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M. A. QUINA EXPORT COMPANY (UNITED STATES) *v.* GERMANY

(August 13, 1926, pp. 756-763.)

DAMAGE: (1) FRUSTRATION OF CONTRACT OBLIGATIONS, (2) RULE OF PROXIMATE CAUSE. Claim for frustration of charter obligations by German blockade of British Isles. *Held* that, under Treaty of Berlin, Germany not liable for such remote and consequential damage.

WAR: DAMAGE TO CHARTERED VESSEL.—DAMAGE: (1) DESTRUCTION OF LIEN, (2) RULE OF PROXIMATE CAUSE, NEGLIGENCE.—EVIDENCE: DECISIONS OF MUNICIPAL COURTS. Charter (a simple contract of affreightment concluded between claimant and Italian shipowner for transportation of goods from Pensacola to Cardiff. Advance of £7,000 made by claimant to shipowner, who gave claimant draft for that amount payable ten days after arrival at Cardiff or upon termination of voyage, but never completed voyage because of collision in Monkstown Bay, Cork Harbour (Ireland), where vessel, badly damaged after shelling on high seas by German submarine on June 3, 1917, was waiting to be towed to Cardiff. Abandonment of vessel by owner. Claim presented on behalf of charterer, who asserts that it had lien on freight and hull to secure payment of £7,000. *Held* that freight was never earned and claimant's lien on it therefore never matured (reference made to Arthur Sewall case, see p. 311 *supra*), and that freight and hull lost, and lien on hull, if any, destroyed, not by act of Germany, but by owner whose negligence caused collision and who abandoned contract of affreightment. Evidence: see *supra*.

Bibliography: Kiesselbach, *Probleme*, p. 112.

PARKER, *Umpire*, rendered the decision of the Commission.

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

Two distinct claims are here put forward on behalf of the M. A. Quina Export Company, an American corporation. One involves the schooner *Maria Lorenza*, of Uruguayan registry, with whose Spanish owner the claimant on February 16, 1916, entered into a charter-party for the transportation of a cargo of lumber from the Gulf of Mexico to a safe port in the United Kingdom of Great Britain and Ireland. The owner declined to fulfil his contract on the ground that subsequent to its execution conditions had changed in that Germany had declared a blockade around the British Isles and was seeking to establish it through an unrestricted submarine campaign which rendered a voyage by a sailing vessel to a British port too hazardous to be undertaken and in effect operated as a frustration of the charter. The claimant in 1917 brought suit against the owner in the District Court of the United States for the Southern District of Florida and libeled the vessel, which was then loading at Tampa. The court sustained the owner's contention and dismissed the claimant's libel (280 Federal Reporter 147 (1922); affirmed 1923, 287 Federal Reporter 626). It is contended that the claimant was damaged to the extent of $16,000 by the frustration of this charter alleged to have been directly attributable to Germany's prosecution of unrestricted submarine warfare. For reasons fully set forth in numerous decisions of this Commission Germany is not liable under the Treaty of Berlin for such remote and consequential damages as form the basis of this claim. It is rejected.

The other claim has to do with the checkered career of the ill-fated Italian Brigantine *Luisa* and her hapless Italian owner, Antonio Benvenuto. who has abundant cause to regret that with his brigantine he ever ventured forth from the safe harbors of sunny Italy to be buffeted by wind and wave, by enemy shellfire, by collisions in strange waters with foreign vessels, and last but not least by the cross-fire of judicial decisions by distinguished judges whose learning was to him a sealed book and whose very language he did not understand. After being thus harassed for more than four years this ill-starred Italian mariner was left stranded and destitute, buried deeper in the muck of insolvency than his brig *Luisa* in the mud bank of Monkstown Bay, Cork Harbor. One of his creditors, the claimant herein, after exhausting with small success such remedies as seemed to be offered by other tribunals now turns to this Commission in the assertion of a claim against Germany.

Without undertaking to state the substance of the voluminous record the Umpire finds:

(1) Antonio Benvenuto, builder, owner, and master of the good ship *Luisa* of the burthen of 1,537 tons register or thereabout, described by an officer of the British Navy as "the largest brigantine I have ever seen", found himself and his vessel in Pensacola, Florida, on January 4, 1917, at which time he entered into a "pitch pine charter" with the claimant herein. This was a simple contract of affreightment for the transportation of pitch-pine sawn timbers and boards from Pensacola to Cardiff.

