

REPORTS OF INTERNATIONAL ARBITRAL AWARDS

RECUEIL DES SENTENCES ARBITRALES

Owner of the Thomas F. Bayard (United States) v. Great Britain

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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

operations within three miles off coast would be in violation of Anglo-American Treaty of October 20, 1818. Return of vessel to Gloucester. Loss of time before getting back to fishing grounds. Contention before Tribunal that notice did not preclude master from catching bait instead of buying it. *Held* that preclusion from catching bait apparent from Newfoundland's restricted interpretation of treaty as rejected by Permanent Court of Arbitration in North Atlantic Coast Fisheries Arbitration. *Res judicata* of Permanent Court's decision. Damages, evidence: claim substantiated by affidavits, receipts, and documents as to each item. Claimed amount awarded.

This is a claim for damages by reason of refusal of Newfoundland authorities to permit an American vessel, enrolled and licensed for the fisheries, to exercise the right of fishing in Bonne Bay on the treaty coast of Newfoundland. The American case is that while the vessel was fishing for halibut off the coast of Newfoundland bait became exhausted and it put into Bonne Bay to obtain a fresh supply. Upon arrival the customs officer gave the master a printed notice as follows:

"I am instructed to give you notice that the presence of your vessel in this port is in violation of the articles of the International Convention of 1818 between Great Britain and the United States, in relation to fishery rights on the coast of Newfoundland, and of the laws in force in this country for the enforcement of the articles of the convention, and that the purchase of bait or ice, or other transaction in connexion with fishery operations, within three miles off the coast of this colony, will be in further violation of the terms of said convention and laws."

The master testifies that he showed the collector a copy of the provision of the Treaty of 1818 and argued that he had a right to take bait under the treaty, but was told by the collector that the latter had an official duty to perform. Fearing that the vessel would be seized if he remained in the bay, and that the halibut already taken would spoil if he went elsewhere in search of bait, the master returned to Gloucester, losing 38 days of fishing before he could get back to the fishing grounds.

It is argued that the notice in question meant only that the master would not be allowed to buy bait, and that he was not precluded from catching it, as he had a right to do under the treaty. We think the answer to this contention is to be found in the attitude of Newfoundland prior to the decision of the Permanent Court of Arbitration at The Hague in the North Atlantic Coast Fisheries Arbitration. The sixth question put to that Tribunal was:

"Have the inhabitants of the United States the liberty under the said articles or otherwise to take fish in the bays, harbours, and creeks on that part of the southern coast of Newfoundland which extends from Cape Ray to Rameau Islands, or on the western and northern coasts of Newfoundland from Cape Ray to Quirpon Islands or on the Magdalen Islands?"

That question grew out of the claim of Newfoundland that the fishing privilege, conceded by the Treaty of 1818, did not include the taking of fish in bays, harbors, and creeks on the Treaty Coast. Great Britain on behalf of Newfoundland so contended before The Hague Tribunal. The notice in question was drawn up in view of this contention, and we have no doubt that any attempt of the vessel to catch bait fish in Bonne Bay would have been followed by serious consequences. The very language of the notice declaring that the mere presence of the American fishing vessel in Bonne Bay was unlawful and forbidding any "transaction in connexion with fishery operations within three miles of the coast" shows that the Newfoundland authorities were asserting and were prepared to maintain the claim as to the limits of the fishing

privilege of the United States which the Permanent Court of Arbitration at The Hague, by its answer to the sixth question in the North Atlantic Coast Fisheries Arbitration, has held to have been unwarranted.

As to the damages, the claim is set forth with unusual precision of detail and is substantiated by affidavits, receipts, and documents as to each item. We are entirely satisfied with this proof and award the sum of \$3,212.98, as claimed.

OWNER OF THE *SARAH B. PUTNAM* (UNITED STATES)
v. GREAT BRITAIN

(November 6, 1925. Pages 568-569.)

RECOGNITION OF FOREIGN FISHING LICENCES.—THREAT TO SEIZE FISHING VESSEL.—INTERPRETATION OF AGREEMENT: MINUTES OF COUNCIL OF NEWFOUNDLAND.—OBLIGATION TO REDUCE DAMAGES.—DAMAGES: LOST PROFITS.—AMENDMENT OF PLEADINGS. *Modus vivendi* entered into between Great Britain and United States on February 15, 1888, under which Newfoundland obliged to recognize Canadian "annual" fishing licences. Difference of opinion concerning meaning of "annual". Interpretative agreement of October 15, 1888, under which Newfoundland undertook to recognize past Canadian licences issued for one year from date of issuance. Failure to instruct Newfoundland customs officials accordingly. Entry in June, 1889, of *Sarah B. Putnam*, an American fishing vessel, in port of Ferryland, Newfoundland. Refusal by local authorities to recognize her Canadian licence expiring on July 25, 1889. Same refusal in two other ports, threat to seize vessel. Return to home port with partial cargo. *Held* that master not bound to pay for Newfoundland licence under protest instead of returning to home port, and that return justified by denial of right to procure bait; that licence of *Sarah B. Putnam* valid in Newfoundland under agreement of October 15, 1888, as interpreted by Tribunal in the light of the minutes of Council of Newfoundland; and that, as to lost profits, United States properly abandoned claim originally put forward for possible second and third voyage (reference made to *Horace B. Parker* and *Thomas F. Bayard* awards, see pp. 153 and 154 *supra*). Claimed amount awarded.

Cross-reference: Am. J. Int. Law, vol. 20 (1926), pp. 377-378.

This is a claim for damages due to refusal of Newfoundland authorities to recognize a fishing licence issued by the Canadian authorities under the terms of a *modus vivendi* agreed to between the Governments of Great Britain and the United States. The *modus vivendi* provided for "annual licences" to be issued either by the Canadian authorities or the Newfoundland authorities, to be recognized by each when issued by either. A difference of opinion developed between the latter Governments as to whether licences should be issued to be valid for one year from their dates or should be made to expire on the 31st of December. Ultimately the Newfoundland Government, as we interpret the minutes of the Council, agreed to recognize past Canadian licences issued to be good for one year from their date, and the Canadian Government agreed for the future to issue licences expiring on December 31. It appears, however, that the Newfoundland customs officials received no orders to recognize Canadian licences, accordingly when the vessel in question, which held a regularly issued Canadian licence expiring on July 25, 1889, presented itself at