally prepared and presented by the maritime services of the respective Powers included damages suffered through the detention of ships from any cause. But the Reparation Commission unanimously decided (the British member of the Commission being particularly clear and emphatic in his statements in support of the decision) that Germany was not obligated to compensate for the heavy damages suffered by Allied nationals through the loss of the use and enjoyment of their vessels damaged or detained by the enemy, and by the application of this decision eliminated from the British shipping claim items aggregating in amount £46,930,000.<sup>5</sup> Items of a similar nature but for much smaller amounts embodied in the Italian, Japanese, Greek, Portuguese, and Brazilian shipping claims were by the application of this decision likewise eliminated.

<sup>1</sup> Administrative Decision No. VII, Decisions and Opinions, page 320. (*Note by the Secretariat*, Vol. VII, p. 235).

<sup>2</sup> Paragraph 13 (f) of Annex II to Section I of Part VIII of the Treaty of Versailles.

<sup>3</sup> Decision No. 998 of the Reparation Commission, dealing with "Claims for loss of enjoyment", embodied in its Minutes No. 146, March 4, 1921.

<sup>4</sup> Minutes No. 172 of the Reparation Commission, April 15, 1921.

<sup>5</sup> Joint Report of the Maritime Service and the Valuation Service on maritime losses dated April 20, 1921, Annex 735-j, being a continuation of Annex 735-g, of the records of the Reparation Commission.

While the decisions of the Reparation Commission constituted under the Treaty of Versailles are not binding on this Commission, nevertheless in seeking the intention of the framers of the Treaty of Berlin with respect to provisions of the Treaty of Versailles embodied therein by reference the decisions of the Reparation Commission construing these provisions, taken long prior to the signing of the Treaty of Berlin and presumably in the minds of the parties to that Treaty at the time of its conclusion, are entitled to great weight. Especially is this true when, as in the instances cited, the decisions were unanimous, were taken a comparatively short time after the Treaty became effective, and denied to the nations whose members composed the Commission the right to demand of Germany extremely heavy payments which it was believed by the most exacting of the victorious Powers were not included in her Treaty obligations and had they been so included would have swelled the reparation demands against Germany far beyond her capacity to pay.

Counsel for claimant cite several decisions by Mixed Arbitral Tribunals constituted under the Treaty of Versailles in support of the contention that Germany is liable for the loss of use of property requisitioned or detained by Germany in German territory. As pointed out in Administrative Decision No. VII at page 344,<sup>b</sup> such cases are within the "Economic Clauses" (Part X) of the Treaty, which deal with enemy property in German territory, and under which rules for measuring damages obtain different from those applicable to the "Reparation Provisions" (Part VIII) of the Treaty. Not only was Germany directly and solely responsible for what happened within her territorial limits, but she and her nationals in the cases cited enjoyed the use of the requisitioned property, for which use she was required to pay. The Reparation Commission clearly distinguished between damages suffered by Allied nationals on account of requisitions, sequestrations, and other war measures applied by the German authorities in German territory and similar measures applied by German authorities in territory invaded by German forces. Claims belonging to the first class were not included in the reparation claims but fell within the jurisdiction of the Mixed Arbitral Tribunals constituted under Article 304 in Part X of the Treaty; while claims belonging to the second class were dealt with by the Reparation Commission as reparation claims under the provisions of Part VIII of the Treaty.<sup>6</sup> While claims on behalf of American nationals embraced within both classes mentioned fall within the jurisdiction of this Commission, the distinction between them is recognized and will be applied. Nothing herein contained will be taken as affecting the right of the United States to recover on behalf of its nationals for the loss of the use or enjoyment of property seized and held or used by Germany in German territory.

The claimant's ship was injured by contact with a German mine off a French port. The claimant has been fully reimbursed through insurance for the cost of repairing the material injury wrought. The Umpire holds that under the Treaty of Berlin Germany is not obligated to make compensation for claimant's loss of the use of its vessel pending repair. This item of the claim is rejected. Germany is, however, obligated to pay the net loss sustained by the claimant resulting from the destruction of the *Kansan* by a German submarine on July 10, 1917.

Applying the rule herein announced and others established by the decisions of this Commission to the facts as disclosed by the record herein, the Commission decrees that under the Treaty of Berlin of August 25, 1921, and in accord-

<sup>b</sup> Note by the Secretariat, Vol. VII, p. 251.

<sup>6</sup> See letter which the Reparation Commission addressed to the President of the Franco-German Mixed Arbitral Tribunal September 15, 1922.

ance with its terms the Government of Germany is obligated to pay to the Government of the United States on behalf of American-Hawaiian Steamship Company the sum of nine hundred fifty thousand dollars (\$950,000.00) with interest thereon at the rate of five per cent per annum from November 11, 1918.

Done at Washington September 30, 1926.

Edwin B. PARKER  
*Umpire*

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