# REPORTS OF INTERNATIONAL ARBITRAL AWARDS

# RECUEIL DES SENTENCES ARBITRALES

**S. Stanwood Menken, Administrator of the Estate of Alice E. Tesson, Deceased, and Others (United States) v. Germany, and Andrew C. McGowin, Administrator of the Estate of Frank B. Tesson, Deceased, and Others (United States) v. Germany**

31 August 1926

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has already been given. Hence it follows that the demand, if any, not based on any provision of that Treaty, which claimant may have against Germany or anyone else does not fall within the jurisdiction of this Commission.

Wherefore the Commission decrees that under the Treaty of Berlin of August 25, 1921, and in accordance with its terms the Government of Germany is not obligated to pay to the Government of the United States any amount on behalf of the claimant herein on account of the acts herein complained of.

Done at Washington August 31, 1926.

Edwin B. PARKER
*Umpire*

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## S. STANWOOD MENKEN, ADMINISTRATOR OF THE ESTATE OF ALICE E. TESSON, DECEASED, AND OTHERS (UNITED STATES) *v.* GERMANY

## ANDREW C. McGOWIN, ADMINISTRATOR OF THE ESTATE OF FRANK B. TESSON, DECEASED, AND OTHERS (UNITED STATES) *v.* GERMANY

*(August 31, 1926, pp. 837-839.)*

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PROCEDURE: REHEARING AFTER FINAL JUDGMENT. — DAMAGE: (1) RULE OF PROXIMATE CAUSE, (2) SPECULATIVE DAMAGE. — DAMAGES IN DEATH CASES. — EVIDENCE: DECISION OF MUNICIPAL COURT OF LAST RESORT. Rehearing granted, although final decree entered before. Claims for alleged losses suffered by children by first marriage of woman, whose second husband carried life insurance payable to her in case she survived him, but who, according to decision of highest court of New York State, simultaneously with him went down with *Lusitania*. *Held* that wife's children cannot claim damages: (1) damage (insurance moneys lost) too remote, (2) Germany not liable for consequences of wife's not surviving her husband, but only for damages proximately resulting from her death, (3) no speculation permissible as to effect on her children of either her survival or her husband's.

PARKER, *Umpire*, made the announcement following:

In the cases numbered and styled as above, [a] which were consolidated, a final decree on the decision of the Umpire was entered by this Commission on February 21, 1924. [1] The claimants in the first case have presented through their attorneys to the American Agent a petition for rehearing praying for an additional award, which has been called to the attention of the Umpire. The rules of this Commission make no provision for a rehearing of any case in which a final decree has been entered. However, in deference to the earnest insistence of eminent counsel the Umpire has carefully reviewed the record in these cases in the light of the petition for rehearing. But he finds nothing in either the record or the petition which had not been taken into account and carefully weighed before the decision was rendered.

The instant petition apparently fails to take into account and correctly appraise the pertinent considerations following:

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[a] *Note by the Secretariat*, Original report: Docket Nos. 217, 293, and 544.

[1] Decisions and Opinions, pp. 361-364. (*Note by the Secretariat, not included in* Vol. VII).

(1) The claim is grounded on damages alleged to have been sustained by claimants resulting from the death of *Alice E. Tesson*, who, with her husband, went down with the *Lusitania*, the two (according to the decision of the highest court of the State of New York in *McGowin v. Menken*, 223 N. Y. 509) dying simultaneously. They both died intestate.

(2) Mrs. Tesson's separate estate amounted to approximately $5,400 and was inherited equally by the claimants William, Charles, and Roy Atkins, *her* sons of a former marriage. Mr. Tesson's separate estate, supplemented by insurance on *his* life collected by his administrator, aggregated $22,828.80, which was inherited by *his* mother, brother, and two sisters.

(3) At the time of their deaths Mrs. Tesson was 60 years of age and her husband 49 and his life expectancy therefore much greater than hers.

(4) Mrs. Tesson derived no income from her personal efforts and it is not established that she possessed any pecuniary earning power. Such contributions as she made to her children were made from her husband's earnings. Her two eldest sons, William and Charles, were 39 and 38 years old at the time she died and were able-bodied and had domestic establishments of their own. They were not dependent upon their mother to any extent. The contributions which she made to them were in the nature of occasional gifts, alleged to average $300 and $200 per annum to William and Charles respectively.

