

# **REPORTS OF INTERNATIONAL ARBITRAL AWARDS**

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## **RECUEIL DES SENTENCES ARBITRALES**

**Arbitral Tribunal (Great Britain-United States) constituted under the Special  
Agreement of August 18, 1910 (18 June 1913 - 22 January 1926)**

VOLUME VI pp. 17-190



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### Special Agreement

#### SPECIAL AGREEMENT FOR THE SUBMISSION TO ARBITRATION OF PECUNIARY CLAIMS OUTSTANDING BETWEEN THE UNITED STATES AND GREAT BRITAIN

*Signed August 18, 1910; ratifications exchanged April 26, 1912<sup>1</sup>*

Whereas the United States and Great Britain are signatories of the convention of the 18th October, 1907, for the pacific settlement of international disputes, and are desirous that certain pecuniary claims outstanding between them should be referred to arbitration, as recommended by article 38 of that convention:

Now, therefore, it is agreed that such claims as are contained in the schedules drawn up as hereinafter provided shall be referred to arbitration under chapter IV of the said convention, and subject to the following provisions:

ARTICLE 1. Either party may, at any time within four months from the date of the confirmation of this agreement, present to the other party any claims which it desires to submit to arbitration. The claims so presented shall, if agreed upon by both parties, unless reserved as hereinafter provided, be submitted to arbitration in accordance with the provisions of this agreement. They shall be grouped in one or more schedules which, on the part of the United States, shall be agreed on by and with the advice and consent of the Senate, His Majesty's Government reserving the right before agreeing to the inclusion of any claim affecting the interests of a self-governing dominion of the British Empire to obtain the concurrence thereto of the Government of that dominion.

Either party shall have the right to reserve for further examination any claims so presented for inclusion in the schedules; and any claims so reserved shall not be prejudiced or barred by reason of anything contained in this agreement.

ARTICLE 2. All claims outstanding between the two Governments at the date of the signature of this agreement and originating in circumstances or transactions anterior to that date, whether submitted to arbitration or not, shall thereafter be considered as finally barred unless reserved by either party for further examination as provided in article 1.

ARTICLE 3. The Arbitral Tribunal shall be constituted in accordance with article 87 (chapter IV) and with article 59 (chapter III) of the said convention, which are as follows:

"ARTICLE 87. Each of the parties in dispute appoints an arbitrator. The two arbitrators thus selected choose an umpire. If they do not agree on this point, each of them proposes two candidates taken from the general list of the

<sup>1</sup> Source: Fred. K. Nielsen, *American and British Claims Arbitration under the Special Agreement concluded between the United States and Great Britain, August 18, 1910, Report of—, Agent and Counsel for the United States* (Washington, Government Printing Office, 1926), pp. 3 *et seq.*

members of the Permanent Court, exclusive of the members appointed by either of the parties and not being nationals of either of them; which of the candidates thus proposed shall be the umpire is determined by lot.

"The umpire presides over the tribunal, which gives its decisions by a majority of votes."

"ARTICLE 59. Should one of the arbitrators either die, retire, or be unable for any reason whatever to discharge his functions, the same procedure is followed for filling the vacancy as was followed for appointing him."

ARTICLE 4. The proceedings shall be regulated by so much of chapter IV of the convention and of chapter III, excepting articles 53 and 54, as the tribunal may consider to be applicable and to be consistent with the provisions of this agreement.

ARTICLE 5. The tribunal is entitled, as provided in article 74 (chapter III) of the convention, to issue rules of procedure for the conduct of business, to decide the forms, order, and time in which each party must conclude its arguments, and to arrange all formalities required for dealing with the evidence.

The agents and counsel of the parties are authorized, as provided in article 70 (chapter III), to present orally and in writing to the tribunal all the arguments they may consider expedient in support or in defense of each claim.

The tribunal shall keep record of the claims submitted, and the proceedings thereon, with the dates of such proceedings. Each Government may appoint a secretary. These secretaries shall act together as joint secretaries of the tribunal and shall be subject to its direction. The tribunal may appoint and employ any other necessary officer or officers to assist it in the performance of its duties.

The tribunal shall decide all claims submitted upon such evidence or information as may be furnished by either Government.

The tribunal is authorized to administer oaths to witnesses and to take evidence on oath.

The proceedings shall be in English.

ARTICLE 6. The tribunal shall meet at Washington at a date to be hereafter fixed by the two Governments, and may fix the time and place of subsequent meetings as may be convenient, subject always to special direction of the two Governments.

ARTICLE 7. Each member of the tribunal, upon assuming the function of his office, shall make and subscribe a solemn declaration in writing that he will carefully examine and impartially decide, in accordance with treaty rights and with the principles of international law and of equity, all claims presented for decision, and such declaration shall be entered upon the record of the proceedings of the tribunal.

ARTICLE 8. All sums of money which may be awarded by the tribunal on account of any claim shall be paid by the one Government to the other, as the case may be, within eighteen months after the date of the final award, without interest and without deduction, save as specified in the next article.

ARTICLE 9. Each Government shall bear its own expenses. The expenses of the tribunal shall be defrayed by a ratable deduction on the amount of the sums awarded by it, at a rate of 5 per cent, on such sums, or at such lower rate as may be agreed upon between the two Governments; the deficiency, if any, shall be defrayed in equal moieties by the two Governments.

ARTICLE 10. The present agreement, and also any schedules agreed thereunder, shall be binding only when confirmed by the two Governments by an exchange of notes.

In witness whereof this agreement has been signed and sealed by the Secretary of State of the United States, Philander C. Knox, on behalf of the United States, and by His Britannic Majesty's Ambassador at Washington, the Right Honorable James Bryce, O.M., on behalf of Great Britain.

Done in duplicate at the City of Washington, this 18th day of August, one thousand nine hundred and ten.

[SEAL]	Philander C. KNOX
[SEAL]	James BRYCE

### SCHEDULE OF CLAIMS

FIRST SCHEDULE OF CLAIMS TO BE SUBMITTED TO ARBITRATION IN ACCORDANCE WITH THE PROVISIONS OF THE SPECIAL AGREEMENT FOR THE SUBMISSION TO ARBITRATION OF PECUNIARY CLAIMS OUTSTANDING BETWEEN THE UNITED STATES AND GREAT BRITAIN, SIGNED ON THE 18TH DAY OF AUGUST, 1910, AND THE TERMS OF SUCH SUBMISSION

CLASS I. Claims based on alleged denial in whole or in part of real property rights.

#### AMERICAN

Webster, Studer, R. E. Brown, Samuel Clark.

#### BRITISH

Cayuga Indians, Rio Grande.

#### *Fijian Land Claims*

Burt, Henry, Brower, Williams.

CLASS II. Claims based on the acts of the authorities of either Government in regard to the vessels of the nationals of the other Government, or for the alleged wrongful collection or receipt of customs duties or other charges by the authorities of either Government.

#### AMERICAN

##### *Fishing Claims*

##### Group 1

##### *Against Newfoundland:*

Cunningham & Thompson (18 vessels): Masconomo, Arbutus, Anglo-Saxon, Quickstep, Nourmahal, Puritan, Talisman, Norma, Norumbega, Aloha, Ingomar, Jennie B. Hodgdon, Arkona, Arethusia, Independence II, S. P. Willard, Corona, Saladin.

Davis Bros. (10 vessels): Oregon, Margaret, Theo. Roosevelt, L. M. Stanwood, Georgie Campbell, Blanche, Veda McKnown, E. A. Perkins, Kearsarge, Lena & Maud.

Wm. H. Parsons (12 vessels): Corsair, Grace L. Fears, Argo, Lizzie Griffin, Independence, Independ-

#### BRITISH

##### *Shipping Claims*

Coquitlam, Favourite, Wanderer, Kate, Lord Nelson, Canadienne, Eastry, Lindisfarne, Newchwang, Sidra, Maroa, Thomas F. Bayard, Jessie, Peschawa.

##### *Canadian Claims for Refund of Hay Duties*

Peter Anderson, Charles Arpin, Nathaniel Bachelder, Magloire G. Blain, Toussaint Bourassa, continuing partner of Bourassa and Forrester; Pierre Bourgeois, William Burland & Company, Charles S. Rowe, surviving partner; Frederick Catudal; L. N. Charlebois, heir and assignee of Denis N. Charlebois; Joseph Couture; Wilfrid Dorais, heir of Louis T. Dorais, John and Francis Ewing, John Ewing, surviv-

AMERICAN (*continued*)

ence II, Dreadnought, Robin Hood,  
Helen G. Wells, Colonial, Alice M.  
Parsons, Mildred V. Lee.

Gorton-Pew Co. (37 vessels): A. M.  
Parker, Priscilla Smith, Senator  
Gardner, Corsair, Vigilant, Harry A.  
Nickerson, Gossip, Flirt, Ella G.  
King, Helen G. Wells, Ramona, Mas-  
sachusetts, Ellen C. Burke, J. J.  
Flaherty, Geo. R. Alston, Maxine  
Elliott, Vera, Orinoco, Miranda,  
Madonna, Atlanta, Gov. Russell,  
Mystery, Jas. A. Garfield, L. I.  
Lowell, Dora A. Lawson, Tattler,  
Alice R. Lawson, Olga, J. R. Bradley,  
Fannie Smith, Rob Roy, Smuggler,  
Essex, Athlete, Valkyria, Septre.

W. H. Jordan (6 vessels): Lewis H.  
Giles, O. W. Holmes, The Gatherer,  
Hattie E. Worcester, Goldenrod,  
Joseph Rowe.

Orlando Merchant (16 vessels): Ava-  
lon, Constellation, O. W. Holmes,  
Golden Rod, Grayling, Joseph Rowe,  
Harvard, Mary E. Harty, Harriet  
W. Babson, Richard Wainwright,  
Henry M. Stanley, Lewis H. Giles,  
Lottie G. Merchant, Oriole, Clin-  
tonia, Esperanto.

Jerome McDonald (3 vessels): Pre-  
ceptor, Gladiator, Monitor.

John Pew & Sons (5 vessels): A. E.  
Whyland, Essex, Columbia, Orinoco,  
Scepter.

D. B. Smith & Co. (12 vessels): Smugg-  
ler, Lucinda I. Lowell, Helen F.  
Whittier, Dora A. Lawson, Carrie  
W. Babson, Golden Hope, Fernwood,  
Sen. Gardner, Maxime Elliott, J. J.  
Flaherty, Tattler, Stranger.

Sylvanus Smith & Co. (7 vessels):  
Lucille, Bohemia, Claudia, Arcadia,  
Parthia, Arabia, Sylvania.

John Chisolm (5 vessels): Admiral  
Dewey, Harry G. French, Monarch,  
Judique, Conqueror.

Carl C. Young (3 vessels): Dauntless,  
A. E. Whyland, William E. Morrissey.

BRITISH (*continued*)

ing partner; Joseph Jean Baptiste  
Gosselin, heirs of Joseph A. Lamou-  
reux, deceased.

AMERICAN (*continued*)

- Hugh Parkhurst & Co. (6 vessels):  
Rival, Arthur D. Story, Patrician,  
Geo. Parker, Sen. Saulsbury, Diana.
- A. D. Mallock (3 vessels): Indiana,  
Alert, Edna Wallace Hopper.
- Thomas M. Nickolson (13 vessels):  
Ada S. Babson, Elizabeth N., Hiram  
Lowell, M. B. Stetson, A. V. S.  
Woodruff, T. M. Nickolson, Land-  
seer, Edgar S. Foster, A. M. Nickol-  
son, Wm. Matheson, Robin Hood,  
Annie G. Quinner, N. E. Symonds.
- M. J. Palson (3 vessels): Barge Til-  
lid, Schooner J. K. Manning, Tug  
Clarita.
- M. J. Dillon (1 vessel): Edith Emery.
- Russell D. Terry (1 vessel): Centen-  
nial.
- Lemuel E. Spinney (3 vessels): Amer-  
ican, Arbitrator, Dictator.
- Wm. H. Thomas (2 vessels): Elmer  
E. Gray, Thos. L. Gorton.
- Frank H. Hall (3 vessels): Ralph H.  
Hall, Sarah E. Lee, Faustina.
- M. Walen & Son (7 vessels): Kentucky,  
Effie W. Prior, Orpheus, Hattie A.  
Heckman, Ella M. Goodsir, Bessie N.  
Devine, Arthur James.
- Atlantic Maritime Co. (7 vessels):  
James W. Parker, Raynah, Susan &  
Mary, Elsie, Fannie E. Prescott, E.  
E. Gray, Mildred Robinson.
- Waldo I. Wonson (5 vessels): Ameri-  
can, Mystery, Procyon, Effie M. Mor-  
rissey, Marguerite.
- Edward Trevooy (1 vessel): Edward  
Trevooy.
- Henry Atwood (1 vessel): Fannie B.  
Atwood.
- Fred Thompson (1 vessel): Elsie M.  
Smith.

## Group 2

*Against Newfoundland:*

- Bessie M. Wells, Elector, Sarah B.  
Putnam, A. E. Whyland, N. B. Parker,  
Thomas F. Bayard, Arethusa, Harry  
A. Nickerson, Arkona, Edna Wallace  
Hopper, Athlete.

AMERICAN (*continued*)*Fishing Claims**Against Canada:*

Frederick Gerring, North, D. J. Adams,  
R. T. Roy, Tattler, Hurricane, Ar-  
gonaut, Jonas H. French.

CLASS III. Claims based on damages to the property of either Government or its nationals, or on personal wrongs of such nationals, alleged to be due to the operations of the military or naval forces of the other Government or to the acts or negligence of the civil authorities of the other Government.

## AMERICAN

Home Missionary Society, Daniel  
Johnson, Union Bridge Company,  
Madeiros.

## BRITISH

*Four Cable Companies Claims*

Cuban Submarine Telegraph Co., East-  
ern Extension Cable Co., Canadian  
Electric Light Co., Great North-  
western Telegraph Co.

*"Philippine War" Claims*

Ackart, Balfour, Broxup, Cundal, Dod-  
son, Fleming, Forbes, Fox, Fyfe,  
Grace, Grindrod, Hawkins, F., Haw-  
kins, J., Hendry, Hill, Hogg, Holi-  
day, Hong Kong Bank, Iloilo Club,  
Eastern Extension Telegraph Co.,  
Higgins, W., Higgins, N. L., Hoskin  
& Co., Kaufman, Ker Bolton & Co.,  
Launders, McLeod, McMeeking,  
Moore, Philippine Mineral Syndi-  
cate, Pohang, Pohoomul, Smith,  
Stevenson, Strachan, Thomson, Un-  
derwood, Warner, Zafiro, C. B. Chie-  
ne, N. L. Chiene, Parsons & Walker.

*"Hawaiian" Claims*

Ashford, Bailey, Harrison, Kenyon,  
Levy, McDowall, Rawlins, Redward,  
Reynolds, Thomas.  
Hardman, Wrathall, Cadenhead.

CLASS IV. Claims based on contracts between the authorities of either Govern-  
ment and the nationals of the other Government.

## BRITISH

King Robert, Yukon Lumber, Henming

## TERMS OF SUBMISSION

I. In case of any claim being put forward by one party which is alleged by the other party to be barred by treaty, the Arbitral Tribunal shall first deal with and decide the question whether the claim is so barred, and in the event of a decision that the claim is so barred, the claim shall be disallowed.

II. The Arbitral Tribunal shall take into account as one of the equities of a claim to such extent as it shall consider just in allowing or disallowing a claim any admission of liability by the Government against whom a claim is put forward.

III. The Arbitral Tribunal shall take into account as one of the equities of a claim to such extent as it shall consider just in allowing or disallowing a claim, in whole or in part, any failure on the part of the claimants to obtain satisfaction through legal remedies which are open to him or placed at his disposal, but no claim shall be disallowed or rejected by application of the general principle of international law that the legal remedies must be exhausted as a condition precedent to the validity of the claim.

IV. The Arbitral Tribunal, if it considers equitable, may include in its award in respect of any claim interest at a rate not exceeding 4 per cent per annum for the whole or any part of the period between the date when the claim was first brought to the notice of the other party and that of the confirmation of the schedule in which it is included.

The foregoing Schedule and Terms of Submission are agreed upon in pursuance of and subject to the provisions of the Special Agreement for the submission to arbitration of pecuniary claims outstanding between the United States and Great Britain, signed on the 18th day of August, 1910, and require confirmation by the two Governments in accordance with the provisions of that Agreement.

Signed in duplicate at the City of Washington, this sixth day of July, one thousand nine hundred and eleven, by the Secretary of State of the United States, Philander C. Knox, on behalf of the United States, and by His Britannic Majesty's Ambassador at Washington, the Right Honorable James Bryce, O.M., on behalf of Great Britain.

