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Barber & Co., Inc. (United States) v. Germany

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BARBER & CO., INC. (UNITED STATES) *v.* GERMANY

(August 13, 1926, pp. 748-751.)

WAR: DESTRUCTION OF CHARTERED, SUBCHARTERED VESSELS.—DAMAGE: VALUE OF CHARTERER'S, SUBCHARTERER'S INTEREST IN VESSELS. Sinking on May 19, 1917, and November 3, 1915, by German submarine of Norwegian and Japanese vessels, chartered and subchartered, respectively, by claimant. Claims for value of claimant's interest in vessels. Application of rules announced in Administrative Decisions Nos. VII and VII-A, see pp. 203 and 330 *supra*. Damages allowed for interest in Japanese vessel.

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.

It is put forward on behalf of Barber & Co., Inc., an American corporation, to recover the value of its alleged interest in two foreign steamships destroyed during the war by German submarines.

One of these was the Steamship *Askild*, of Norwegian ownership and registry, with a deadweight tonnage of about 3,000 to 3,600 tons. It appears that on April 30, 1917, the owner and the claimant executed a "net grain charter" by the terms of which the owner contracted to transport for the charterer from New York to Havre, France, a "complete cargo of lawful merchandise" "in consideration whereof Charterers shall pay the vessel freight" of 200s. per ton of 2.240 pounds. It was stipulated that charterer had the option to cancel should the vessel not be ready to load on or before July 31, 1917. It will be noted that this was a simple contract of affreightment. While on a westbound voyage with a cargo of coal from Wales to Portugal to be discharged before entering upon this charter the *Askild* was sunk by a German submarine near the English Channel on May 19, 1917. She was never delivered to the charterer and, as by the express terms of the charter it was terminated by her loss, there never was a time when the charterer was entitled to delivery. The owner of this ship was accustomed to operate her under contracts of affreightment rather than to commit her under time fixtures. In pursuance of that practice she was en route to New York for loading under a "net charter" currently entered into at a hire which was equal to or possibly a trifle above the going rate at the time she was destroyed.

The Umpire finds that under the principles laid down in Administrative Decisions No. VII and No. VII-A this charter did not constitute an encumbrance or burden on, and that the claimant had no interest in, the *Askild* at the time of her loss.

The second charter on which this claim is based covered the *Yasukuni Maru*, of Japanese ownership and registry, with a deadweight carrying capacity of 7,270 tons. On February 4, 1915, the Japanese owner entered into a time charter-party with Messrs. Phs. Van Ommeren (London), Ltd., for a period of about 12 months from date of delivery, effected March 25, 1915, and at a charter hire of £2,000 per month or about 5s. 6d. per deadweight ton per month. This was substantially below the then going rate for 12-month time charters, a number of which were entered into about that time in which the

restrictions were greater but the hire in excess of that contained in this charter. While it contained some territorial restrictions and a provision that "any detention caused by warlike operations to be for account of Charterers", it on the whole permitted reasonable freedom for engaging in Allied trading. The record contains no explanation of the low hire stipulated for.

On September 10, 1915, Messrs. Phs. Van Ommeren, Ltd., original time charterers, subchartered the *Yasukuni Maru* to the predecessor of Barber & Co., Inc., claimant herein, for a period of about six months at a monthly hire of £5,275, or about 14s. 6d. per deadweight ton per month—approximately the rate at which several other fixtures for a like period were made about that time. The steamship was delivered under this subcharter to the claimant at Newport News on September 18, 1915. She was loaded by the claimant for a voyage to Salonica, in the course of which she was shelled and sunk in the Mediterranean by a German submarine on November 3, 1915. At that time the claimant had used the ship under this charter one and one-half months. The original time charter would have expired on March 25, 1916, or about four and three-quarters months from the date the ship was destroyed. On the date of loss time-charter hire for periods from four to six months had increased to approximately 20s. per deadweight ton per month.

Manifestly the original time charter held by Messrs. Phs. Van Ommeren, Ltd., constituted a very substantial burden and encumbrance on the *Yasukuni Maru* at the time of her loss, but the subcharter of the claimant did not. This subcharter in effect sublet the ship to the claimant for a limited period at an increased hire and assigned to claimant a proportionate interest in the chartered owner's interest in the vessel, which, on such assignment, became impressed with American nationality. In measuring the extent of the interest in the ship of (1) the owner, (2) the time charterer, and (3) the subcharterer respectively it will be borne in mind that the owner was receiving a charter hire of 5s. 6d. per deadweight ton per month, that the time charterer was receiving *net* the difference between this charter hire and 14s. 6d. per deadweight ton per month, and that the subcharterer had the use of the vessel by paying this last-named charter hire at a time when the market hire was 20s. per deadweight ton per month.

The ship was of Japanese ownership and registry and the risk of requisition therefore remote. The risk of destruction under conditions as they existed in November, 1915, was substantial. Making allowance for that risk and applying the principles and rules announced in Administrative Decisions No. VII and No. VII-A, the Umpire finds that Barber & Co., Inc., had an interest of $43,000 in the *Yasukuni Maru* at the time of her loss.

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 obligated to pay to the Government of the United States on behalf of Barber & Co., Inc., the sum of forty-three thousand dollars ($43,000.00) with interest thereon at the rate of five per cent per annum from November 3, 1915.

Done at Washington August 13, 1926.

Edwin B. PARKER
Umpire