(2) The vessel was loaded by claimant. In accordance with the terms of this charter it advanced to the owner £7,000, receiving from him a draft dated January 26, 1917, for that amount payable ten days after arrival at Cardiff or upon termination of the voyage, which draft recited that it was for "value received, for necessary disbursements of my vessel at this Port, for the payment of which I hereby pledge my vessel and freight; and my consignees at the Port of destination are hereby directed to pay the amount of this obligation, from the first amount of freight received, for account of my said vessel".

(3) The owner, as master of the brigantine, issued and delivered to the claimant bills of lading covering the cargo to be transported to Cardiff and there delivered to the claimant or its assignees upon it or they paying the stipulated freight. These bills of lading were properly endorsed and negotiated by the claimant and were acquired and held by Denny, Mott & Dickson, Ltd., British subjects.

(4) After sailing on February 14, 1917, from Pensacola for Cardiff, the *Luisa* encountered such rough weather that much of her gear and stores had to be thrown overboard and a part of the deckload of timber jettisoned. She was finally brought by a salvage tug to a port in Bermuda where she was repaired and a part of her deck cargo sold to pay for the salvage and repairs.

(5) Nothing daunted, the *Luisa* on May 14 again set her course for Cardiff without serious mishap until when about 230 miles west of the Fastnet on June 3, 1917, she was attacked and shelled by a German submarine. One of her crew was killed and another wounded and the master with the rest of the crew in order to save their lives launched one of the boats and rowed away from the ship, taking with him the ship's log but little besides. He kept in sight of the *Luisa* for about an hour, during which time the shellfire continued; but the wooden vessel, heavily laden with pitch pine, did not sink. Twenty-four hours afterwards Benvenuto's boat was picked up by an American destroyer. He reported his experience to the Italian consul at Queenstown, in whose hands he left his case, and, believing his ship destroyed, he and his crew soon returned to Italy.

(6) An American destroyer went in search of and located the *Luisa* on June 6, brought her into Berehaven on June 10, and delivered her to the British receiver of wrecks on June 11. She was moved to Queenstown June 16, where the Italian consul on behalf of the owner claimed the right to the possession of the vessel and her cargo and was permitted to put men on board her. He communicated with the owner, who at once returned to Queenstown with his crew and took possession of his ship on July 1.

(7) While the *Luisa* was badly damaged by shellfire she was in a condition to be towed with her cargo on board to Cardiff. While she was waiting for her tug in Monkstown Bay on the night of August 14 she was run into by the British Steamship *Dungeness* and very seriously damaged as a result of this collision. The official survey discloses that the longitudinal bindings of the *Luisa* were severed and she was cut into amidships leaving a vertical gash of 15 feet 6 inches with a depth of penetration of her stem of 5 feet 3 inches while its fore and aft width was 4 feet. She was found to be developing a tendency for her two ends to fall asunder. Her deck planking and top-side planking butts were sprung open, the maximum distortion measuring one and one-quarter inches. All these enumerated damages were by the survey attributed to the collision and not to her previous damage by shellfire.

(8) That this collision was due to the negligence of the owner and master of the *Luisa* in not exposing proper lights was not seriously contested, and it was so found or assumed by all of the courts by which her case has been considered. The case serves aptly to point the moral that the negligence of one's self is often more deadly than the shafts of one's enemies. Following the collision there was instituted a systematic but ill-advised sparring for position between the owner of the *Luisa*, who was being advised by the Italian consul, on the one part and Denny, Mott & Dickson, Ltd., the transferees of the bills of lading and the cargo owners, who were being advised by their solicitors and the Salvage Association, on the other part. The owners of the cargo insisted that it should be delivered at Cardiff. Without declining to make such delivery the shipowner submitted several proposals, including a delivery of the cargo at Cork upon the payment of freight on a *pro tanto* basis. Nothing came of these negotiations. The cargo was a valuable one and was worth very much more at Cardiff than at Cork. The trial judge found that at a cost of not exceeding £2,500 temporary repairs could have been made on the *Luisa* which would have permitted her being towed to Cardiff where her owner would have been entitled to collect freight in an amount sufficient to pay claimant's draft and approximately £7,000 besides.

(9) The record suggests that the owner of the *Luisa* probably had neither cash nor credit to enable him to make these repairs. Whether in this emergency he appealed to the claimant herein for assistance is not disclosed. But the record does disclose that this claimant did advance to the shipowner funds with which to prosecute his litigation with the cargo owner. The sparring between the shipowner and the cargo owner continued to no purpose. As aptly stated in the opinion of Lord Summer when the litigation between them was before the House of Lords, "It seems to me that the Respondent [shipowner] dropped his bone in snatching at the shadow". Be this as it may, after a delay of nearly four months the cargo owners, despairing of having their cargo delivered to Cardiff by the *Luisa*, on October 29, 1917, began an action to recover the cargo without the payment of freight. An order was entered on December 3 directing that the cargo be delivered to the plaintiffs upon their giving bond, which was done.