Philander C. KNOX  
James BRYCE

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## Decisions

### GREAT BRITAIN *v.* UNITED STATES

(*Yukon Lumber case*<sup>1</sup>. June 18, 1913. Pages 438-444.<sup>2</sup>)

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**ALTERNATIVE CLAIM.—IMPLIED WAIVER OF CLAIM.—CONTRADICTION BETWEEN PRIMARY AND ALTERNATIVE CLAIM.** Claim for payment of timber dues or, alternatively, of value of timber. Timber, illegally cut in Canada by Mr. Mountain, was sold by the latter to Mr. Ramsay, and in September 1900 by Mr. Ramsay to United States military authorities in Alaska. Since Canadian authorities never claimed ownership of timber, and for 13 years requested only payment of dues, *held* that alternative claim can no longer be presented. Alternative claim moreover somewhat contradictory, as claim for dues is exclusive of claim for recovery.

**PERSONAL OBLIGATION.—CONTRACT.—NEGLIGENCE.—GOOD FAITH.** No personal obligation of United States military authorities towards Canadian Government *held* to exist: no contract between them made, nor any negligence committed; United States military authorities dealt with Mr. Ramsay in perfect good faith without assuming debts and engagements of Mr. Mountain.

**OBLIGATION *IN REM*.—ENFORCEMENT OF MUNICIPAL LAW ABROAD.—SEIZURE OF STATE PROPERTY.** No obligation *in rem*: even if lien on timber had been reserved, lien would be inoperative as (1) its enforcement in United States impossible, and (2) timber State property and, therefore, not subject to seizure.

**POSSIBILITY TO AVOID GRIEVANCE.** Canadian Government cannot complain now of grievance which was easy to avoid.

*Cross-references:* Am. J. Int. Law, vol. 7 (1913), pp. 885-890; Jahrb. des V., vol. 2 (1914), pp. 458-462.

At the end of September, 1900, the Dominion Crown Timber and Land Agent at Dawson, Yukon Territory (Canada), Mr. F. X. Gosselin, was aware that a certain quantity of timber, viz., 68,500 feet, had just been cut without permit or authority on the vacant Dominion lands by a certain Howard Mountain, and that the said Mountain had sold the same timber to a certain O. N. Ramsay, who at that time was a contractor for the United States military authorities in Alaska, that the said Ramsay, under a contract of sale for delivery, had delivered the same with other large quantities of timber to the said United States military authorities, and also that the said Ramsay, who had obtained, at the request of the United States military authorities,

<sup>1</sup> In the report of Fred. K. Nielsen referred to on page 3 *supra* this case has been called the *Yukon Lumber Company* case. No such company has, however, been mentioned either in the decision or in the Schedule of Claims reprinted on p. 11 *supra*.

<sup>2</sup> References to page numbers following the date of each decision are to the report of Fred. K. Nielsen referred to in footnote 1.

a permit for 50,000 feet, had cut in trespass 24,570 feet more, and delivered the same to the said authorities.

It appears from a letter from the said Crown Agent, Gosselin, that he met Ramsay and Mountain at that time, but did not claim for recovery of the timber illegally cut and claimed only for payment of the Crown dues at \$4 per M. on the said timber as if it had been legally cut.

It is shown (Gosselin's letters December 4, 1900, and July 20, 1901) that, on September 29, 1900, Ramsay paid the Crown dues for the 24,570 feet of timber cut by him in excess of his permit, i.e., in trespass, and that Gosselin then took Mountain's promise that he would pay the same Crown dues for the 68,500 feet also cut in trespass *when he would come to Dawson some time during the winter* (Gosselin's letter December 4, 1900) or *as soon as he had cashed the order from Mr. Ramsay* which he had received for logs (Gosselin's letter July 20, 1901); and that delay was agreed to.

On December 4, 1900, Gosselin informed the Department of the Interior of the above-mentioned facts and on January 17, 1901, the Secretary of that Department, without objecting to anything Gosselin had done, gave an instruction that *if the dues were not paid within a reasonable time*, the matter was to be reported to the officer commanding the Department of North Alaska for advice as to what steps should be taken to recover the amount of dues and expenses, but no reference was made to any claim to the timber or its value.

In the meantime, that is to say on November 15, 1900, January 4, 10, 12, and March 2, 1901, the United States military authorities paid Ramsay for all the timber (300,000 feet) he had sold and delivered under contract.

In May or June, 1901, Gosselin was informed that Mountain had gone away to San Francisco, leaving no property behind him, and that he departed under an assumed name owing several people in the country.

On July 20, 1901, the said Crown Agent Gosselin applied to the United States military authorities for payment of the Crown dues left unpaid by Mountain for the timber sold by him to Ramsay and by Ramsay to the said authorities. The Crown Agent observed that Ramsay had a permit granted to him as a consideration to the United States Government, and that he should have ascertained whether or not Mountain, his vendor, had paid the Crown dues.

The views officially expressed by the Government Legal Adviser in Alaska (British memorial, annex 16) were that it would be the duty of the United States Government to either pay the dues on the 68,500 feet cut by Mountain or to see that Ramsay did.

Thereafter a correspondence was exchanged during the year 1902 between the Canadian Government and the United States military authorities in Alaska and Washington, wherein on one side the views of the Canadian Legal Adviser were communicated and applications were made to obtain from the military authorities the payment of the dues which Mountain failed to pay, and on the other side, the United States military authorities replied that they were not to be held responsible for the dues which Mountain had not paid.

Since 1902 no documents appear in the memorial except two affidavits given apparently for the present case, one of them dated in 1912 and the other without any year mentioned.

The British Government claim at the present time before this Tribunal that the United States Government should either pay the timber dues in question or the value of the timber converted by the Government of the United States to their own use.

The United States Government, on the other hand, contends that the claim is not well founded in fact or in law and asks that it be dismissed and finally barred.

It is clear at the outset that a double trespass was committed in September, 1900, one by Ramsay, who cut 24,570 feet without permit, and the other by Mountain, who cut 68,500 feet without permit.

In such matters the Canadian Government is represented by the Crown Agent, whose duties and powers are defined in an Order in Council of July 7, 1898, article 6 (British memorial, annex 27), in the following terms:

"It shall be the duty of the Crown Timber and Land Agent, subject to the authority of the Commissioner, *to receive and regulate all applications for licenses and permits to cut timber for lumbering purposes* and for fuel, for the purchase of coal lands, for the lease of lands for grazing purposes, and for hay permits; also, subject to regulations to be provided in that behalf, to receive and deal with applications for the purchase of land, but no lease or sale of land shall take place except in accordance with the regulations furnished from the Department."

The Crown Agent dealt with Ramsay and Mountain in the same manner, when he was informed of the trespass; he neither reproached the trespassers for their offense, nor did he claim the timber or its value, about \$34.40 per M. (United States answer, exhibit 5), but he claimed only the Crown dues of \$4 per M.

The Crown Agent did not, and since that time the Canadian Government did not, claim that the ownership of the timber rested in the Crown; the Canadian Government has considered itself not as the owner of the timber, nor even as the creditor of its value, but only as the creditor of certain dues, called Crown or stumpage dues, of \$4 per M., and it is shown that the Crown Agent, after having been paid by the first offender, Ramsay, granted Mountain delay until some time during the winter of 1901. Such a concession of delay implies, in this Tribunal's opinion, the existence of a debt, and not of a claim for repossession.

Not only has this been the attitude of the Crown Agent and the Canadian Government with both Ramsay and Mountain, but also with the United States military authorities.

From the very beginning, that is to say, from September and December, 1900, the Canadian Government and its Agents were perfectly aware that the timber was in the possession of the United States military authorities, but they never claimed for it or for its value. According to the express statement of the Secretary of the Interior (letter, December 9, 1901), it was only when the *Agent* of that Department at Dawson did not succeed in collecting the dues from Mountain and Ramsay, that application was made to the United States authorities to pay the said dues.

Under these circumstances, Mountain sold to Ramsay, and Ramsay sold to the United States military authorities, not a thing belonging to a third person but a thing liable for certain dues remaining unpaid; that is to say, the United States military authorities, whose perfect good faith has never been questioned, did not receive from Ramsay some timber the title to which was still vested in the Canadian Government, but some timber for which Mountain, the original vendor, had not paid the dues.

So the question which arose between the two parties has never been whether or not the ownership in the timber rested in the United States military authorities, but whether those authorities had or had not to pay the dues instead of the vendor of their vendor.

Even now, before this Tribunal, the British Government claim for payment of dues, and they have added only as an alternative a claim for the value of the timber. The opinion of this Tribunal is that it is impossible to admit that after having at the beginning ratified the trespass and claimed during 13 years

for only the payment of dues, and still now claiming for that payment, the British Government is entitled to contend that they retained the ownership of the said timber and claim for its value as representing the thing itself which has been consumed. Moreover, the British Government does not claim first for the value and secondly for the dues, but first for the dues and in the alternative for the value. It seems that this alternative is somewhat contradictory, as it is clear that the claim for the dues is exclusive of a claim for recovery.

Consequently, the question to be decided is not whether or not the United States military authorities are the legal owners of the timber, but whether or not the debt of the Crown dues can be claimed against them, which is quite a different question and the only one to be considered.

In the first place, it is difficult to find any personal obligation of the United States military authorities towards the Canadian Government. The said authorities have made no contract, and have committed no negligence, out of which could arise an obligation. Even supposing that Ramsay's permit had been granted at their request, and that they had some liability as to Ramsay's trespass, they had absolutely nothing to do with Mountain. It is impossible to find in the promise that Ramsay would not in any way abuse the permission given him to cut logs, a caution or a guarantee or some other obligation personally assumed as to the payment of Crown dues by a third person from whom Ramsay may have purchased some timber which was sold *afterwards* to the said military authorities.

The United States military authorities have purchased from Ramsay, and paid him for, the timber in perfect good faith; they had no notice of its origin; they did not assume in any way the debts and engagements which the original provider of their vendor may have assumed towards the Canadian Government in respect of the cutting of the timber; they cannot be held bound and obliged by Mountain's promise made to and agreed to by the Crown Agent to pay the dues at such or such a time, i.e., some time during the winter of 1901.

In the second place the United States military authorities are not bound *in rem*.

It is not contested that the cutting of timber in the Yukon Territory is subject to the Canadian regulations which have full power to provide the Canadian Government with such lien or other securities for guaranteeing the payment of their dues, as well as with the right of legal prosecution against any offender. The right of legal prosecution has not been exercised, and the Canadian Government has never claimed except for the dues.

Even supposing that Canadian legislation reserved a lien on the timber, giving the Crown a title to seize the timber in order to be paid the dues, this lien is inoperative in the present case.

First, because the timber is outside the Canadian Territory, and the lien, if any, enacted by the municipal law can not be enforced in a foreign country against a foreigner unless such a lien is provided for by the law of that country, and can be enforced under that law.

Second, because the timber having become State property is not subject to any seizure.

Finally, the Canadian Government does not seem justified in complaining now of a grievance which easily could have been avoided.

The still wild condition of the country may explain the absence of any efficient control over timber cutting, taking out, and passing the boundary; but the Canadian Government had every opportunity and facility in September, 1900, and at least from November, 1900, to March, 1901, until the final payment for the timber, to claim for the recovery of the timber, or of

its value, to stop the payment of the sums representing that value, when they were in the hands of the United States military authorities.

Under these conditions, the cutting of timber as well by Mountain as by Ramsay having been ratified by the Canadian Government, it remained only a debt of Crown dues. Ramsay's debt was paid by Ramsay himself, and Mountain's debt can not be considered as constituting for the United States military authorities either a personal obligation or an obligation *in rem*. Furthermore the Canadian Government, having been able to avoid the grievance arising from Mountain's acts, does not seem to be entitled now to hold the United States military authorities in any way responsible for it.

*On these motives*

The decision of the Tribunal is that the claim of the British Government be disallowed.

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OWNERS OF THE *LINDISFARNE* (GREAT BRITAIN) *v.*  
UNITED STATES

(*June 18, 1913. Pages 483-488.*)

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**COLLISION OF VESSELS IN NEW YORK HARBOUR.—EVIDENCE: PROOF OF FAULT, BURDEN OF PROOF, UNIVERSALLY ADMITTED RULE OF MARITIME LAW.—INEVITABILITY OF COLLISION, NECESSARY CARE AND MARITIME SKILL, CIRCUMSTANCES, HARBOUR REGULATIONS, BREACH OF DUTY OR LIABILITY OF VESSEL.** Universally admitted rule of maritime law that ship under way colliding with ship at anchor has to prove that it was itself not at fault, or that the other ship was at fault. In the present case (*Crook*, under way, on May 23, 1900, collides with *Lindisfarne*, in dock in New York harbour), neither sufficient evidence of inevitability of collision, nor of *Crook's* necessary care and maritime skill. No evidence presented concerning either circumstances of collision, or harbour regulations and their observance, or breach of duty or liability on part of *Lindisfarne*.

**ADMISSION OF LIABILITY.** By Act of April 7, 1906, United States Congress provided for payment of costs of repairs on assumption of obligation to pay, arising out of liability.

**DEMURRAGE.** No sufficient evidence that repairs delayed or interrupted commercial operations of *Lindisfarne*. Claim for one day's demurrage yet to be allowed under Terms of Submission.

**INTEREST.** *Held* equitable to allow interest at 4 % per annum for over ten years.

*Cross-references:* Am. J. Int. Law, vol. 7 (1913), pp. 875-879; Jahrb. des V., vol. 2 (1914), pp. 450-453.

On the 23rd of May, 1900, the United States Army Transport *Crook*, damaged by collision the British steamship *Lindisfarne*, net tonnage 1944 t. in the harbour of New York. The *Lindisfarne* had to be repaired and the time while the repairs were being carried out was one day. The cost of these repairs was defrayed by the United States Government, and His Britannic Majesty's Government, on behalf of the owners of the said ship, claim a sum of £ 32. 8s. for the one day's demurrage, with interest at 4 % for 11 years, i.e., from the 25th of May, 1901, the date on which His Britannic Majesty's Government first

brought the claim to the notice of the officials of the United States Government, to the 26th of April, 1912, the date of the confirmation of the First Schedule to the Pecuniary Claims Convention, viz., £ 14. 5s. 1d., making a total of £ 46. 13s. 1d.

The Government of the United States denies that it is liable for demurrage on account of the injury sustained by the *Lindisfarne* through such collision, and asks that this claim be dismissed and finally barred.

The facts as to the collision are set forth in a communication of the Secretary of State for the United States, dated January 2, 1902, the text of which is quoted in the British memorial. These facts are admitted by the United States Government in their answer and are as follows:

"The *Crook* was being backed out of Pier No. 22 and was under charge of the Cahill Towing Company, contractors for handling the army transports in New York harbour; that while being backed, another vessel crossed her stern, and Assistant Marine Superintendent Lothrop, who was on the *Crook*, seeing danger of colliding with it, gave orders to stop the *Crook* which caused her bow to swing against the *Lindisfarne* lying alongside, with such force as to damage her."

Further it appears from the documents of the case (letter of the Secretary of State, January 8, 1902), that on the day after the collision, i.e., on May 24th noon to noon May 25, 1900, the necessary repairs to the *Lindisfarne* were made by order of the army transport officials, and after having been made the cost of these repairs was defrayed by an appropriation for that purpose by an Act of Congress approved April 7, 1906.

On May 26, 1901, the shipowners, acting through their agents in New York, Messrs. J. H. Winchester and Company, wrote to the General Superintendent, Army Transport Service, claiming for the one day's demurrage of the ship while undergoing repairs.

On September 3, 1901, the United States military authorities in New York answered that the claim could not legally be paid in the absence of a specific appropriation therefor. It was added that the claimant should apply to Congress wherein appropriations were made for like purposes.

On November 4, 1901, December 10, 1904, and February 27, 1906, the British Government, through their Ambassador at Washington, presented to the Department of State of the United States notes relative to the claim, requesting that the said claim be submitted to Congress.

On January 13, 1902, December 14, 1904, March 14, 1906, and January 6, 1909, the claim was presented to Congress, either with the expression of opinion of the War Department that "*the claim for demurrage is warranted*" or with the statement of the Department of State "*that in view of the recognition given*" this claim "*by one or another of the Departments it is not easy for this Department to give satisfactory reasons why provisions for the payment is not made.*" Favourable reports on this claim were made by the Senate Committee on Foreign Relations, and by the House of Representatives' Committee on Claims. Notwithstanding the pressing notes of the British Embassy at Washington and notwithstanding all these favourable reports, expressions of opinion and recommendations, no conclusive action was taken by Congress.

Under these circumstances the British Government contend that the liability of the United States Government has never been contested, and the failure by Congress to make an appropriation to pay is the only cause of non-payment.

On the other hand, before this Tribunal, the United States Government raises various reasons tending to reject any liability: first, that the collision was caused through the efforts of the *Crook* to avoid running down a third

vessel, and these efforts were conducted with ordinary care and maritime skill; secondly, that the collision was not the result of any negligence on the part of the officer in command of the *Crook*, either in the determination of a course of action or in the handling of the transport, and no negligence on his part can be presumed in view of his manifest duty to avoid colliding with a vessel in motion; thirdly, that the collision was in fact and in law an inevitable accident; and fourthly, that no evidence is presented on behalf of His Britannic Majesty's Government upon which a claim for demurrage can be predicated or the amount of demurrage computed; and fifthly, that the Government of the United States has never admitted any liability for the collision.