(5) It was *Mr. Tesson's* death that cut off the source of the contributions which their mother had made to these three claimants, who were not his children.

(6) The argument that the claimants through their mother's death have lost the insurance on Tesson's life, which was payable to her in the event she survived him, aside from being in legal contemplation too remote to support a claim for damages, ignores the realities. Tesson and his wife died simultaneously. His life expectancy was greater than hers. He made no provision that the policies should be payable in whole or in part to the claimants or any of them in the event his wife did not survive him. The payments were in fact made to *his* heirs. The argument put forward on behalf of these claimants amounts to a complaint that one group of American nationals (Tesson's heirs) benefited at the expense of another group of American nationals (these claimants) because Mrs. Tesson died simultaneously with her husband. Germany cannot be held liable because she did not survive him, but only for damages suffered by claimants proximately resulting from *her* death.

(7) It is not permissible to speculate with respect to the pecuniary effect on claimants had their mother survived Tesson or had Tesson survived her. The fact is, as a competent court of last resort has found, that they died simultaneously and the claimants' demand is based on the pecuniary damage suffered by them resulting from their mother's death.

(8) But if it were competent for this Commission to indulge in such speculations they would not lead to a different result. Had Tesson been lost with the *Lusitania* and his wife survived, it is apparent that her interest in his small estate and her smaller estate, supplemented by the insurance on his life which was for her benefit should she survive him, would scarcely have provided for her own needs and would not have put her in a position to make any substantial contributions to her sons. On the other hand, had Tesson survived his wife the record does not justify the conclusion that his contributions to the sons of his wife would have exceeded the equivalent of the award made.

(9) Notwithstanding this state of the record the Umpire in his opinion of February 21, 1924, said: " It is evident from the record that *if either* Tesson or his wife had lived her crippled son Roy would probably have continued to

receive small contributions of not less than $25 per month for his maintenance and support." An award was accordingly made on behalf of this son Roy, who was 28 years of age when his mother died, in the sum of $5,000 and a further award on behalf of the administrator of Mrs. Tesson's estate for $2,325, the value of her personal property lost, with interest on both amounts.

(10) In this state of the record no award was justified on behalf of Mrs. Tesson's sons William Atkins and Charles Atkins.

The petition is found to be without merit and is hereby dismissed.

Done at Washington August 31, 1926.

Edwin B. PARKER
*Umpire*

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## AMERICAN-HAWAIIAN STEAMSHIP COMPANY (UNITED STATES) *v.* GERMANY

*(September 30, 1926, pp. 843-848.)*

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SEA WARFARE: DAMAGE TO, DESTRUCTION OF, VESSEL BY MINE, SUBMARINE. — WAR: RESPONSIBILITY UNDER GENERAL INTERNATIONAL LAW, TREATY OF BERLIN. — DAMAGES: (1) LOSS OF USE, (2) MARKET VALUE. — INTERPRETATION OF TREATIES: INTENTION OF PARTIES. — PROCEDURE: CONFIRMATION BY NATIONAL COMMISSIONERS OF AGREEMENT BETWEEN AGENTS. Damage to hull of American vessel by German mine on December 18, 1916, followed by sinking by German submarine on July 10, 1917. Claim for loss of use pending repairs, and for value of vessel, respectively. *Held* that under Treaty of Berlin, Germany not liable for loss of use or enjoyment of property injured but not destroyed outside German territory through act of war (reference made to Administrative Decision No. VII, see Vol. VII, p. 203): (1) Commission not concerned with Germany's liability under general international law (according to which loss of profit from, or use of, vessel pending repairs of injuries resulting from maritime tort is proper element of damage to be taken into account in determining tort feasor's liability): Germany's liability limited by Treaty of Berlin, (2) intention of parties to Treaty of Berlin with respect to provisions of Treaty of Versailles embodied therein by reference, shown by intention of parties to Treaty of Versailles as authoritatively expressed by Reparation Commission, whose decisions, though not binding on Commission, are entitled to great weight. Agreement between Agents on fair market value of vessel confirmed by National Commissioners. Damages allowed for loss of vessel.

*Bibliography:* [a] Kiesselbach, *Probleme*, pp. 35, 120.

PARKER, *Umpire*, on a certificate of disagreement of the National Commissioners delivered the opinion of the Commission.

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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[a] 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.