(10) The claimants relied on the alleged abandonment of the contract of affreightment by the owner and master of the *Luisa*, *first* in leaving her when

she was under shellfire and letting her drift as a derelict and *second* by failing to proceed on the voyage after her collision with the *Dungeness* due to the negligence of her master, which collision, it was alleged, rendered her incapable of any further voyage.

(11) At the time this action was instituted the state of the decisions of the British courts supported the first ground of abandonment alleged. The case came on for hearing before Mr. Justice Gordon, the trial judge, who on June 27, 1918, reserved judgment, and before judgment was rendered by him the House of Lords reversed the decision of the Appeal Court in Newsome *v.* Bradley (1919 A. C. 16) upon which the plaintiffs relied. Mr. Justice Gordon delivered judgment on November 29, 1918, and held that the master of the *Luisa* in leaving her under shellfire did not abandon her under circumstances which amounted to a termination of the contract of affreightment. This point which was definitely settled in favor of the shipowner was the only ray of encouragement glimpsed by him in an otherwise inky sky.

(12) Throughout the litigation it was contended on behalf of the owner of the *Luisa* that she was not a wreck and that the voyage had not been abandoned.

(13) But Mr. Justice Gordon in effect held that the inaction of the owner of the *Luisa* was equivalent to a refusal to deliver the cargo at the port of destination and that in these circumstances the plaintiffs "were entitled to get possession of their cargo at Queenstown without being liable to pay the freight which had not been earned, or a pro rata freight which they had not expressly or impliedly agreed to pay".

(14) The case was reviewed in the Divisional Court of Appeal and the judgment of the trial court reversed. The unanimous opinion concluded thus: "Should there be a further appeal, we trust it will be set down forthwith for argument, so as to release Benvenuto from the perils and uncertainties of law on land after his escape from war dangers at sea. Hope deferred must indeed have made him heartsick, notwithstanding his cheery name."

(15) On appeal to the Court of Appeal (Ireland) the judgment of the Divisional Court of Appeal was affirmed with elaborate opinions.

(16) On final appeal to the House of Lords the judgment of the trial court as rendered by Mr. Justice Gordon was restored and affirmed and the judgment of the Divisional Court and the judgment of the Court of Appeal (Ireland) were reversed. There were present at the hearing Viscount Finlay, Lord Atkinson, Lord Summer, Lord Parmoor, and Lord Phillimore. The first three read elaborate opinions in support of their judgment while the last two read equally elaborate opinions in favor of sustaining the Divisional Court of Appeal and the Court of Appeal (Ireland) and dismissing the appeal to the House of Lords.

(17) Thus on this narrow margin by the decision of the House of Lords rendered on May 10, 1921, Antonio Benvenuto, shipbuilder, shipowner, master mariner, but not a shining light either as a financier or negotiator, was left without cargo or freight, with his brig *Luisa*, which he and his solicitors vigorously protested throughout was not a wreck, lying abandoned in the mud of Monkstown Bay, Cork Harbor.

(18) All of the courts found that while the *Luisa* was damaged by German shellfire she was thereafter in a condition to be towed with her cargo to Cardiff. The shipowner and the cargo owner were acting in concert with a view to having her towed to Cardiff prior to the collision with the *Dungeness* which was her undoing. But all of the courts found that (as stated by Viscount Finlay in rendering the judgment in the House of Lords) "It must be remembered

throughout that the unfitness of the 'Luisa' to carry the cargo on to Cardiff was the result of the negligence of the Defendant [Benvenuto] himself".

(19) The claimant herein, M. A. Quina Export Company, alleges that it purchased insurance, including insurance against risks of war, to protect it against the loss of its interest in the freight to be earned by the *Luisa*, which interest was represented by the draft for £7,000 given by Antonio Benvenuto described in paragraph (2) *supra*. The insurance companies denied liability on the grounds among others that the loss sustained by claimants was not attributable to a war risk and also that the proximate cause of the loss was the negligence of the master which was not insured against. Demurrers interposed on these grounds were sustained by the court. Most of the claims were subsequently settled on the basis of 25% of the face of the policies.

(20) The record is barren of testimony from which the Commission could form any estimate or even hazard an intelligent guess of the amount, stated in terms of dollars, of the damage inflicted upon the *Luisa* by the shellfire of the German submarine.