Such are the facts of the case and the contentions of the two parties.

I. *As to the liability:*

The United States Government does not deny that it must assume the liability, if any, incurred by the *Crook*.

It is not contested that the collision took place between the *Crook*, which was under way, and the *Lindisfarne* which was lying in dock.

It is a universally admitted rule of maritime law, as well in the United States as elsewhere, that in case of collision between a ship under way and a ship at anchor, it rests with the ship under way to prove that she was not at fault, or that the other ship is at fault.

In the present case no sufficient evidence is afforded in that respect by the United States Government. The mere fact that a third vessel crossed the *Crook's* stern, while she was being backed, and that there was danger of colliding with a third vessel is not sufficient evidence that the collision with the *Lindisfarne* was an inevitable accident. The mere fact that the *Crook* stopped to avoid collision with a third vessel is not sufficient evidence that the *Crook* did use the necessary care and maritime skill. No evidence is presented either as to the speed, handling, and way of the third vessel, or as to the speed of the *Crook*, the lookout on board that ship, the time when the order to stop was given, or as to the hour of the collision, the weather at that time, the tide, currents, and general condition of the waters in the harbour of New York at that time, or as to the harbour's regulations and the due observance of those regulations. No evidence and no contention is presented involving any breach of duty, or any liability on the part of the *Lindisfarne*.

The United States Government contends that some of the State or Congressional papers refer to certain reports (with the text of which the parties have been unable to provide the Tribunal), expressing the opinion that the collision was an accident which could not be foreseen. But it is stated in certain other reports, which have not been furnished to the Tribunal but which are quoted in other State or Congressional papers printed in the memorial, that the fault was entirely that of the *Crook*.

The United States Government contends that it did not admit liability for the collision by the Act of Congress approved April 7, 1906, and entitled "*An Act providing for the payment to the New York Marine Repair Company of Brooklyn, New York, of the cost of the repairs to the steamship Lindisfarne necessitated by injuries received from being fouled by the United States Army Transport Crook, in May, 1900.*" They maintain that the defraying of these repairs was simply a matter of grace and an unusual liberality. But no evidence is presented showing an intention to do an unusual liberality. Nothing appears in that respect in any of the Congressional papers and documents. On the contrary, the same papers show clearly that the said payment was provided for by Congress on an assumption of an obligation to pay, arising out of a liability.

Under these circumstances the Tribunal is of the opinion that there is no good reason to reject the liability of the United States Government.

II. *As to the nature and amount of the claim:*

The British Government claim for the one day's demurrage while the *Lindisfarne* was repaired.

It is clear that demurrage means some detention or delaying of the ship during a certain time.

In that respect no sufficient evidence is afforded by the British Government that the repairs have delayed or interrupted in any way the commercial operations of the *Lindisfarne*.

But according to clause No. 2 of *Terms of Submission* annexed to the compromise, it has been specially agreed by the two Governments:

"The Arbitral Tribunal shall take into account as one of the equities of a claim to such extent as it shall consider just in allowing or disallowing a claim any admission of liability by the Government against whom a claim is put forward."

It has already been shown that on the many occasions when this claim was under consideration neither the United States authorities nor Government objected to the claim for demurrage.

Under these circumstances the Tribunal, acting under the said specially stipulated terms of submission, consider it just not to disallow this claim.

III. *As to interest:*

The claim was presented first on May 25, 1901, to the Army authorities of the United States, and they then explained that it should not be addressed to them but to the United States Congress. It was then presented to Congress through the Department of State, acting at the request of the British Ambassador on January 8, 1902. Since that time there is no evidence to justify why during more than ten years the bills, however favourably presented, reported and recommended, never passed. As the Secretary of State said himself in his letter of March 23, 1906, in view of the recognition given these claims by one or another of the Departments *it is not easy to give satisfactory reasons why provision for the payment has not been made.*

Without referring to other grounds and discussing the United States contention that according to their public law no interest is due on State debts, the Tribunal is authorized by clause No. 4 of the Terms of Submission, annexed to Schedule I of the Compromise, to allow interest at 4 % per annum for the whole or any part of the period between the date when the claim was first brought to the notice of the other party. Taking into consideration the circumstances above mentioned, the Tribunal thinks it is equitable to do so in the present case.

*On these motives*

The Tribunal decides that the United States Government shall have to pay the British Government the sum of £ 32. 8s. with interest at 4 % since the 8th day of January, 1902, to the 26th day of April, 1912.

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WILLIAM HARDMAN (GREAT BRITAIN) *v.* UNITED STATES*(June 18, 1913. Pages 495-498.)*

DESTRUCTION OF PRIVATE PROPERTY IN TIME OF WAR.—NECESSITY OF WAR, *VIS MAJOR*.—SANITARY MEASURE. Destruction of private property by United States military authorities on or about July 12, 1898, in Cuba, during Spanish-American War and in the interest of preservation of health of military forces *held* to be necessity of war, i.e. an act which is made necessary by the defence or attack and assumes the character of *vis major*.

NECESSARY WAR LOSSES. Necessary war losses *held* not to give rise to legal right of compensation.

EXTRAJUDICIAL ACTION. Tribunal suggests that United States consider possibility of compensation as matter of grace and favor.

*Cross-references:* Am. J. Int. Law, vol. 7 (1913), pp. 879-882; British Yearbook, vol. 2 (1921-1922), pp. 198-200; Jahrb. des V., vol. 2 (1914), pp. 454-455.

*Bibliography:* <sup>1</sup> Sir Cecil Hurst, K.C.B., K.C., "British American Pecuniary Claims Commission", British Yearbook, vol. 2 (1921-1922), pp. 198-200.

On or about July 12, 1898, during the war between the United States and Spain, while the town of Siboney, in Cuba, was occupied by the United States armed forces, certain houses were set on fire and destroyed by the military authorities in consequence of sickness among the troops and from fear of an outbreak of yellow fever. In one of these houses was some furniture and personal property belonging to a certain William Hardman, a British subject, which was entirely destroyed with the house itself.

The British Government claim, on behalf of the said William Hardman, the sum of £ 93, as the value of the said personal property and furniture, together with interest at 4 %, for 13 years from March, 1899, when the claim was brought to the notice of the United States military authorities in Cuba, to the 26th of April, 1912, when the schedule to Pecuniary Claims Agreement, in which the claim was included, was confirmed, i.e. £ 49, the full claim being, therefore, for the total sum of £ 142.

The United States denies that it is liable in damages for the destruction of the personal property of William Hardman, and contends that the United States military authorities who were conducting an active campaign in Cuba had a right in time of war to destroy private property for the preservation of the health of the army of invasion and that such authorized destruction constituted an act of military necessity or an act of war, and did not give rise to any legal obligation to make compensation.

The two parties admit the facts as above related and agree as to those facts. The British Government do not contend that Hardman's nationality entitled him to any special consideration. At the hearing of the case they did not maintain their former contention that there is no sufficient evidence of the same interest to destroy the furniture as the house. They admit that necessary war losses do not give rise to a legal right of compensation. But they contend that the destruction of Hardman's property was not a war loss in that it did not constitute a necessity of war, but a measure for better securing the comfort and health of the United States troops, and that in that respect no private property can be destroyed without compensation.

<sup>1</sup> References in this section are to publications referred to on p. 7 *supra* and to the Annual Digest.

The question to be decided, therefore, is not whether, generally speaking, the United States military authorities had a right in time of war to destroy private property for the preservation of the health of the army, but specially whether, under the circumstances above related, the destruction of the said personal property was or was not a necessity of war, and an act of war.

It is shown by an affidavit of Brigadier-General George H. Torney, Surgeon General, United States Army (United States answer, exhibit 3), who personally was present at that time at Siboney and familiar with the sanitary conditions then existing in that place, that the sanitary conditions at Siboney were such as made it advisable and necessary to destroy by fire all buildings and their contents which might contain the germs of yellow fever. No contrary evidence is presented against this statement, the truth of which is not questioned.

In law, an act of war is an act of defense or attack against the enemy and a necessity of war is an act which is made necessary by the defense or attack and assumes the character of *vis major*.

In the present case, the necessity of war was the occupation of Siboney, and that occupation, which is not criticized in any way by the British Government, involved the necessity, according to the medical authorities above referred to, of taking the said sanitary measures, i.e., the destruction of the houses and their contents.

In other words, the presence of the United States troops at Siboney was a necessity of war and the destruction required for their safety was consequently a necessity of war.

In the opinion of this Tribunal, therefore, the destruction of Hardman's personal property was a necessity of war and, according to the principle accepted by the two Governments, it does not give rise to a legal right of compensation.

On the other hand, notwithstanding the principle generally recognized in international law that necessary acts of war do not imply the belligerent's legal obligation to compensate, there is, nevertheless, a certain humanitarian conduct generally followed by nations to compensate the private war losses as a matter purely of grace and favor, when in their own judgment they feel able to do so, and when the sufferer appears to be specially worthy of interest. Although there is no legal obligation to act in that way, there may be a moral duty which can not be covered by law, because it is grounded only on an inmost sense of human assistance, and because its fulfilment depends on the economical and political condition of the nation, each nation being its own judge in that respect. In this connection the Tribunal can not refrain from pointing out the various benevolent appreciations given by the Department of State in this particular case, and commends them to the favourable consideration of the Government of the United States as a basis for any friendly measure which the special condition of the sufferer may justify.

*Upon these motives*

The decision of the Tribunal in this case is that the claim of the British Government be disallowed.

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THE GLASGOW KING SHIPPING COMPANY (LIMITED) (GREAT  
BRITAIN) *v.* UNITED STATES

(King Robert case. *June 18, 1913. Pages 520-523*)

CONTRACT.—DEFENDANT NOT REAL PARTY IN INTEREST. Messrs. R. Chapman & Son, of Newcastle-on-Tyne, under a contract of February 11, 1905, with Messrs. McCall & Co., contractors to the U.S. Bureau of Equipment, Navy Department, Washington, D.C., accepted to transport coal by the *King Robert*, a freighter chartered by Chapman & Son from the owners, the Glasgow King Shipping Company (Limited). By agreement of June 8, 1905, the latter company relieved Chapman & Son from all responsibility for and in relation to the transportation. In view of the fact that McCall & Co. were contractors to and not agents for the U.S. Bureau of Equipment, no claim out of the contract with McCall & Co. can be brought by the company against the United States.

EVIDENCE.—UNSIGNED DOCUMENT. So-called copy of contract of February 11, 1905, attached to agreement of June 8, 1905. This so-called copy, possibly a preliminary memorandum, calling McCall & Co. "agents", but not signed by McCall, therefore constitutes no evidence of this quality.

*Cross-references* : Am. J. Int. Law, vol. 7 (1913), pp. 882-885; *Jahrb. des V.*, vol. 2 (1914), pp. 456-458.

*Bibliography* : Nielsen, p. 520.

This is a claim on behalf of the Glasgow King Shipping Company (Limited) for the sum of £ 111. 3s. 8d. with interest at 4 % per annum from the 10th of April, 1906, to the 26th of April, 1912, amounting to £ 26. 13s. 8d., making a total of £ 137. 17s. 4d. Of this amount £ 100. 13s. 8d. represents interest at the rate of 6 % per annum from the 17th of November, 1905, to the 7th of March, 1906, on the sum of \$26,486.40 freight earned by the *King Robert* while chartered as below set forth, and £ 10. 10s. represents the expenses of cables, telegrams, postage, etc., in relation to this claim for interest.

The *King Robert* was employed under an agreement dated June 8, 1905, which is set forth in annex 7 of the British memorial, by which the Glasgow King Shipping Company, owners of the *King Robert*, and Messrs. R. Chapman & Son, of Newcastle-on-Tyne, agreed that in consideration of the said steamer "being nominated by R. Chapman & Son under their contract with the U.S. Bureau of Equipment, Navy Department, Washington, D.C., dated the 11th February, 1905, for the transportation of coal from Norfolk, Newport News, Philadelphia, or Baltimore to Manila, the owners agree to relieve R. Chapman & Son from all responsibility for and in relation to the transportation of a cargo of not less than 5,400 tons, or more than 5,700 tons, from Norfolk, Newport News, Philadelphia, or Baltimore, as ordered, to U.S. Naval Coal Depot, Sangley Point, Manila Bay, under the terms of said contract, copy of which is attached". It was further specified that freight at \$4.80 per ton was to be collected.

The document described in this agreement as R. Chapman & Son's "Contract with the U.S. Bureau of Equipment, Navy Department, Washington, D.C., dated the 11th February, 1905", a copy of which is referred to as attached to that agreement, is set forth in annex 7 of the British memorial. The copy of this document which was annexed to the agreement has also been produced for the inspection of this Tribunal.

This document shows on its face that it is not a contract between R. Chapman & Son with the U.S. Bureau of Equipment, Navy Department, as described in R. Chapman & Son's agreement of June 8th with The Glasgow King Shipping Company. The opening paragraph shows conclusively that the U.S. Bureau of Equipment is not a party to it, the parties being described as Messrs. McCall & Co., by cable authority of Messrs. Wrenn & Co., London agents for Messrs. R. Chapman & Son, steamship owners of Newcastle-on-Tyne; and Messrs. McCall & Co., contractors to the U.S. Bureau of Equipment, Navy Department, Washington, D.C. It is true that at the close of this document the following paragraph appears:

"As agents, by authority of Messrs. Wrenn and Co., London, dated February 9th, 10th. and 11th, agents for Messrs. R. Chapman and Son, Newcastle, and H. N. Manney, Chief Bureau of Equipment, Navy Department, Washington, D.C."

So far, however, as this purports to be a representation that McCall & Co. are agents for H. N. Manney, Chief Bureau of Equipment, Navy Department, it is valueless because McCall & Co's signature is not affixed to the document. Moreover, no authority has been shown, and so far as appears there is no justification for any such representation of agency on the part of McCall & Co.

This so-called contract may have been a preliminary memorandum, but at any rate it fails utterly to imply any contracted relation between Messrs. Chapman & Son and the United States Bureau of Equipment of the Navy Department.

In the answer of the United States a signed contract is set forth (exhibit 2), dated the 8th of March, 1905, between "Messrs. McCall & Co., of Baltimore, in the State of Maryland, Md., party of the first part, and the United States, by the Purchasing Pay Officer, United States Navy Pay Office, Baltimore, Md., acting under the direction of the Secretary of the Navy, party of the second part". By this contract McCall & Co. agreed to furnish "transportation of 30,000 tons (10 % more or less) best quality bituminous coal from Baltimore, Md., Philadelphia, Pa., Lambert's Point, Va., or Newport News, Va. (loading port for each cargo at the option of the Bureau of Equipment) to the U.S. Naval Coal Depot, Sangley Point, Manila Bay, Philippine Islands. Rate of freight four dollars eighty-seven and one-half cents (\$4.87 1/2) per ton 2,240 lbs."

There is no sufficient evidence of any other contract with the Government of the United States, and it appears on the contrary that it is under this contract that the United States Government paid to the McCall & Co.) \$26,811.75 on the 6th of March, 1906, freight for 5,506 tons delivered on the 17th of November, 1905 (United States answer, exhibit 1). It will be observed that this payment was for freight at the rate of \$4.87 1/2 per ton as provided in this contract, and not at the rate of \$4.80 per ton as provided in the so-called contract above mentioned of February 11, 1905, a copy of which was annexed to and formed part of the charter party of June 8, 1906, between the owners of the *King Robert* and Chapman & Co., at which lower rate the freight would have amounted to only \$26,428.80, being \$382.55 less than the amount which the McCall-Dinning Company have accounted for to the owners of the *King Robert* for this service.

It is unquestioned that the transportation by the *King Robert* of the cargo delivered in November, 1905, and paid for by the United States Government as above set forth is the same transportation as that upon which this claim is founded (Walker & Co.'s bill of March 30, 1906, British memorial, annex 1).

The Tribunal, therefore, must rely only on this contract of March 8, 1905, between McCall & Co. and the United States in determining the liability of

the United States in this case, and consequently the Tribunal finds that there was no privity of contract between the United States Government and the owners of the *King Robert*, who were merely contractors with a subcontractor of McCall & Co., who in turn were merely contractors with the United States Government, and not agents for that Government.

The contract of March 8, 1905, between McCall & Co. and the United States Government expressly provides:

"That upon the presentation of the customary bills and the proper evidence of the delivery, inspection, and acceptance of the said article, articles, or services, and within ten days after the warrant shall have been passed by the Secretary of the Treasury, there shall be paid to the said McCall & Co., or to their order, by the Navy paymaster for the port of Philadelphia, Pa., the sum of one hundred and forty-six thousand two hundred and fifty dollars, for all the articles delivered or services performed under this contract: *Provided, however*, that no payments shall be made until all the articles or services shall have been delivered or performed and accepted, except at the option of the Bureau of Supplies and Accounts.

"It is mutually understood and agreed, as aforesaid, that no payment or allowance to said party of the first part will or shall be made by the United States for or on account of this contract except as herein specified."

