

REPORTS OF INTERNATIONAL ARBITRAL AWARDS

RECUEIL DES SENTENCES ARBITRALES

Owner of the Horace B. Parker (United States) v. Great Britain

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ation and adjudication upon the merits. The record here does not permit this, and we are definitely of the opinion that no Tribunal so far removed in time and space from the date and scene of this controversy can be expected adequately to deal with the intricate questions of fact involved. The industry and ingenuity of counsel in making the best of so difficult a situation has challenged our unreserved admiration. They have done everything that highly skilled and competent advocates could do to assist us.

The opportunity once presented to carry the claim before the courts of Johore under guaranties apparently sufficient to insure full inquiry and impartial adjudication seems to have been passed over for reasons which are not sufficiently explained. This Tribunal earnestly recommends that this offer be renewed and accepted and that the courts of Johore in that event take the matter up in a liberal spirit without regard to legal refinements and technicalities.

With this emphatic recommendation the award of the Tribunal is that the claim of the Government of the United States be disallowed.

OWNER OF THE *HORACE B. PARKER* (UNITED STATES)

v. GREAT BRITAIN

(November 6, 1925. Pages 570-572.)

REFUSAL OF REPAIRS OF FOREIGN FISHING VESSEL.—INTERPRETATION OF TREATY.—DAMAGES: LOSS OF USE, LOST PROFITS.—EVIDENCE. USUAL AND UNCHALLENGED. Refusal of Newfoundland authorities to allow *Horace B. Parker*, an American fishing vessel, the replacing in Bay of Bulls (Newfoundland) of riding sail blown away in boisterous weather. Vessel compelled to go to St. Pierre therefor. Time lost in getting back to fishing grounds. Decay of bait. Loss of catch. *Held* that under article 1 of Anglo-American Treaty of October 20, 1818, right of American fishermen to repair damages in Newfoundland waters not restricted to repairs essential to navigation, and that replacing sail needed for fishing purposes, where such sail has been blown away, is clearly within the phrase "repairing damages". *Held* also that measure of damages is loss of use of vessel, i.e., of probable catch, i.e. of catch of other vessels, or of average catch under conditions at hand (reference made a.o. to *Wanderer*, *Kate*, and *Favourite* awards, see pp. 68, 77, and 82 *supra*). *Held* further that unchallenged evidence of usual character provides sufficient basis upon which to make award. Amounts claimed for loss of catch and loss of bait awarded.

Cross-reference: Am. J. Int. Law, vol. 20 (1926), pp. 378-380.

This is a claim for damages by reason of the refusal of the Newfoundland authorities to permit exercise of the right of making repairs as secured to American fishermen by the proviso to article 1 of the Treaty of 1818. The evidence is somewhat in conflict. For the purpose of decision we accept the British version of the case as to what the claimant sought to do. The riding sail of the vessel having been blown away in boisterous weather, the master put into Bay of Bulls on the east coast of Newfoundland to obtain water and make necessary repairs. The Newfoundland authorities refused to allow the procuring of a new riding sail, asserting that "a riding sail is part of a fishery outfit and is not necessary for the sailing of a vessel". The master protested to the collector of customs and also sought to obtain a different ruling through the American consular agent, but the authorities at St. Johns sustained the

local authorities and persisted in the refusal. In consequence of inability to procure the sail at Bay of Bulls, the vessel was compelled to go to St. Pierre therefor. Five days were lost in getting to St. Pierre and further time in getting back to the fishing grounds. During that time the bait decayed. Also there was a "spurt of fish", and other vessels on the spot took large cargoes.

At the time of the occurrence it was contended by the authorities of Newfoundland that the words "repairing damages" in the treaty must be construed to limit the permissible repairs to repairs essential to navigation and could not be held to cover repairs necessary to fishing. At the hearing, a further contention was made to the effect that "repairing damages" must be limited to such repairs as the crew itself could make with the materials carried by the ship. But we observe that the treaty secures the right to "American fishermen". This indicates that it was given in order that they might fish in the waters adjacent to Newfoundland, not part of British territorial waters, where they had been accustomed to fish, and negatives an interpretation which would restrict the right to repairs essential to navigation and distinct from fishing. For the rest, it is enough to say that replacing a sail needed for fishing purposes, where such a sail has been blown away, seems to us clearly within the phrase "repairing damages"; and we so hold.

It is contended in the answer that the damages claimed are "remote, speculative, contingent, and incapable of ascertainment". As to this, it is enough to say that a long line of decisions of international tribunals has established as the measure of damages for such cases loss of use of the vessel, to be measured by the loss of probable catch. For this purpose the catch of other vessels or the average catch under the conditions at hand has often been taken as the measure. Indeed, this tribunal has so held in three prior cases. The *Wanderer*, claim No. 13. American-British claims arbitration; The *Favorite*, claim No. 13, id.; The *Kate*, claim No. 28, id. See also, the *Hope On*, Moore, international arbitrations, IV, 3261; Bering Sea damage claims, id. II, 2123, 2131; case of Costa Rica packet, id. V, 4948; foreign relations of the United States, 1902, appendix I, pp. 451, 454, 459.

Objection was made at the hearing that the affidavits in the memorial of the United States do not expressly preclude the possibility of the ship's having afterwards obtained a full cargo. But we find the evidence in this case is of the sort which has usually been presented in such cases, and, as the answer raised only the question of the legal rule as to the measure of damages, and did not challenge the evidence in the memorial as not sufficiently specific and circumstantial, we think there is a sufficient basis upon which we may make an award.

We therefore award the sum claimed by the United States, namely, \$1,500, on account of failure to obtain cargo and \$100 for loss of bait, in all \$1,600.

OWNER OF THE *THOMAS F. BAYARD* (UNITED STATES)

v. GREAT BRITAIN

(November 6, 1925. Pages 573-574.)

FISHING IN TERRITORIAL WATERS.—INTERPRETATION OF TREATY: *RES JUDICATA*. DAMAGES: LOST PROFITS.—DAMAGE, EVIDENCE: AFFIDAVITS, RECEIPTS, DOCUMENTS. Entry of *Thomas F. Bayard*, an American fishing vessel, into Bonne Bay, Newfoundland, to obtain fresh supply of bait. Notice by customs officer to master that purchase of bait or other transaction relating to fishery