(21) The charter of January 4, 1917, entered into between the owner of the *Luisa* and the claimant herein, was executed at a time when the *Luisa* was in port at Pensacola. She was immediately loaded thereunder and entered at once upon the performance thereof in the regular course of business at the then current rates. There is no evidence that the charter constituted an encumbrance on the *Luisa* within the rules announced in Administrative Decisions No. VII and No. VII-A.

(22) But the claimant asserts that it had a lien on the *freight* in the sum of £7,000 for advances made to the owner and master of the *Luisa* and that this freight was lost through the act of Germany. The British House of Lords decided that the freight was not lost through the act of Germany but through the negligence of the owner and master of the *Luisa* and because of his abandonment of the contract of affreightment. Moreover, the freight was never earned, and hence the lien on the freight to secure the payment of claimant's indebtedness never matured (see decision of this Commission of April 21, 1926, in the *William P. Frye* case, Docket No. 6070;[a] opinion of Viscount Finlay cited above; and Lord Ellenborough in Hunter *v.* Prinsep (1808), 10 East, page 394).

(23) The claimant further contends that it had a lien on and an interest in the *hull* of the *Luisa* to secure the payment of Benvenuto's indebtedness to it of £7,000. Assuming for the purposes of this opinion that such a lien was fixed on January 26, 1917, and still continues in existence, the claimant has wholly failed to produce before this Commission any proof that its interest in the *Luisa* was destroyed by the act of Germany. According to the record the *Luisa* was crippled but not destroyed by German shellfire. There is no evidence that after this shelling the value of the vessel on which claimant had a lien was not fully equal to the claimant's debt. If the claimant's interest in the *Luisa* was destroyed at all, as seems probable, it was, as abundantly proven in the litigation in the British courts, destroyed through the negligence of the owner, against which claimant had not insured and for which Germany cannot be held liable under the Treaty of Berlin.

Wherefore, applying the rules established in Administrative Decisions No. VII and No. VII-A and other decisions of this Commission to the facts as above set out, the Commission decrees that under the Treaty of Berlin of August 25, 1921, and in accordance with its terms the Government of Germany

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[a] *Note by the Secretariat*, this volume, p. 311 *supra*.

is not obligated to pay to the Government of the United States any amount on behalf of the M. A. Quina Export Company, claimant herein.

Done at Washington August 13, 1926.

Edwin B. PARKER
Umpire

ARTHUR ELLT HUNGERFORD (UNITED STATES) *v.* GERMANY

(August 13, 1926, pp. 766-772.)

WAR: CIVILIANS AND CIVILIAN POPULATION AS DISTINCT FROM PERSONS WITH MILITARY STATUS; PERSONAL PROPERTY IMPRESSED WITH MILITARY CHARACTER.—EVIDENCE: OFFICIAL Y.M.C.A. PUBLICATIONS. Sinking by German submarine on April 28, 1918, of British merchant vessel transporting Young Men's Christian Association group recruited for service with American Expeditionary Forces in Europe. Claim for damages on account of personal property lost by leader of group. *Held* that members of group were not "civilians" or members of "civilian populations" of United States, as those terms are used in Treaty of Berlin, and that claimant, therefore, not entitled to damages: reference made to Christian Damson, case, see p. 184 *supra*. Evidence: official publications of Y.M.C.A.

Bibliography: Kiesselbach, *Probleme,* pp. 139-140.

PARKER, *Umpire*, rendered the decision of the Commission.

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 Arthur Ellt Hungerford, an American national, who was one of a group of 57 men recruited by the Young Men's Christian Association for service with the American Expeditionary Forces in Europe. The claimant was the leader of and in charge of this party which sailed from New York April 13, 1918, on the British merchant vessel *Oronsa* "en route to England, and from thence to the active war regions of France" (American brief, page 1). On April 28 the *Oronsa* was torpedoed and sunk in the Irish Channel by a German submarine. The claimant and his entire party escaped in small boats without sustaining personal injuries. They, however, lost their personal belongings for the value of which claims are made against Germany aggregating approximately $50,000. This particular case is put forward for the value of claimant's personal belongings, fixed at $1,529.96, including uniforms and equipment adapted for use in service with the A. E. F.

The question here presented for decision is: At the time of the sinking of the *Oronsa* were the members of the group to which claimant belonged "civilians" or members of the "civilian population" of America as those terms are used in the Treaty of Berlin? Applying the principles announced by this Commission in its decision in the Christian Damson case (Docket No. 4259, Decisions and Opinions, pages 258-265[a]) to the facts as disclosed by this record, the Umpire decides that they were not. It was there held:

" * * * The true test in determining what nationals of each power belong to this class [civilians] is to be found in the object and purpose of their pursuits

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[a] *Note by the Secretariat*, this volume, pp. 195-199 *supra*.