There is nothing in this case to show that the payments thus provided for have not been made by the United States in exact accordance with these requirements of that contract.

The Tribunal is therefore of the opinion that the owners of the *King Robert* are not entitled to recover interest against the United States Government for delaying until March 6, 1906, before paying to Messrs. McCall & Co. the freight earned by the *King Robert*, and as the other items of the claim are dependent upon this item, they fall with it.

*Upon these motives*

The decision of the Tribunal in this case is that the claim of the British Government be disallowed.

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GREAT BRITAIN AND OTHERS (GREAT BRITAIN)  
v. UNITED STATES

(Canadienne case. May 1, 1914. Pages 427-431.)

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**COLLISION OF VESSELS ON ST. LAWRENCE RIVER.—APPLICABLE LAW: *LEX LOCI DELICTI COMMISSI*.—FAULT AND LIABILITY: INTERNATIONAL RULES OF THE ROAD.** Collision on October 29, 1897, on St. Lawrence River between Canadian Government steamship *Canadienne*, chartered by Mr. Lindsay, and United States Government steamship *Tanitic*. According to generally recognized rule of international law in United States and in Great Britain the *lex loci delicti commissi* must apply. Fault and liability of ships involved determined under the International Rules of the Road obtaining at time of collision on St. Lawrence River between Montreal and Quebec, and under English law, respectively.

**EVIDENCE: PROOF OF FAULT. REPORTS OF INVESTIGATIONS BY PARTIES.** Concerning the facts of the collision no other evidence available to Tribunal than reports of two investigations made by Canadian Marine Authorities

at Montreal on November 3 and 8, 1897, and by United States Naval Authorities on November 22, 1897, at Quebec. Tribunal without opportunity to see the witnesses, the ship's papers, or the engineer's log. For some of the items of the charterer's estimate of damages no sufficient proof is given.

**EXTENT OF LIABILITY: BOTH SHIPS AT FAULT.**—In the opinion of Tribunal both ships are at fault, but in a different proportion. Under applicable English law each ship obliged to pay half the loss of the other. *Held* that, although no claim for damages suffered by the *Yantic* has been presented by United States, the *Yantic's* damage has to be taken into consideration in assessing the amount to which Great Britain is entitled.

**INTEREST.** *Held* that no allowance of interest justified.

*Cross-reference:* Am. J. Int. Law, vol. 8 (1914), pp. 655-659.

This is a claim presented by His Britannic Majesty's Government for seven thousand eight hundred sixty-five 59/100 dollars (\$7,865.59), for damage to the Canadian Government's steamship *Canadienne* and loss to her charterer, the late Robert Lindsay and his representatives, all of them British subjects, resulting from a collision which occurred in the River St. Lawrence between the steamship *Canadienne* and the United States Government's steamship *Yantic*, on October 29, 1897.

The collision was the subject of two investigations, one made by the Canadian Marine Authorities at Montreal on November 3 and 8, 1897, the other by the United States Naval Authorities on November 22, 1897, at Quebec.

#### I. *As to the facts:*

The *Canadienne* left Montreal on October 27, 1897, bound for Quebec, Gaspé, and other ports on the lower St. Lawrence. She was fully manned and had an apprentice pilot on board. In the early morning of October 29th she was on her way down nearing Pointe-à-Pizeau or Sillery Point, on the north bank of the river, about three miles above Quebec.

On the same morning the United States steamship *Yantic* left her Quebec anchorage at 4.15 a.m., bound for Montreal, and at 4.30 she stood up the river with a duly licensed Canadian pilot on board.

It appears from the evidence taken at the investigation held by the Canadian Authorities that the *Canadienne*, when approaching Sillery Point, first saw both side lights of another steamer, which subsequently proved to be the *Yantic*, and shortly thereafter, only her green light; afterwards both side lights appeared again, and then the green light disappeared, leaving only the red light visible.

It appears from the inquiry held by the United States Authorities that the *Yantic* came up to and passed Sillery Point without reporting any light ahead; then she changed her course slightly to starboard, and after the ship was steadied on that new course, she reported the masthead and the green light of an approaching steamer, which was the *Canadienne*.

It was found in the United States inquiry that "when the *Canadienne* saw both the *Yantic's* side lights and afterwards the green only, the latter must have been east of Pizeau Point" (United States answer, p. 29).

It is further stated in the report of the same inquiry that it is probable that the change of course made by the *Yantic* in rounding Sillery Point opened again her two lights and let the green disappear, leaving only the red visible.

After the green light of the *Canadienne* was reported, the *Yantic* finding herself red to green came one-half point to starboard and gave one blast of the whistle to indicate that she was directing her course to starboard.

To this signal the *Canadienne* gave no answer, but kept steadily on her course. Then the *Yantic* put her helm hard-a-port, reduced her speed, stopped and reversed the engines.

The *Canadienne* continued on her way, full speed ahead.

Almost immediately the collision occurred.

## II. *As to the liability:*

At the outset it must be observed that the *International Rules of the Road* applied in 1897 on the St. Lawrence River between Montreal and Quebec.

When the *Canadienne* saw both side lights of the *Yantic*, and particularly when almost immediately afterwards the *Yantic* showed her red light—a clear indication that she was coming to starboard—the *Canadienne* was at fault in taking or keeping her way to cross the *Yantic*'s bow so as to pass starboard to starboard, instead of giving way so as to pass port to port according to the Rules of the Road (articles 25, and 18, paras. 1 and 3). There is no evidence in this record showing the existence of any necessity, local conditions, or special rule which would authorize the *Canadienne* to keep the north side of the river (Rules of the Road, article 30). Furthermore the *Canadienne* was about to round a point in the river, and when she saw another steamer rounding the same point in the opposite direction, she was at fault in not indicating her course by sounding her whistle (Rules of the Road, article 28, para. 2).

On the other hand, it is stated in the United States inquiry that the *Yantic*, before reporting the masthead and green light of the *Canadienne*, that is to say, before or when she was rounding Sillery Point, was within sight of and should have reported the lights of the *Canadienne*. The United States officer appointed to make the inquiry said: "As the lights were plainly visible, they should have been seen before" (United States answer, p. 28), and, in fact, at that time the *Yantic* had already been sighted by the *Canadienne*. Nevertheless, those on board the *Yantic* failed to report the *Canadienne*'s lights until after their ship had taken her course to starboard, and it necessarily follows that the *Yantic* did not keep a proper lookout (Rules of the Road, article 29). The same officer also stated that as he had been unable to examine the lookout he could not give any explanation as to why the lights of the *Canadienne* had not been reported.

Whatever may be the reason, right or wrong, why the *Canadienne* took or kept her way toward the north side of the river and was still showing her green light, the failure of the *Yantic* to keep a proper lookout prevented her from seeing the *Canadienne* until they were so close that it was dangerous to try to cross her bow and the *Yantic* should have kept clear of a way in which she was able to see the other steamer was already engaged (Rules of the Road, articles 27 and 29).

The *Canadienne* acted most negligently, after taking or keeping her port way as aforesaid, (a) in giving no blast signal and no answer to the starboard blast of the *Yantic*; (b) in not reducing her speed; (c) in not stopping and reversing as she was approaching nearer and nearer the *Yantic*. And when the collision appeared to be inevitable, she did not take any of the measures prescribed by the Rules of the Road as well as by the most elementary prudence to avert the accident.

Consequently, so far as it is possible to ascertain the facts of a collision after 15 years have elapsed, and without an opportunity to see the witnesses, the ship's papers, or the engineer's log, the Tribunal is of opinion that the *Canadienne* was at fault, but that the *Yantic* was not without reproach, and consequently that both ships are to blame, but in a different proportion.

### III. *As to the law and the consequences of the liability:*

According to the generally recognized rule of international law in the United States (Story, *Conflict of Laws*, ch. 14, sec. 558) and in Great Britain (Marsden, *Collisions at Sea*, 6th ed., p. 198), in such a case as this the *lex loci delicti commissi* must apply.

The law in force in that respect in Canada in 1897 was the law in force in England (Canada Shipping Act, Rev. St. 1906, ch. 113, sec. 918), and at that time the English rule as reported in Marsden, *Collisions at Sea*, 6th ed., p. 123, was as follows:

"The law apportions the loss where both ships are in fault by obliging each wrongdoer to pay half the loss of the other. Thus, if the loss on ship A is £ 1,000 and that on B is £ 2,000 A can recover £ 500 against B, and B can recover £ 1,000 against A."

### IV. *As to the amount of the claim:*

His Britannic Majesty's Government give an estimate of four thousand three hundred eight 77/100 dollars (\$4,308.77) net for the disbursements of the Dominion of Canada for repairs to the *Canadienne*, dock dues and incidental expenses, and the charterer an estimate of three thousand five hundred fifty-six 82/100 dollars (\$3,556.82) net, making the total of seven thousand eight hundred sixty-five 59/100 dollars (\$7,865.59) as claimed.

But some of the items in the charterer's estimate represent damages, of which no sufficient proof is given, viz., loss of traffic, two thousand two hundred fifty dollars (\$2,250); witnesses and fees of counsel, five hundred dollars (\$500); and traveling expenses, two hundred forty-eight dollars (\$248), amounting to two thousand nine hundred ninety-eight dollars (\$2,998), reducing the total amount to four thousand eight hundred sixty-seven 59/100 dollars (\$4,867.59), one-half of which is two thousand four hundred thirty-three 79/100 dollars (\$2,433.79).

Although the United States did not claim for damages suffered by the *Yantic*, inasmuch as, according to the law applicable to this case, each vessel is entitled to recover one-half of her own damage, the *Yantic's* damage, which has been estimated by the United States Naval Commissioner at one thousand dollars (\$1,000) (United States answer, p. 33), must be taken into consideration.

### V. *As to the interest:*

The Tribunal, being entitled under the Terms of Submission to allow or disallow interest as it thinks equitable, is of the opinion that in this case no allowance of interest is justified.

#### *On these motives*

The Tribunal decides that in this case the Government of the United States shall pay the Government of His Britannic Majesty the sum of one thousand nine hundred thirty-three 79/100 dollars (\$1,933.79) without interest.

## HENRY JAMES BETHUNE (GREAT BRITAIN) *v.* UNITED STATES

(Lord Nelson case. May 1, 1914. Pages 432-435.)

CAPTURE OF VESSEL PRONOUNCED ILLEGAL AND VOID BY MUNICIPAL COURT.—  
ADMISSION OF LIABILITY. Capture on June 5, 1812, nearly two weeks before declaration of war between Great Britain and United States, of British

schooner *Lord Nelson* by United States Naval Authorities. Vessel sold to United States Navy for \$2,999.25. On July 11, 1817, capture pronounced to be illegal and void by Court of Northern District of New York and proceeds of sale directed to be paid to owners, but direction never complied with. Before Tribunal the United States, acting on report on real value of vessel at time of capture, made on February 11, 1837, by the United States Secretary of the Navy, admitted liability to the extent of principal sum, viz: \$5,000.

DAMAGES: WRONGFUL POSSESSION AND USE, GENERALLY RECOGNIZED PRINCIPLE, VALUE OF PROPERTY, VALUE OF USE.—INTEREST: *DIES A QUO*, RATE. This claim is not for payment of liquidated and ascertained sum of money, but for indemnity and redress on the ground of wrongful possession and use. Therefore, the amount of indemnity, according to international law and generally recognized principle, must represent both value of property taken and value of use, and especially when Terms of Submission, as in this case, provide for interest and specify *dies a quo* and *dies ad quem*. *Dies a quo* not date of capture but, according to Terms of Submission, date when claim was first brought to notice of United States. Generally recognized rule of international law that interest to be paid at rate current in place and at time the principal was due. According to Terms of Submission, however, interest may not exceed 4% per annum, which rate *held* equitable in this case. Interest allowed from February 3, 1819, to April 26, 1912.

*Cross-reference*: Am. J. Int. Law, vol. 8 (1914), pp. 659-662.

This is a claim for five thousand dollars (\$5,000) and interest from June 5, 1812, presented by His Britannic Majesty's Government on behalf of Henry James Bethune, legal personal representative of James and William Crooks, deceased, the owners of the *Lord Nelson*, a British schooner, on account of the capture of the said schooner by the United States Naval Authorities on June 5, 1812, nearly two weeks before the declaration of war between Great Britain and the United States of America.

The capture of this schooner at the date and under the circumstances above mentioned is not disputed.

Further, it appears that the vessel, after her capture, was acquired by the United States Navy at a valuation of two thousand nine hundred ninety-nine 25/100 dollars (\$2,999.25). She was converted into a war vessel by the United States and used against Great Britain in the War of 1812, and was never returned to her former owners.

It is said that in 1815 the owners applied to the United States Government for redress, but no evidence is offered to show either the date of that application or whether it constituted a claim regularly presented.

On July 11, 1817, by decree of the Court of the Northern District of New York, the capture of the *Lord Nelson* was pronounced to be illegal and void and the proceeds of the sale, i.e., two thousand nine hundred and ninety-nine 25/100 dollars (\$2,999.25), were directed to be paid to the owners; but that direction was not complied with because the funds had meanwhile been embezzled by the clerk of the court.

On February 3, 1819, a regular claim for indemnity was received by the United States Government from the British Government, and subsequently numerous claims, petitions, and applications were presented either by the claimants or by His Britannic Majesty's Government, but no action was taken notwithstanding favorable reports and recommendations on bills introduced in Congress providing for payment of the claim.

On June 24, 1836, on a new petition presented by the claimants, the Committee on Claims of the House of Representatives, considering that the illegality of the capture was established by the said decree of 1817, resolved that an investigation should be made by the Secretary of the Navy as to the real value of the ship at the time of the capture. And on February 11, 1837, the Secretary of the Navy, after an investigation by a special committee, reported that this value should be fixed at five thousand dollars (\$5,000).

This estimate has never been questioned on any of the many occasions when this claim has been under consideration by executive or congressional committees, and the United States Government has admitted before this Tribunal its liability on this claim to the extent of the principal, to wit: five thousand dollars (\$5,000) (United States answer, p. 1).

The only question remaining for decision by this Tribunal is whether or not interest upon the principal should be awarded, and, if so, for what period and at what rate.

On this point it should be observed that from the beginning this claim has never been presented to nor considered by the United States Government as a claim for the payment of a liquidated and ascertained sum of money, but as a claim for indemnity and redress, because the United States Government wrongfully took possession of and used the vessel belonging to the claimant. That plainly appears as well from the application made as aforesaid in 1819 by His Britannic Majesty's Government, as from the valuation made by the United States Government in 1837, and from the admission that the valuation of five thousand dollars (\$5,000) was the real value of the vessel at the time of the capture.

In international law, and according to a generally recognized principle, in case of wrongful possession and use, the amount of indemnity awarded must represent both the value of the property taken and the value of its use (Rutherford's Institutes, bk. 1, ch. XVII, sec. V; VI Moore's International Law Digest, p. 1029; Indian Choctaw's case, Law of Claims against Governments, report 134, 43 Cong., 2nd sess. House of Representatives, Washington, 1875, p. 220, *et seq.*).

This principle applies especially when the Terms of Submission, as in this case, provide for interest and specify the *dies a quo* and the *dies ad quem*, for the allowance of interest, as the Tribunal thinks equitable.

It is admitted in this case that the sum of five thousand dollars (\$5,000) represents only the value of the vessel, and does not cover the use by the United States Government of the vessel or the money equivalent to its value.

Under these considerations it would have been justifiable to allow interest from the time of the capture, i.e., from June 12, 1812 except that according to section IV of the Terms of Submission annexed to the Pecuniary Claims Convention, interest is not to be allowed by this Tribunal previous to the date when the claim was first brought to the notice of the other party, and as above stated that date must be fixed as February 3, 1819.

As to the rate, it is a generally recognized rule of international law that interest is to be paid at the rate current in the place and at the time the principal was due. But in this case, by the Terms of Submission above mentioned, the two parties have agreed that in respect of any claim interest is not to exceed four per cent (4%) per annum, and, in view of all the circumstances, the Tribunal considers that the allowance of interest at this rate is equitable.

#### *On these motives*

The Tribunal decides that the agreement given by the Government of the United States to pay to His Britannic Majesty's Government the sum of five

thousand dollars (\$5,000) claimed by the legal representatives of the owners of the *Lord Nelson*, shall be put on record; and further awards that the said sum shall be paid accordingly with interest at four per cent (4%) from February 3, 1819 to April 26, 1912.

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GREAT NORTHWESTERN TELEGRAPH COMPANY OF CANADA  
(GREAT BRITAIN) *v.* UNITED STATES

(May 1, 1914. Pages 436-437.)

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DAMAGE TO TELEGRAPH CABLE IN QUEBEC HARBOUR.—AMENDMENT OF PLEADINGS. Damage caused on July 17, 1904, by United States gunboat *Essex*, in dropping anchor in reserved space. Principal amount and claimed counsel fees reduced during proceedings.

PARTIAL ADMISSION OF LIABILITY.—COUNSEL FEES.—INTEREST.—EVIDENCE. United States admitted liability as to principal amount, denied liability as to counsel fees and interest. On account of insufficient evidence for principal amount which United States accepted to pay, this amount *held* sufficient compensation for any loss incurred. *Held* not equitable to allow interest. *Cross-references* : Am. J. Int. Law, vol. 8 (1914), pp. 662-663.

This is a claim presented by His Britannic Majesty's Government on behalf of the Great Northwestern Telegraph Company of Canada, a British corporation, for one thousand thirty-nine 58/100 dollars (\$1,039.58) as stated in their memorial, which amount was reduced on the oral argument to nine hundred thirty-nine 58/100 dollars (\$939.58), together with interest from July 17, 1904, for damage caused to the telegraph cable of the said company in Quebec Harbour on July 17, 1904, by the United States gunboat *Essex*, in dropping her anchor in a reserved space and fouling that cable.

Both parties agree as to the facts.

It appears from an affidavit of the Superintendent of the company (British memorial, pp. 28-29) that within eight days after the cable was damaged, the damage was examined and estimated to be equal to at least one-third of the original cost of the cable, viz., six hundred seventy-nine 48/100 dollars (\$679.48). It appears further that the actual cost of repairs was one hundred forty-eight 10/100 dollars (\$148.10).

The claim is presented for both those items, being altogether eight hundred twenty-seven 58/100 dollars (\$827.58), to which is added, as a third item, counsel fee for two hundred twelve dollars (\$212)—afterwards reduced to one hundred twelve dollars (\$112)—a total of nine hundred thirty-nine 58/100 dollars (\$939.58).

The United States Government admits its liability for eight hundred twenty-seven 58/100 dollars (\$827.58), but denies any liability as to counsel fees and interest.

The Tribunal cannot but remark that the estimated damage of six hundred seventy-nine 48/100 dollars (\$679.48) is simply the contention of the injured party without being supported by any other evidence than its own statement and that the actual expenses for repairs, being one hundred forty-eight 10/100 dollars (\$148.10) is accounted for separately.

Under these circumstances, and considering section 4 of the Terms of Submission, the Tribunal is of opinion that the sum of eight hundred twenty-seven 58/100 dollars (\$827.58) as accepted by the United States Government

is sufficient compensation for any loss incurred by said damage, and in view of all the circumstances it does not consider it equitable to allow interest.

*On these motives*

The Tribunal decides that the agreement given by the Government of the United States to pay His Britannic Majesty's Government the sum of eight hundred twenty-seven 58/100 dollars (\$827.58) claimed by the Great North-western Telegraph Company of Canada shall be put on record, and further awards that the said sum shall be paid accordingly without interest.

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SIVEWRIGHT, BACON AND CO. (GREAT BRITAIN)  
v. UNITED STATES

(Eastry case. May 1, 1914. Pages 499-504.)

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DAMAGE TO VESSEL AT MANILA BAY.—NATIONALITY OF VESSEL: EVIDENCE, CERTIFICATE OF REGISTRY, TRIBUNAL ACTING *PROPRIO MOTU*. The *Eastry*, belonging to Messrs. Sivewright, Bacon and Co., of Manchester, England, chartered by Mr. Simmons and sublet by him to a company under contract with United States, damaged in June, 1901, at Manila Bay by coal hulks taking off her cargo and belonging to the United States. British nationality of ship shown by certificate of registry, produced at request of Tribunal.

DENIAL OF LIABILITY.—EVIDENCE: COURSE ADOPTED BY LOCAL UNITED STATES MILITARY AUTHORITIES, FAILURE TO DENY LIABILITY PREVIOUSLY. Quartermaster, Chief Quartermaster and Assistant Adjutant General, United States Army Transport Service, Manila, recommended payment of \$6,500, the amount the owners agreed to take in final settlement of their claims for cost of repairs and demurrage. Army Transport Service decided to make only temporary repairs in view of possible additional damages if final repairs were made, and to leave owners to file claim for such damages as had not been repaired. When temporary repairs completed, claim forwarded to War Department, Washington, by Army Transport Service with recommendation for early adjustment. Notification of United States by owners of survey of ship in Liverpool, England, on July 14, 1902, before final repairs took place. The United States never contested its obligation to pay for repairs, either at Manila, or when notified of survey at Liverpool, or later in the course of diplomatic correspondence. Denial of liability before tribunal *held* inconsistent with evidence.

AMOUNT OF CLAIM.—EVIDENCE: BURDEN OF PROOF.—DEMURRAGE. The United States never objected to amount of claim. Therefore, no burden upon Great Britain to prove that dry docking for more than a year after injuries were suffered was necessitated solely for purpose of repairing such injuries. Computation of demurrage according to rate at place of detention.

INTEREST. *Held* equitable to allow interest: no explanation can be given why this claim so frequently recommended and so favorably reported on by United States authorities was not paid.

*Cross-reference*: Am. J. Int. Law, vol. 8 (1914), pp. 650-655.

This is a claim presented by His Britannic Majesty's Government on behalf of Messrs. Sivewright, Bacon and Co., of Manchester, England, against the Government of the United States for the sum of eight hundred forty-nine

pounds eight shillings nine pence (£ 849. 8s. 9d.) with interest at four per cent (4%) for nine and a half years, i.e., from December 9, 1902, the date on which His Majesty's Government first brought the claim to the notice of the United States Government, to April 26, 1912, the date of the confirmation of the first schedule of the Pecuniary Claims Convention, viz., three hundred twenty-three pounds (£ 323), making a total of one thousand one hundred seventy-two pounds, eight shillings, nine pence (£ 1,172. 8s. 9d.).

By the certificate of registry, produced at the request of this Tribunal, it appears that the steamship *Easty*, belonging to Messrs. Sivewright, Bacon and Co., was in June, 1901, a British ship.

It is admitted by both parties that, at that date, the *Easty* was under time charter to one Simmons by whom she had been sublet to the Compania Maritima, a company then under contract with the United States Government to carry a cargo of coal to be delivered at Manila Bay.

It appears by the logbook of the *Easty*, and it is not contested, that she arrived and anchored at Cavite, Manila Bay, on June 7, 1901, and that, on the same and following days, i.e., on June 7, 8, 13 and 15, she was damaged by certain coal hulks that come alongside to take off her cargo. It is admitted that the hulks belonged to the United States Government (British memorial, annex 8).

By a letter dated June 17, 1901 (British memorial, annex 8), a Major and Quartermaster, United States Army, in charge of the Army Transport Service, Manila, reported to the Chief Quartermaster, Division of Manila, that after inspecting the damage done the *Easty* by the coal hulks, the superintending engineer of his office estimated the cost of necessary repairs at four thousand five hundred dollars (\$4,500) and the time required to complete these repairs at 20 working days, which at two hundred twenty-five dollars (\$225) per day demurrage would make the total cost nine thousand dollars (\$9,000).

He stated further that the ship's master had informed the superintending engineer that he, the master, estimated the cost of repairs, including demurrage, at one thousand three hundred pounds (£ 1,300), i.e., six thousand five hundred dollars (\$6,500).

In his request for instructions, the Quartermaster said:

"It would therefore appear that it will be to the advantage of the United States Government if the amount of damages as fixed by Captain Carr (the ship's master) could be paid."

The Chief Quartermaster forwarded this letter to the Adjutant General of the Division on June 18, 1901, with an endorsement recommending approval of the expenditure of six thousand five hundred dollars (\$6,500), considering that to make the repairs and pay the demurrage "will cost considerably more than \$6,500, the amount the owners are willing to take in final settlement."

By another endorsement dated June 19, 1901, *ibid.*, the Assistant Adjutant General expressly approved the recommendation of the Chief Quartermaster.

On June 24, 1901, the ship's master wrote to the Superintendent of the United States Army Transport Service submitting a claim for damages sustained by the *Easty*, which he estimated at one thousand three hundred pounds (£ 1,300), and he requested payment of this amount. This request was made in consequence of the decision reached by the officers of the Army Transport Service as appears from the endorsements of July 17th and July 24th on that letter, that it would be advisable not to make the final repairs then, but to place the ship, by way of temporary repairs, in such a condition that she could be given a certificate of seaworthiness, leaving the owners to file a claim for such damages as had not been repaired. The reason given in these endorsements for adopting this course was that additional damages would be claimed because

of the delay involved in making all the repairs, and also because of the consequent loss of another charter party which the ship then had.

It is shown by the said endorsement of July 17, 1901, that after a new survey and estimate at the request of the United States authorities, temporary repairs were made at the expense of the United States Government, which repairs were finished on June 24, 1901, and that the United States authorities then informed the master of the *Eastry* that his ship was seaworthy, and a certificate to this effect was furnished him. He was further informed in reply to his letter of June 24th that all claims against the United States Government are adjusted by the War Department in Washington, and that his letter with all papers pertaining to the case would be forwarded with a statement of the matter, recommending that the claim be adjusted as early as practicable (British memorial, annex 9).

In August, September, October, 1901, and May 1902 (British memorial, annexes 11, 12, 13, 14, and 15), some correspondence took place between the owners of the *Eastry* and the United States authorities with reference to the offer made by the owners to accept the payment of one thousand three hundred pounds (£ 1,300) in settlement, in reply to which offer the owners were informed that "there were no funds under the control of the War Department from which claims for damages can be paid, and that Congress alone can grant relief in such cases" (British memorial, annex 15).

On July 11, 1902 (British memorial, annexes 16, 17, 18, and 20), the *Eastry* being in Liverpool, England, the representatives of the owners notified by telegrams and letters both the United States authorities in Washington and the American Embassy in London, that a survey of the ship was to be made and they advertised the fact in the newspapers, so that the United States Government might have full opportunity to be represented.

By a telegram dated at Washington, July 11, 1902 (British memorial, annex 19), the United States authorities notified the owners that the ship having been surveyed in Manila, it was not practicable for their Government to be represented by surveyors at Liverpool.

On July 14, 1902, the survey was made in the absence of any representatives of the United States Government and immediately thereafter the repairs were proceeded with.

The United States Government contends before this Tribunal that it is not liable in damages for the injuries and losses suffered by the *Eastry* because they were due to rough seas, and because the captain alone had authority to determine the time and manner of discharging the cargo. It is further alleged that the captain of the steamer was negligent in that he allowed the work of discharging the cargo to be proceeded with under the circumstances.

This was not the view taken by the United States Military authorities who had control of this case at the time the damages occurred, and who were familiar with all the circumstances. In an endorsement on the records of the case made by the Chief Quartermaster at Manila dated June 18, 1901, within a week after the injuries occurred, he stated "the damages were clearly the fault of the Government and that there is no question as to the Government's responsibility", etc. (British memorial, annex 8). So also the Major and Quartermaster in charge of the Army Transport Service at Manila, stated in a further endorsement, dated July 17, 1901, that "it is thought that the repairs should be made at the expense of the United States Government".

It does not appear from the documents, and there is no evidence, that the captain was ever consulted or asked to agree to the method adopted by the United States authorities in making the temporary repairs. He was merely informed of what had been done.

The United States Government contends before this Tribunal that the temporary repairs at Manila were made as an act of grace. But this contention finds no support either in the documentary or other evidence. All the evidence goes to show that the United States authorities throughout sought to make the most advantageous arrangement for their Government, and the course adopted by the United States authorities, both at the time the injuries occurred, and in making the preliminary repairs, is wholly inconsistent with the contention now made that the United States was not liable for the damages inflicted.

It must be especially noted that, before this claim was submitted to this Tribunal, the United States Government never, either at Manila or afterwards when it was notified of the survey and repairs at Liverpool, or later in the course of the diplomatic correspondence relating to the presentation of the claim, contested its obligation to pay for the repairs.

In view of all the evidence presented in the record and for the reasons above stated, the Tribunal is of the opinion that the United States Government is liable to pay for the damages, which form the basis of this claim.

*As to the amount of the claim:*

The United States Government contends that the fact that the *Eastry* was not dry-docked at Liverpool for more than a year after the injuries were suffered by the vessel at Manila, imposed a burden upon His Majesty's Government to prove that the dry-docking was necessitated solely for the purpose of repairing such injuries. It is not disputed that to make the repairs required as the result of the occurrences at Manila, nine days were taken in the dry dock. For that period of time the owners of the vessel were deprived of her use by reason of the said occurrences and they are entitled to compensation therefor, and four pence (4d) per gross registered ton per day is the amount claimed for demurrage for the loss of the owners on that account, which is the rate at which demurrage is computed at the place where the detention occurred.

It has been shown that the United States had full opportunity to discuss the nature and amount of the repairs and all matters connected therewith when notified of the survey at Liverpool.

Here, again, it is to be noted that from the time the claim was first transmitted to the United States Government, no objection whatever has been made either to the amount of the claim or to the obligation to pay it. On the contrary, it appears from the congressional public documents that the claim has always been recommended for payment either by the United States War Department, the Secretary of State, or the President, and favorably reported to Congress.

*As to interest:*

This claim was presented to the United States Government by the British Ambassador at Washington on December 9, 1902. There is no evidence to explain why a claim so frequently recommended and so favorably reported on by the United States authorities was not paid.

By clause No. 4 of the Terms of Submission, annexed to Schedule 1 of the Special Agreement, this Tribunal is authorized to allow interest at four per cent (4%) per annum for the whole or any part of the period between the date when the claim was first brought to the notice of the other party and the date of the confirmation of the first schedule. Taking into consideration the circumstances above mentioned, the Tribunal thinks it is equitable to allow interest in the present case.

*On these motives*

The Tribunal decides that in this case the United States Government shall pay to His Britannic Majesty's Government the sum of eight hundred forty-

nine pounds eight shillings nine pence (£ 849. 8s. 9d.) with interest at four per cent (4%) from December 9, 1902, to April 26, 1912.

REPRESENTATIVES OF ELIZABETH CADENHEAD  
(GREAT BRITAIN) *v.* UNITED STATES

(May 1, 1914. Pages 506-508.)

RESPONSIBILITY FOR ACTS OF MILITARY FORCES.—MILITARY DUTY: MUNICIPAL LAW, RULING OF MILITARY COURT. On July 22, 1907, Miss Cadenhead killed by rifle shot fired by United States private soldier at escaping military prisoner on public highway. Whether or not soldier acted in conformity with military duty is question of municipal law of United States. Such conformity established by United States military court.

DENIAL OF JUSTICE.—SPECIAL CIRCUMSTANCES.—RIGHTS OF ALIENS: GENERALLY RECOGNIZED RULE OF INTERNATIONAL LAW.—PERSONAL PECUNIARY LOSS OR DAMAGE. No denial of justice shown, nor special circumstances, nor grounds of exception to generally recognized rule of international law that foreigner within United States is subject to its public law and has no greater rights than nationals of that country. No personal pecuniary loss or damage to relatives or legal representatives of victim (reference to Schedule of Claims, clause III).

EXTRAJUDICIAL ACTION. Tribunal suggests that United States consider possibility of compensation as act of grace.

*Cross-reference:* Am. J. Int. Law, vol. 8 (1914), pp. 663-665.

*Bibliography:* Nielsen, p. 505.

His Britannic Majesty's Government present a memorial in this case "in support of the claim respecting the killing of Elizabeth Cadenhead", a British subject, who left next of kin her surviving as stated in annex 1 of the memorial, all of whom are British subjects. The amount claimed as compensation for the death of Miss Cadenhead is twenty-five thousand dollars (\$25,000).

The death of Miss Cadenhead occurred under the following circumstances:

July 22, 1907, Miss Cadenhead with her brother, George M. Cadenhead, and Katharine Fordyce Cadenhead were at Sault Ste. Marie, a city in the State of Michigan, United States of America; it was about 3.30 p.m. and they were returning to the city from a visit to a military post named Fort Brady, the entrance of which is situated on a public highway called South Street. They were proceeding along the sidewalk of South Street, and when at about two hundred yards from the entrance of the Fort, Miss Cadenhead was hit by a rifle shot and instantly killed.

The shot was fired by a private soldier belonging to Company M of the Seventh Infantry, garrisoned at Fort Brady, and was aimed at a military prisoner who was escaping from his custody when at work just at the entrance of the Fort on South Street, by running easterly along the sidewalk on that street in the rear of the Cadenhead party.

His Britannic Majesty's Government contend that this soldier was not justified in firing upon an unarmed man on a public highway, that he acted unnecessarily recklessly, and with gross negligence, and that compensation should be paid by the Government of the United States on the ground that under the circumstances it was responsible for the act of this soldier.

The question whether or not a private soldier belonging to the United States Army and being on duty acted in violation of or in conformity with his military duty is a question of municipal law of the United States, and it has been established by the competent military court of the United States that he acted in entire conformity with the military orders and regulations, namely, section 365 of the Manual of Guard Duty, United States Army, approved June 14, 1902.

The only question for this Tribunal to decide is whether or not, under these circumstances, the United States Government should be held liable to pay compensation for this act of its agent.

It is established by the evidence that the aforesaid orders under which this soldier, who fired at the escaping prisoner, acted, were issued pursuant to the national law of the United States for the enforcement of military discipline, and were within the competency and jurisdiction of that Government.

It has not been shown that there was a denial of justice, or that there were any special circumstances or grounds of exception to the generally recognized rule of international law that a foreigner within the United States is subject to its public law, and has no greater rights than nationals of that country.

Furthermore, no evidence is offered and no contention is made as to any personal pecuniary loss or damage resulting to the relatives or legal representatives of the unfortunate victim of the accident, and it is to be noted that this is a pecuniary claim based on alleged personal wrongs of nationals of Great Britain, as appears from its inclusion in clause III of the Schedule of Claims in the Pecuniary Claims Convention, under which it is presented.

Under those conditions the Tribunal is of the opinion that in the circumstances of this case no pecuniary liability attaches to the Government of the United States.

It should be said, however, that it may not have been altogether prudent for the United States authorities to permit prisoners under the charge of a single guard to be put at work just at the entrance of a fort on a public highway in a city, and order or authorize that guard, after allowing one of these prisoners to escape under these circumstances, to fire at him, while running along that highway.

This Tribunal, therefore, ventures to express the desire that the United States Government will consider favorably the payment of some compensation as an act of grace to the representatives of Miss Cadenhead, on account of the unfortunate loss of their relative, under such distressing circumstances.

*On these motives*

The Tribunal decides that with the above recommendation, the claim presented by His Britannic Majesty's Government in this case be disallowed.

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OWNER OF THE *FREDERICK GERRING*, Jr. (UNITED STATES)  
v. GREAT BRITAIN

(May 1, 1914. Page 577.)

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SEIZURE OF FISHING VESSEL OFF NOVA SCOTIA.—SETTLEMENT OF CLAIM. Claim made by the United States on account of seizure on May 25, 1896, and subsequent condemnation and confiscation of American fishing vessel *Friede-*

rick Gerring, Jr., together with fishing equipment. Amicable settlement between Governments.

*Cross-Reference*: Am. J. Int. Law, vol. 8 (1914), p. 655.

*Bibliography*: Nielsen, pp. 575-576.

The Tribunal considering that an amicable settlement of this case has been arrived at by the Governments concerned, according to which the Canadian Government is disposed to place at the disposal of the United States Government a sum of nine thousand dollars (\$9,000), to be employed in blotting out the recollection by the American citizen affected of an incident which, on its side, the Government of the United States will regard henceforth as finally and from every point of view closed and settled,

Decides that the said settlement shall be put on the record of this Tribunal, and shall be complied with by the Governments in conformity therewith.

## HOME FRONTIER AND FOREIGN MISSIONARY SOCIETY OF THE UNITED BRETHREN IN CHRIST (UNITED STATES)

v. GREAT BRITAIN

(December 18, 1920. Pages 423-426.)

COLONIAL TAX POLICY.—EXERCISE OF SOVEREIGNTY. Imposition of hut tax a fiscal measure in accordance with general usage in colonial administration and usual practice in African countries, to which British Government perfectly entitled in legitimate exercise of sovereignty.

MOB VIOLENCE.—GOOD FAITH, NEGLIGENCE, STANDARDS OF PROTECTION OF ALIENS.—AWARENESS OF RISK. Claim in respect of losses and damages during native rebellion in 1898 in British Protectorate of Sierra Leone. No Government responsible for act of rebellious bodies of men committed in violation of its authority, where it is itself guilty of no breach of good faith, or of no negligence in suppressing insurrection. Good faith of British Government cannot be questioned, and from outbreak of insurrection British authorities took every measure available for repression. Impossible to judge system of police and protection of life and property in savage regions of Africa by standard of highly civilized countries or cities. Missionary Society must have been aware of perils to which it exposed itself. Great Britain held not responsible.

EXTRAJUDICIAL ACTION. Tribunal recommends that Great Britain repair losses as far as possible as an act of grace.

*Cross-references*: Am. J. Int. Law, vol. 15 (1921), pp. 294-297; Annual Digest, 1919-1922, pp. 173-174.

*Bibliography*: Nielsen, pp. 421-422; Annual Digest, 1919-1922, pp. 376-377.

This is a claim for \$78,068.15 together with interest thereon from May 30, 1898, presented by the United States Government on behalf of an American religious body known as the "Home Frontier and Foreign Missionary Society of the United Brethren in Christ". The claim is in respect of losses and damages sustained by that body and some of its members during a native rebellion in 1898 in the British Protectorate of Sierra Leone.

The facts are few and simple.

In 1898 the collection of a tax newly imposed on the natives of the Protectorate and known as the "hut tax" was the signal for a serious and widespread revolt in the Ronietta district. The revolt broke out on April 27 and lasted for several days. As is common in the more uncivilized parts of Africa, it was marked by every circumstance of cruelty and by indiscriminating attacks on the persons and properties of all Europeans.

In the Ronietta district, which was the centre of the rebellion, the Home Missionary Society had several establishments: the Bompeh Mission at Roto-funk and Tiama, the Sherbro-Mendi Mission at Shengeh, the Avery Mission at Avery, and the Imperreh Mission at Danville and Momaligi.

In the course of the rebellion all these missions were attacked, and either destroyed or damaged, and some of the missionaries were murdered.

The rising was quickly suppressed, and law and order enforced with firmness and promptitude. In September, October, and November such of the guilty natives as could be caught were prosecuted and punished. (British answer, annexes 15, 16, and 17.)

A Royal Commissioner was appointed by the British Government to inquire into the circumstances of the insurrection and into the general position of affairs in the Colony and Protectorate.

On the receipt of his report, as well as of one from the Colonial Governor, the Secretary of State for the Colonies came to the conclusion that though some mistakes might have been made in its execution, the line of policy pursued was right in its main outlines and that the scheme of administration, as revised in the light of experience, would prove a valuable instrument for the peaceful development of the Protectorate and the civilization and well-being of its inhabitants (British Blue Book, Sierra Leone, C. 9388 and 1899, part 1, p. 175).

On February 21, 1899, the United States Government (British answer, annex 39,) through its Embassy in London, brought the fact of the losses sustained by the Home Missionary Society to the attention of the British Government. In his reply on October 14, 1899, Lord Salisbury repudiated liability on behalf of the British Government with an expression of regret that sensible as it was of the worth of the services of the American missionaries, there was no fund from which, as an act of grace, compensation could be awarded.

The contention of the United States Government before this Tribunal is that the revolt was the result of the imposition and attempted collection of the "hut tax"; that it was within the knowledge of the British Government that this tax was the object of deep native resentment; that in the face of the native danger the British Government wholly failed to take proper steps for the maintenance of order and the protection of life and property; that the loss of life and damage to property was the result of this neglect and failure of duty, and therefore that it is liable to pay compensation.

Now, even assuming that the "hut tax" was the effective cause of the native rebellion, it was in itself a fiscal measure in accordance not only with general usage in colonial administration, but also with the usual practice in African countries (Wallis, *Advance of our West African Empire*, p. 40).

It was a measure to which the British Government was perfectly entitled to resort in the legitimate exercise of its sovereignty, if it was required. Its adoption was determined by the course of its policy and system of administration. Of these requirements it alone could judge.

Further, though it may be true that some difficulty might have been foreseen, there was nothing to suggest that it would be more serious than is usual and inevitable in a semi-barbarous and only partially colonized protectorate, and certainly nothing to lead to any apprehension of widespread revolt.

It is a well-established principle of international law that no government can be held responsible for the act of rebellious bodies of men committed in violation of its authority, where it is itself guilty of no breach of good faith, or of no negligence in suppressing insurrection. (Moore's International Law Digest, vol. VI, p. 956; VII, p. 957; Moore's Arbitrations, pp. 2991-92; British answer, p. 1.)

The good faith of the British Government can not be questioned, and as to the conditions prevailing in the Protectorate there is no evidence to support the contention that it failed in its duty to afford adequate protection for life and property. As has been said with reference to circumstances very similar, "it would be almost impossible for any government to prevent such acts by omnipresence of its forces" (Sir Edward Thornton-Moore's Arbitrations, pp. 3-38).

It is true that the Royal Commissioner criticized in his report the mode of application of certain measures. But there is no evidence of any criticisms directed at the police organization, or the measures taken for the protection of Europeans. On the contrary, it is clear that from the outbreak of the insurrection the British authorities took every measure available for its repression. Despite heavy losses, the troops in the area of revolt were continually increased. But communication was difficult; the risings occurred simultaneously in many districts remote from one another and from any common centre; and it was impossible at a few days' or a few hours' notice to afford full protection to the buildings and properties in every isolated and distant village. It is impossible to judge the system of police and protection of life and property in force in the savage regions of Africa by the standard of countries or cities which enjoy the social order, the respect for authority, and the settled administration of a high civilization. A Government can not be held liable as the insurer of lives and property under the circumstances presented in this case (see *Wipperman case*, Ralston's International Law and Procedure, No. 491, p. 231).

No lack of promptitude or courage is alleged against the British troops. On the contrary the evidence of eye-witnesses proves that under peculiarly difficult and trying conditions they did their duty with loyalty and daring, and upheld the highest traditions of the British army.

Finally it is obvious that the Missionary Society must have been aware of the difficulties and perils to which it exposes itself in its task of carrying Christianity to so remote and barbarous a people. The contempt for difficulty and peril is one of the noblest sides of their missionary zeal. Indeed, it explains why they are able to succeed in fields which mere commercial enterprise can not be expected to enter.

For these reasons, the Tribunal is of opinion that the claim presented by the United States Government on behalf of the Home Missionary Society has no foundation in law and must be dismissed.

But if His Britannic Majesty's Government in consideration of the service which the Home Missionary Society has rendered and is still rendering in the peaceful development of the Protectorate and the civilization of its inhabitants, and of the support its activities deserve, can avail itself of any fund from which to repair as far as possible the losses sustained in the native revolt, it would be an act of grace which this Tribunal can not refrain from recommending warmly to the generosity of that Government.

*For these reasons and subject to this recommendation*

The Tribunal decides that this claim must be dismissed.

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OWNERS OF THE CARGO OF THE *COQUITLAM* (GREAT BRITAIN)  
v. UNITED STATES

(December 18, 1920. Pages 447-451.)

SEIZURE OF VESSEL IN PORT ETCHES, HINCHINBROOK ISLAND (ALASKA); MUNICIPAL COURT PROCEEDINGS, RELEASE ON BOND. Seizure of British vessel *Coquitlam* on June 22, 1892, by United States revenue cutter at Port Etches, Hinchinbrook Island (Alaska). On July 5, 1892, libel of information filed by United States District Attorney; on September 17, 1892, release of vessel, cargo, and appurtenances on bond; on September 18, 1893, condemnation by District Court, whose decree on November 16, 1896, reversed by United States Circuit Court of Appeals with dismissal of libel.

GOOD FAITH AND FAIR CONDUCT OF SEIZING OFFICERS, BUT ERROR IN JUDGMENT;—PROBABLE CAUSE OF SEIZURE: SUSPICION OF UNDOUBTEDLY WRONGFUL FACT.—WRONGFUL APPLICATION OF MUNICIPAL LAW BY CUSTOMS AUTHORITIES. Before Tribunal, United States denies all liability on the ground that seizing officer acted in bona fide belief that revenue laws of United States had been infringed, and that for this belief there was probable cause. Good faith and fair conduct of seizing officers unquestionable, yet error in judgment for which United States liable: probable cause of seizure implies the existence of certain facts which, if proved, are undoubtedly wrongful. At time of seizure, however, wrongful character of fact not beyond doubt. Since United States judicial authorities decided that application of Customs Statutes wrong, *held* that liability clearly arises.

DAMAGES: INQUIRY OF AGENTS BY TRIBUNAL. Tribunal made inquiry of agents to determine proper amount to be paid as compensation.

INTEREST.—FAILURE TO REACT ON UNITED STATES DECLARATION. *Held* not equitable to allow interest for periods prior to six months after decision of Court of Appeals, and beyond December 21, 1904, date of declaration that United States was disposed to recommend payment subject to certain conditions and to which Great Britain never reacted.

*Cross-references*: Am. J. Int. Law, vol. 15 (1921), pp. 301-304; Annual Digest, 1919-1922, pp. 171-172, 192-193.

*Bibliography*: Nielsen, pp. 445-446; Annual Digest, 1919-1922, p. 193.

This is a claim for \$104,709.03 and interest presented by the Government of His Britannic Majesty on behalf of the owners of the cargo of the steamer *Coquitlam*. It arises out of the seizure of that steamer on the 22nd of June, 1892, by the United States cutter *Corwin* in the Behring Sea.

The following facts are admitted: the *Coquitlam* was a British ship owned by the Union Steamship Company, of British Columbia, and registered at the Port of Vancouver, B.C.; her gross registered tonnage was 256.33, her net tonnage 165.67.

In the spring of 1892 a number of British schooners left Victoria, B.C., for the purpose of hunting seals in the North Pacific Ocean. The owners of these vessels belonged to an association known as the Pacific Sealers Association, and at the time they sailed from Victoria it was understood that a ship would be sent out in the following June to convey supplies to the schooners and receive in return their catch of seal skins.

In pursuance of this understanding the *Coquitlam* was chartered on June 4, 1892, for a period of 30 days and fitted out at the Port of Victoria by the Pacific

Sealers Association. She sailed from that port for the North Pacific Ocean on June 8.

It had been arranged that the schooners should rendezvous at Marmot Island, or Tonki Bay, in Afognak Island, or at Port Etches, in Hinchinbrook Island.

The *Coquiltam* arrived at Tonki Bay on June 18, 1892, and next day at the mouth of the bay received from eight sealing schooners 5,835 seal skins and transferred to the other vessels the supplies provided. She left Tonki Bay for the second rendezvous at Port Etches and arrived there on June 22. The same day, before any transfer had been made to or from the schooners, she was seized in the harbour by the United States revenue cutter *Corwin* and taken to Sitka, where she was handed over to the Collector of Customs.

No document or entry in the ship's log has been produced purporting to have been made at the time and stating the circumstances of and reasons for the seizure.

On July 5 the United States District Attorney filed in the District Court of Alaska a libel of information against the *Coquiltam*, its appurtenances and cargo, alleging that she had committed three separate offenses: the first, under sections 2867 and 2868 of the Revised Statutes of the United States, by receiving or unloading merchandise and cargo in the waters and within four leagues of the coast of the United States; the second, under section 3109 of the same Revised Statutes, by transferring merchandise within the said limits without having previously reported and received a permit; the third, under sections 2807, 2808, and 2809, by having no manifest in writing of the cargo brought into an United States harbour.

By order of the District Court of the 17th of September, 1892, the vessel, cargo, and appurtenances were released upon giving bonds for \$87,660.95.

Upon the trial of the libel the *Coquiltam*, her cargo and appurtenances were condemned by a decree of the District Court, dated September 18, 1893. But on appeal the United States Circuit Court of Appeals for the Ninth Circuit on the 16th day of November, 1896, reversed the decree of forfeiture made by the District Court and dismissed the libel.

This decision of the judicial authorities of the United States is binding upon the Government. It decides that what sections 2867, 2868 of the Revised Statutes had in view was vessels bound to the United States and that there was no evidence that the *Coquiltam* was so bound—that section 3109 contemplated vessels not merely arriving in the United States waters but intending to proceed further inland, either to unload or take on cargo, and that there was on the record no proof of any such intention—that sections 2807, 2808 and 2809 made liable to forfeiture only such merchandise as is consigned to the master, mate, officers, or crew, and that it was not alleged in this case that any merchandise was so consigned.

The same decision goes on to say that there was no contention “that any injury has been done to the United States by the acts which are complained of in the libel, or that the United States has in any way been defrauded of revenue, or that there was any intention upon the part of the masters or owners of the vessels to evade the provisions of the revenue laws. The merchandise was not bound to the United States, nor was it consigned to any person, nor destined to be delivered at any place in the United States.”

#### I. *As to the liability:*

It appears that shortly after the seizure of the vessel the British Government brought the matter to the attention of the United States Government, but no action was taken during the pendency of the judicial proceedings, the

*Coquitlam* in the meantime having been released on bond. Subsequently, in a letter of the Secretary of State to the British Ambassador, dated December 21, 1904, the United States Government stated that the Department of State "is disposed to recognize liability and to recommend payment of a reasonable indemnity; but it will be necessary to have submitted to it the proofs showing the nature and extent of the damages suffered by the seizure, in order that the Department may consider the amount of the liability to make a definite recommendation". There is no evidence that the British Government ever complied with the request.

Before this Tribunal the United States Government denies all liability in this case.

It contends that the construction put upon the language of the Statutes by the Circuit Court of Appeals is a very technical construction, while the construction upon which the officer acted in making the seizure had abundant support in decisions of the United States Courts prior to this case, that it is clear when this circumstance is taken in conjunction with the facts as disclosed that the officer acted in the bona fide belief that the revenue laws of the United States had been infringed, and that for this belief there was probable cause.

The good faith and fair conduct of the officers of the *Corwin* are unquestionable, but though this may be taken into account as an explanation given by the same officers to their Government, it can not operate to prevent their action being an error in judgment for which the Government of the United States is liable to a foreign Government.

Further, even supposing that the interpretation of the United States Customs Statutes may have given rise to some doubt, such a doubt can not constitute a probable cause of seizure. Probable cause of seizure, as defined by Chief Justice Marshall, "imports a seizure made under circumstances which warrant suspicion" (*Locke v. United States*, 1813, vii Cranch. 339, at p. 348). It implies the existence of certain facts which *prima facie* create a liability to seizure, facts which there is good reason to believe will be established though they are not yet actually proved. The doubt must be as to the existence of the fact, not as to its wrongful character.

Since in this case there was no doubt as to the circumstances of fact under which the seizure took place, but, according to the United States contention, some possible doubt as to the application of the Statutes, their application was made by the United States naval authorities at the risk of their Government, and since it has been decided by the United States judicial authorities that this application was wrong, liability clearly arises.

## II. *As to the consequences of the liability and amount of damages :*

The result of inquiry made by the Tribunal of the agents of both Governments has been to show that a sum of \$48,000 represents a proper amount to be paid by the Government of the United States as compensation for the seizure and its consequences.

## III. *As to interest :*

It would not be equitable that interest should be allowed for the period prior to six months after the decision of the Circuit Court of Appeals on November 16, 1896, i.e., prior to May 16, 1897. On the other hand, it has been shown that, on December 21, 1904, the United States Government declared that it was disposed to recommend payment on condition that the British Government should submit proof of the nature and extent of the damages. As has been said, there is no evidence that the British Government ever complied with that request.

Taking these circumstances into consideration, this Tribunal is of opinion that interest at 4 % should be allowed from May 16, 1897, to December 21, 1904.

*For these reasons*

This Tribunal decides that the Government of the United States must pay to the Government of His Britannic Majesty the sum of \$48,000 on behalf of the British subjects injured by the seizure of the S.S. *Coquiltam* in June 1892, with interest at 4% from May 16, 1897, to December 21, 1904.

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OWNERS OF THE *TATTLER* (UNITED STATES) v. GREAT BRITAIN

(December 18, 1920. Pages 490-494.)

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SEIZURE OF FISHING VESSEL IN LIVERPOOL (NOVA SCOTIA) AND NORTH SYDNEY (CAPE BRETON).—SEPARATION OF CLAIMS. Seizure of United States vessel *Tattler* on April 10, 1905, by Canadian authorities in Liverpool (Nova Scotia), and on December 15, 1905, by the same authorities in North Sydney (Cape Breton). Claims presented on account of each seizure argued and decided separately.

RELEASE OF VESSEL.—WAIVER OF CLAIMS BY INTERESTED PARTIES BINDING UPON STATE. Release of vessel on April 16, 1905, subsequent to agreement whereby owners of vessel unconditionally waived all claims on account of its seizure. Owners' waiver *held* binding upon United States as the only right it is supporting is that of the owners.

WRONGFUL APPLICATION OF MUNICIPAL LAW BY CUSTOMS AUTHORITIES.—Refusal in October, 1905, by Canadian authorities in North Sydney, Cape Breton, of licence enabling the *Tattler* to ship additional members of the crew. When the *Tattler*, nevertheless, shipped men and on December 15, 1905, again entered North Sydney, she was seized for violation of the relative Canadian Statute, though in the meantime the Canadian authorities in North Sydney had discovered that their refusal had been based on an error and had issued a licence to the *Tattler*. Vessel not released until December 18, 1905. Great Britain *held* responsible.

AMOUNT OF CLAIM.—LOST PROFITS. Claim for value of herring not caught because of detention. Uncertainty of prospective catch. Indemnity fixed on the basis of trouble undergone by owners, period of detention, and tonnage, equipment and manning of vessel.

INTEREST: POSTPONEMENT OF DECISION.

*Cross-references* : Am. J. Int. Law, vol. 15 (1921); pp. 297-301; Annual Digest, 1919-1922, pp. 235-236, 172-173.

*Bibliography* : Annual Digest, 1919-1922, p. 236.

*First claim*

This is a claim for \$2,028.88 with interest, on account of a seizure of the said schooner *Tattler* on April 10, 1925, and its detention for six days, i.e., from April 10 to April 16, 1905, by the Canadian Authorities in Liverpool, Nova Scotia, on a charge of an alleged contravention of the first article of the treaty concluded at London on October 10, 1818, between Great Britain and the United States, and of section 3, paragraph 3, of chapter 94 of the

Revised Statutes of Canada, 1886, entitled: "An Act respecting fishing by foreign vessels."

The record shows that by an agreement made at Liverpool, Nova Scotia, April 15, 1905 (United States memorial, exhibit 19, enclosure 1), the owners entered into the following undertaking:

"In consideration of the release of the American schooner *Tattler* of Gloucester, Mass., now under detention at the port of Liverpool, Nova Scotia (on payment of the fine of five hundred dollars, demanded by the Honourable Minister of Marine and Fisheries of Canada, or by the Collector of Customs at said port), we hereby guarantee His Majesty King Edward the Seventh, his successors and assigns, represented in this behalf by the said Minister, and all whom it doth or may concern, against any and all claims made or to be made on account of or in respect to such detention or for deterioration or otherwise in respect to said vessel or her tackle or apparel, outfits, supplies or voyage, hereby waiving all such claims and right of libel or otherwise before any courts or Tribunal in respect to said detention or to such or any of such claims or for loss or damage in the premises."

It has been observed by the United States Government that on the same day the owners notified the Canadian authorities that the payment of the said sum of \$500 was made under protest.

But neither this protest nor the receipt given by the Canadian authorities for the \$500 contains any reservation to, or protest against, the guarantee given against "any and all claims made or to be made on account of or in respect to such detention". It does not appear, therefore, that the waiver in the undertaking of any claim or right "before any court or tribunal" was subject to any condition available before this tribunal.

It is proved by the documents that the consent of the British Government to the release of the vessel was given on two conditions, first, on payment of \$500, and, second, on the owners undertaking to waive any right or claim before any court, and the protest against the payment does not extend and can not in any way be held by implication to extend to this waiver.

This protest appears to have been a precautionary measure in case the Canadian authorities should have been disposed to reduce the sum. Any protest or reserve as to the waiver of the right to damages would have been plainly inconsistent with the undertaking itself and would have rendered it nugatory if it had been accepted by the other party.

On the other hand, it has been objected that the renunciation of and guarantee against any claims are not binding upon the Government of the United States, which presents the claim.

But in this case the only right the United States Government is supporting is that of its national, and consequently in presenting this claim before this Tribunal, it can rely on no legal ground other than those which would have been open to its national.

#### *For these reasons*

This Tribunal decides that the claim relating to the seizure and detention of the American schooner *Tattler* on and between April 10 and April 16, 1905, must be dismissed.

#### *Second claim*

This is a claim for \$2,100 with interest for the seizure of the same American schooner *Tattler* by the Canadian authorities on December 15, 1905, in the port of North Sydney, Cape Breton, for an alleged violation of the Canadian

Statute 55 and 56 Vict. (1892) chapter 3, entitled: "An Act respecting fishing vessels of the United States."

In October, 1905, the *Tattler* registered at and sailed from Gloucester, Massachusetts, to Newfoundland on a salt herring voyage, proceeding to North Sydney, Cape Breton, and entered that port to obtain a licence from the Canadian authorities under the above-mentioned Canadian Act enabling it to ship additional men as members of the crew.

It is shown by the documents and it is not denied that the Master of the *Tattler* after entering that port went on shore and applied to the Canadian authorities for the said licence; that notwithstanding three separate requests the licence was refused him on the ground that the schooner was on the American register and did not hold an American fishing licence; and that on this refusal the men were shipped without a license.

It is established by a report of the Canadian authorities to the Minister of Marine and Fisheries of Canada dated at Ottawa, December 15, 1905 (British answer, annex 51), that up to that season United States vessels registered as trading vessels visited Newfoundland for the purpose of obtaining cargoes of frozen herring, and were afforded all the ordinary port privileges extended to trading vessels. Newfoundland, however, in that year, i.e., 1905, passed an Act preventing such vessels from procuring bait fishes and herring within the territorial jurisdiction of Newfoundland, and they were forced to catch their cargoes of fish for themselves, and so became fishing vessels. As they had not the necessary crews and could not under the Newfoundland regulations ship them in Newfoundland waters, it became necessary for them either to return home or procure the necessary crews in Canadian ports. In the early part of the season the Canadian local custom officials were not very clear as to the status of these vessels under the changed conditions. The Canadian Government, however, decided that the moment they shipped crews to catch fish they changed their character and became fishing vessels, and as such must procure a Canadian licence, under the Canadian Act. When the Government's decision was made known to the officials, this course was followed.

In the following month, i.e., November, 1905, information was received by the owners of the *Tattler* that the Canadian authorities at North Sydney had discovered their error in regard to the licence requested by and refused to the schooner, and that they were ready to issue the licence on receipt of the proper fee. The owners mailed the amount without delay to the Canadian authorities at North Sydney.

By that time the *Tattler* had returned to Gloucester and sailed again for Newfoundland, and on December 15th owing to bad weather she entered North Sydney for shelter. She was immediately seized on the charge of having, on her previous trip, shipped men without a licence. Telegraphic correspondence took place between the owners and the Canadian authorities to ascertain the facts. But it was not until three days later, i.e., on December 18, 1905 (British answer, annex 53), that her release was obtained.

This Tribunal is of opinion that the British Government is responsible for that detention.

It is difficult to admit that a foreign ship may be seized for not having a certain document when the document has been refused to it by the very authorities who required that it should be obtained.

The British Government in their answer and argument contend that the captain of the schooner had never expressly informed the Canadian Collector of Customs that his vessel was a fishing vessel. But it is to be observed that this same ship, a few months before, sailing under exactly the same conditions

and entering Canadian ports, had been treated as a fishing vessel, blacklisted and seized as one by the Canadian authorities.

That this fact could not have been and was not forgotten is shown by the aforesaid Canadian report of December 16, 1905 (British answer, annex 51).

In any case, it was admitted by the Canadian authorities (*ibid.*) that the officials were at that time insufficiently informed and uncertain as to the exact status of such vessels.

Such an error of judgment by the Canadian officials shall not result in prejudice to the foreign ship in question.

Under these circumstances the *Tattler* is entitled to an indemnity.

*As to the quantum :*

The claim is for the alleged loss of 665 barrels of herring valued at \$2,100, which it is contended the vessel did not catch because of the three days detention.

But no evidence is produced as to the certainty of this prospective catch. Nobody can say whether the vessel would have made such a catch, or whether it would have encountered some mishap of the sea.

Taking into consideration the trouble undergone by the owners, the period of the detention, and the tonnage, equipment and manning of the vessel, this Tribunal thinks that the sum of six hundred and thirty dollars (\$630) is a just indemnity.

*For these reasons*

This Tribunal decides that the Government of His Britannic Majesty must pay to the Government of the United States the sum of six hundred and thirty dollars (\$630) for the seizure and detention of the American schooner *Tattler* on and between December 15 and 18, 1905.

As to the interest, further decision will be given.

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## H. J. RANDOLPH HEMMING (GREAT BRITAIN) *v.* UNITED STATES

(December 18, 1920. Pages 620-623.)

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**IMPLICIT APPROVAL OF, LIABILITY FOR ACTION TAKEN BY CONSUL.**—Employment of attorney by United States Consul at Bombay in December, 1894, January and February, 1895, for the sole benefit of United States. Whatever the Consul's authority to employ attorney, United States by its implicit approval of employment liable for costs of services rendered.

**AMOUNT OF CLAIM.—INTEREST.** Claim for \$2,000 and interest at 4% per annum for 16 years. No specific fee ever agreed upon. House of Representatives Committee of Claims suggested payment of \$2,000 in full settlement. In consideration of services rendered, expense and trouble undergone by Hemming, and of delay in payment, award made of \$2,500 without interest.

*Cross-references :* Am. J. Int. Law, vol. 15 (1921), pp. 292-294; Annual Digest, 1919-1922, p. 170.

*Bibliography :* Nielsen, pp. 617-619.

This is a claim presented by His Britannic Majesty's Government on behalf of Henry Joseph Randolph Hemming for \$2,000 and \$1,280 for 16 years' interest at 4%, and also for such further compensation as this Tribunal may think right.

This claim is on account of professional services rendered as a lawyer by H. J. Randolph Hemming at the request of the United States Consul at Bombay in December, 1894, January and February, 1895, in the prosecution of certain persons accused of counterfeiting United States gold coin in India.

The Government of the United States admits the employment of Hemming by its Consul and the rendering by him of some legal services. It does not deny the American Consul's clear right to prevent, if possible, the counterfeiting of American coin in India by setting in motion the machinery of police and prosecution, but it contends that the Consul had no legal authority to employ private counsel on behalf of his Government, for the performance of duties which might well have been carried out by the public officials of the Crown.

*As to the facts :*

It appears from the documents in the case, that on December 13 and 15, 1894, the United States Consul at Bombay informed the Secretary of State of the counterfeiting of American gold dollars in India and asked for instructions, and that in the absence of any reply he further informed him on December 22, 1894, and January 5 and 26, 1895, of the steps which he was taking to put an end to the counterfeiting and for the prosecuting of the offenders, of the employment of a lawyer, and also of the various legal services and assistance rendered in the matter by the said Hemming.

On January 30, 1895, the Secretary of State in reply forwarded some technical remarks of the Treasury Department as to the counterfeiting and made no objection to or criticism of the steps which had been taken.

On February 2 and May 11, 1895, the Consul forwarded to the Secretary of State further information as to the progress of the prosecution he had initiated and the employment of the attorney and finally communicated to his Government the decision of the Indian Court, and asked for instructions as to an appeal.

By a letter dated July 2, 1895, the Secretary of State, still acting in conjunction with the Secretary of the Treasury, negatived the suggestion of an appeal. As before he made no criticism of, nor did he refer in any way to, the employment of Hemming.

The legal proceedings thus came to an end, and the Consul by a letter dated August 2, 1895, reported to the Secretary of State the request of Hemming for a fee of \$2,000, but recommended a fee of \$500.

It is shown by the documents that the United States Government decided not to pay Hemming the fee recommended by the Consul on the ground that his employment was unauthorized, and would not have been sanctioned. There is no evidence that this decision was communicated to Hemming either by the United States Government, or by its Consul.

In 1904, Hemming, who had in the meantime given up practice in India and returned to England, addressed the American Embassy in London through Merton and Steele, solicitors in London. But it appears from the documents that the United States Government on the receipt through the Embassy of this new request adhered to its decision that as the records did not show any authorization for the employment of counsel, or for the incurring of expense in connection with the case, the claim could not be paid. There is no evidence that this decision was communicated by the United States Government or by its Embassy, either to Hemming or to his solicitors.

In 1908 Hemming went to Washington to endeavour to secure payment. There he obtained the presentation before Congress of some bills which were favorably reported upon, at first for \$500, finally, after hearing Hemming's

explanation, for \$2,000. But they had not passed when the claim was brought before this Tribunal.

It was only in April, 1910, that Hemming appealed to His Britannic Majesty's Government for assistance in procuring redress, and it is said that the claim was accordingly recommended informally to the State Department by the British Ambassador at Washington.

*As to the law :*

Whatever at the outset was the authority of the United States Consul to employ an attorney at the expense of the United States Government, it is plain from the correspondence referred to above that that Government was perfectly well aware, after its Consul's letter of December 22, 1894, received January 14, 1895, of Hemming's employment in a prosecution initiated solely for its benefit, that it did not object in any way whatever during the progress of the case to the steps taken by its Consul but appeared implicitly at all events to approve of those steps and of Hemming's employment.

This Tribunal is, therefore, of opinion that the United States is bound by the contract entered into, rightly or wrongly, by its Consul for its benefit and ratified by itself.

*As to the amount of the claim :*

There is no evidence that any specific sum was ever agreed upon as a fee to be paid to Hemming.

As has been shown, the American Consul first recommended a sum of \$500. The same sum was accordingly recommended in 1910 as equitable to the Committee of Claims of the House of Representatives by the Secretary of State and favorably reported upon in 1910 by that committee. Subsequently, in 1912, after a close investigation into Hemming's claim, the same committee suggested a sum of \$2,000 in full settlement.

This Tribunal taking into consideration the services rendered, and the expense and trouble undergone by Hemming as well as the delay in payment, thinks that the sum of two thousand five hundred dollars (\$2,500) is sufficient in full settlement of the claim, without interest.

*For these reasons*

This Tribunal decides that the Government of the United States must pay to the Government of His Britannic Majesty for the benefit of Henry Joseph Randolph Hemming, the sum of two thousand five hundred dollars (\$2,500) without interest.

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OWNERS OF THE *SIDRA* (GREAT BRITAIN) *v.* UNITED STATES

(November 29, 1921. Pages 453-458.)

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COLLISION OF VESSELS ON PATAPSCO RIVER.—NATIONALITY OF VESSEL, EVIDENCE, CERTIFICATE OF REGISTRY. Collision on October 31, 1905, on Patapsco River between British merchant ship *Sidra* and United States Government tug boat *Potomac*. British nationality of *Sidra* shown by certificate of registry.

APPLICABLE LAW: *LEX LOCI DELICTI COMMISSI*.—EVIDENCE: PROOF OF FAULT, BURDEN OF PROOF, RULE OF MARITIME LAW RECOGNIZED IN UNITED STATES AND

GREAT BRITAIN. According to well settled rule of international law the *lex loci delicti commissi* must apply. Well settled rule of maritime law recognized both in United States and Great Britain that ship under way colliding with ship at anchor is liable unless it proves that collision is due to fault of the other vessel.

DENSE FOG. ANCHORING AND NAVIGATION, INLAND RULES OF UNITED STATES.

In a dense fog, the *Sidra* anchored across the path of navigation, while she could well have anchored clear of the channel. The *Potomac*, upon hearing the bell of the anchored *Sidra*, stopped and instead of keeping stopped and ascertaining the location of the *Sidra* according to the common rule of prudent navigation confirmed by the Inland Rules of the United States, she then altered her course and continued ahead in the narrow channel frequented by numerous ships, without a lookout on the forecastle, at a speed as to make it unable to avoid collision. The *Potomac* held responsible for collision and the *Sidra* as having contributed to it.

EXTENT OF LIABILITY: BOTH SHIPS AT FAULT. According to applicable United States law, when both ships are to blame the damage suffered by each of them must be supported by moiety by the other.

INTEREST: PRESENTATION OF CLAIM. No proper presentation of claim made to United States Government.

*Cross-references* : Am. J. Int. Law, vol. 16 (1922), pp. 110-114; Annual Digest, 1919-1922, p. 100.

*Bibliography* : Nielsen, p. 452.

This is a claim presented by His Britannic Majesty's Government for £ 4,336. 7s. 4d. and £ 1,127 interest for damages on account of a collision which occurred during a dense fog in the Patapsco River in the approaches of Baltimore Harbor, Maryland, in the territorial waters of the United States on the 31st of October, 1905, between the United States Government tug boat *Potomac* and the British merchant ship *Sidra*.

It appears from her certificate of registry that the *Sidra*, a steam-screw vessel, was in 1905 a British ship of 5,400 tons of displacement, 322 feet long, and drawing 10 to 12 feet.

The *Potomac* was a steam-screw tug boat owned by the United States Government; she was 135 feet in length with a draft of about 15 feet; her displacement was 650 tons.

On October 31, 1905, at 6 o'clock in the morning, the *Sidra*, bound from New York to Baltimore, was proceeding up the channel to Baltimore harbor; the pilot and the captain were on the bridge, a seaman was at the wheel, the chief officer and carpenter were stationed on the forward deck by the anchor, which was ready to let go.

At about 7.30 a.m., soon after passing Fort Carroll, the weather became foggy and the fog became so thick that at 7.45, in the judgment of pilot, it was prudent to anchor. The exact position of the vessel, when anchored, is contested.

Immediately upon anchoring, the *Sidra* rang her bell in conformity with the Inland Rules of the United States, article 15, and, thereafter, hearing the fog-blasts of an approaching steamer, which proved to be the *Potomac*, she continued to ring her bell.

On the same day, October 31, 1905, at about 6 a.m., the United States tug boat *Potomac* had left Annapolis, under orders to proceed to Baltimore to obtain provisions for the North Atlantic Fleet and to return to Annapolis on the afternoon of that same day (United States answer, exhibit 6). The com-

manding officer was on the bridge and with him a government-licensed pilot and the boatswain as lookout. She had no lookout on the forecastle.

At about 8 o'clock in the morning the *Potomac* passed Fort Carroll and proceeded up the river on the starboard side of the channel heading up; at that time the weather was still clear (United States answer, p. 44), but about ten minutes later it suddenly changed and a dense fog shut in upon the water.

Before the fog shut down, the *Potomac* sighted a steamer under way about two miles ahead in the channel and, according to the commanding officer, she was the *Sidra* (United States answer, p. 18).

As soon as the fog shut in, the *Potomac* slowed gradually until going 4 knots (United States answer, p. 44), and blew her whistle in conformity with the regulations. She passed on starboard hand close aboard of one of the buoys marking the starboard side of the channel, then she passed a second one which she ran over, then having altered her course, so as to keep more in the channel, she heard the bell of a ship, which proved to be the *Sidra*. The sound seemed to her to come from dead ahead; her course was altered so as to bring it on the starboard bow. But suddenly the shape of the steamer loomed up dead ahead at about 100 or 150 feet. The *Potomac* immediately reversed the engines full speed astern, but she was unable to check her headway in sufficient time to avoid collision. The *Potomac* collided with the *Sidra* at about right angles, causing her a large amount of damage without damaging herself. At the moment of the collision it was 8.15 a.m.

A few days after the collision occurred, i.e., on November 3, 4, 6, and 9, 1905, a United States Naval Board of Investigation was convened by the Commander in Chief of the North Atlantic Fleet, to inquire into the circumstances of the collision, and to express an opinion as to which one of the two vessels was responsible for the collision. The conclusion reached by that Board was that the *Sidra* was responsible, as she might have anchored well clear of the channel and she did not.

Before this Tribunal the British Government contend that the collision occurred by the fault of the *Potomac* in that she was proceeding at an excessive rate of speed in fog and did not stop her engines and navigate with caution on hearing forward of her beam the fog signal of a vessel anchored, whose position was not ascertained, and further in that the *Potomac* did not keep within the channel but ran outside thereof, and in that she did not maintain a proper or sufficient lookout.

The United States Government contends that the collision was due to the fault of the *Sidra* in anchoring in the channel and obstructing the path of navigation, while she might, without difficulty and with perfect safety, have been anchored outside and out of the path of other vessels.

According to the well settled Admiralty rule, recognized both in the United States and Great Britain, in case of a collision between two ships, one of them being moving and the other at anchor, the liability is for the vessel under way, unless she proves that the collision is due to the fault of the other vessel.

Consequently, in this case the responsibility lies upon the *Potomac* and the Government of the United States, unless and so far as it is established that the *Sidra* was in fault.

In that respect there is not sufficient evidence to show the exact location of the place where the *Sidra* anchored and the collision took place. It has been stated by the commanding officer of the *Potomac* (United States answer, p. 17) that the *Sidra's* anchor was a little outside the line of buoys on the easterly or starboard side of the channel, the ship herself lying across the channel. Also there is the concurring statement of those on board two other vessels, the *Chicago* and the *Sparrow*. The *Sparrow* said that she saw the *Sidra* lying her portside

parallel with the line of the channel about 50 yards from it, i.e., 160 feet. And the *Chicago* said that she saw the *Sidra* lying from 150 to 200 feet from the channel and at the time the vessel did not project into the channel.

On the other hand, the testimony of the captain of the *Sidra* shows that he took no soundings before or when anchoring (British memorial, p. 41): that he did not know where he anchored from bearings, buoys, etc. (*ibid.*), and that he anchored when he thought he was clear of the channel, but he did not know (*ibid.*, question 31, p. 41; question 79, p. 70; see also p. 76), and that after the collision at 8.20, the tide beginning to change, he used the engines to bring the vessel around quicker, in order not to be laying across the channel, and afterwards changed her anchorage in order not to be "worrying about" vessels passing up and down; furthermore, he admitted that he could have gone at least half a mile further to the northeast with entire safety and that there is three-fourths of a mile between the line of the channel and the shoal water (see British memorial, pp. 64, 65, 70).

No sufficient evidence is afforded by the British Government to contradict the above elements of proof, from which it results that the *Sidra* anchored outside the channel, but being given her 322 feet length, not far enough to prevent her from rounding across the eastern side of the path of navigation. As noted by the United States Board of Inquiry, "prudence would dictate to any vessel finding herself under the necessity of anchoring to choose a position well clear of the channel". This the *Sidra* did not do, and no reason is given why it could not have been done. As it has been shown there was about one-half-mile room farther outside the channel; the *Sidra* said that she rounded one of the buoys marking the channel before anchoring; then she had the possibility of calculating how far she had to go to be certain she was entirely clear of the line. It was so much more her duty to do it, since she heard the whistle of other vessels in the neighborhood (British memorial, p. 66, question 50).

By that lack of prudence, the *Sidra* had, in this Tribunal's opinion, contributed to the collision.

As regards the *Potomac*, this Tribunal regrets not to have before it such important testimonies and documents as the testimony of the chief engineer and the log book of that vessel. But it results from the testimony of the commanding officer that when the vessel heard the bell of the *Sidra* she was going at 4 knots an hour, and that after she had stopped her engines and altered her course to port, again she continued her course ahead under the same speed (United States answer, pp. 16, 32, 46, and 62) without ascertaining the location of that bell.

In dense fog, it is the common rule of prudent navigation not only to stop as soon as a bell is heard, but also to keep stopped until the location of the other vessel ringing the bell and being an obstruction be ascertained, and everybody knows that it is impossible in fog to rely upon the apparent direction of the sound for ascertaining that location (see Marsden, *Collisions at Sea*, pp. 378, 379).

That rule is confirmed by articles 16 and 23 of the Inland Rules of the United States as they have been construed by various Federal decisions (*The Grenadier v. the August Korff*, 74 Fed. Rep., 974, 975).

Furthermore, it must be observed that whatever be her naval orders, the *Potomac* was proceeding in a narrow channel of 600 feet wide, frequented by numerous ships going up and down, and that she knew another steamer was ahead on her way, and she had to be especially cautious as to her speed, and the strict observance of the most prudent navigation. The *Potomac*, as has been shown, had no lookout on the forecastle and she was proceeding in a fog so dense that she was unable to sight the *Sidra* until about 50 feet before colliding

and she was proceeding at such a speed as to make her unable to avoid collision.

For these reasons, the *Polomac* is to be held responsible for the collision, for not navigating with sufficient prudence, and on the other hand, the *Sidra* is to be held as having contributed to the collision by having imprudently anchored too close to the channel.

According to the well settled rule of international law, the collision having occurred in the territorial waters of the United States, the law applicable to the liability is the law of the United States, according to which when both ships are to blame the damage suffered by each of them must be supported by moiety by the other.

It results from the United States inquiry that the *Polomac* suffered no damage, and it is shown by the documents that the damage suffered by the *Sidra* amounted to £ 4,336. 7s. 4d., including £ 750 for demurrage. Consequently, the United States Government, as the owner of the *Polomac*, is liable for £ 2,168. 3s. 8d.

As for the interest, it seems difficult to consider the letter of November 10, 1905, by which the representatives of the *Sidra* asked for the result of the United States naval investigation, as having brought the present claim to the notice of the United States Government.

*For these reasons*

This Tribunal decides that the United States Government shall pay to His Britannic Majesty's Government for the benefit of the owners of the *Sidra*, the sum of two thousand one hundred and sixty-eight pounds, three shillings and eight pence (£ 2,168. 3s. 8d).

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OWNERS OF THE *JESSIE*, THE *THOMAS F. BAYARD* AND  
THE *PESCAUHA* (GREAT BRITAIN) *v.* UNITED STATES

(*December 2, 1921, Pages 479-482.*)

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SEARCH OF VESSELS ON THE HIGH SEAS; SEALING OF FIREARMS, AMMUNITION.—

CONVENTIONAL PROTECTED ZONE OF FUR-SEALING. Seizure of British vessels *Jessie*, *Thomas F. Bayard* and *Pescawha* on June 23, 1909, by United States revenue cutter on high seas near Chirikof Island, North-East Pacific Ocean, while hunting sea otters in conventional protected zone of fur-sealing. Firearms and ammunition found on board placed under seal. Order not to break seals before leaving zone.

FUNDAMENTAL PRINCIPLE OF INTERNATIONAL MARITIME LAW.—DENIAL OF LIABILITY.—GOOD FAITH OF SEARCHING OFFICER, BUT ERROR IN JUDGMENT.

Fundamental principle of international maritime law concerning interference with foreign vessels on the high seas. The United States, though admitting illegal and unauthorized character of search, denies liability because of good faith of searching officer, because of insufficient evidence, and because of exaggeration and fraudulent character of claims. United States *held* liable, notwithstanding good faith of naval authorities: responsibility for errors in judgment of officials purporting to act within the scope of their duties and vested with power to enforce their demands. Liability not affected by alleged exaggeration and fraudulent character.

AMOUNT OF CLAIM.—EVIDENCE.—EXAGGERATION, FRAUDULENT CHARACTER, GOOD FAITH OF CLAIMS.—LOST PROFITS.—TROUBLE. Insufficiency of evidence

as to damages and alleged exaggeration of claims do not justify charge that claims are fraudulent: bona fides of claims *held* proven by the mere fact of their presentation by Great Britain. Vessels, caused to leave conventional protected zone of fur-sealing, went fur-sealing in North-West Pacific Ocean. Possibility of such voyage contemplated by owners and captains before departure. No damage suffered on voyage. Profitable catch of fur-seals by vessels. No evidence of profits from sea otter hunting lost by interference by United States naval authorities. Expenses in engaging crews specially trained in sea otter hunting wasted. Allowances made for such expenses and for trouble.

INTEREST: PRESENTATION OF CLAIM. No presentation of claim made to United States Government.

*Cross-references:* Am. J. Int. Law, vol. 16 (1922), pp. 114-116; Annual Digest, 1919-1922, pp. 175, 187.

*Bibliography:* Annual Digest, 1919-1922, pp. 187-188.

These are three claims presented by His Britannic Majesty's Government:

1. For \$38,700 on behalf of the British schooner *Jessie*;
2. For \$51,628.39 on behalf of the British schooner *Thomas F. Bayard*;
3. For \$52,661.60 on behalf of the British schooner *Pescawha*, together with interest from June 23, 1909.

It is admitted that the *Jessie*, the *Thomas F. Bayard*, and the *Pescawha*, all of them British schooners, cleared at Port Victoria, B.C., for sealing and sea otter hunting and were in June, 1909, actually engaged in hunting sea otters in the North Pacific Ocean; that on June 23, 1909, while on the high seas near the north end of Chirikof Islands<sup>1</sup> they were boarded by an officer from the United States revenue cutter *Bear* who, having searched them for sealskins and found none, had the firearms found on board placed under seal, entered his search in the ship's log, and ordered that the seals should not be broken while the vessels remained north of 35° north latitude, and east of 180° west longitude.

The United States Government admits in its answer to the British memorial that there was no agreement in force during the year 1909 specifically authorizing American officers to seal up the arms and ammunition found on board British sealing vessels, and that the action of the commander of the *Bear* in causing the arms of the *Jessie*, the *Thomas F. Bayard*, and the *Pescawha* to be sealed was unauthorized by the Government of the United States.

The United States Government, however, denies any liability in these cases, first, because the boarding officer acted in the bona fide belief that he had authority so to act, and secondly, because there is no evidence on the claims except the declaration of the interested parties, and because these claims are patently of an exaggerated and fraudulent nature.

#### I. *As to the liability:*

It is a fundamental principle of international maritime law that, except by special convention or in time of war, interference by a cruiser with a foreign vessel pursuing a lawful avocation on the high seas is unwarranted and illegal, and constitutes a violation of the sovereignty of the country whose flag the vessel flies.

It is not contested that at the date and place of interference by the United States naval authorities there was no agreement authorizing those authorities to interfere as they did with the British schooners, and, therefore, a legal

<sup>1</sup> Misprint for Chirikof Island [Note by the Secretariat of the United Nations, Legal Department].

liability on the United States Government was created by the acts of its officers now complained of.

It is unquestionable that the United States naval authorities acted bona fide, but though their bona fides might be invoked by the officers in explanation of their conduct to their own Government, its effect is merely to show that their conduct constituted an error in judgment, and any Government is responsible to other Governments for errors in judgment of its officials purporting to act within the scope of their duties and vested with power to enforce their demands.

The alleged insufficiency of proof as to the damage and the alleged exaggeration and fraudulent character of the claims, do not affect the question of the liability itself. They refer only to its consequences, that is to say, the determination of damages and indemnity.

## *II. As to the consequences of the liability:*

It must first be observed that the insufficiency of proof as to damages, and the alleged exaggeration of the claims formulated by the British memorial, are not enough in themselves to justify the charge that they are fraudulent in character. For this Tribunal, the mere fact that the claims are presented by the Government of His Britannic Majesty is sufficient evidence of their complete bona fides.

The three schooners, after their arms and ammunition had been sealed with an order that the seals must not be broken until they were outside the conventional protected zone of fur-sealing, went across the North Pacific Ocean to catch fur-seals alongside the Russian Islands in the western part of that ocean.

It has been submitted by the United States Government that in any event the vessels would have made the same voyage; but of that contention no sufficient evidence has been given.

On the other hand it is shown by the agreements with the crews that the possibility of such a voyage was contemplated by the owners and the captains. It is admitted by counsel for Great Britain that no damage was actually suffered on the voyage by any of the three vessels. Further it is admitted that the catching of fur-seals on the coast of the Russian Islands was profitable, though a request by this Tribunal for some detailed information as to these profits has not been satisfied.

There has been adduced no evidence sufficient to establish that had there been no interference by the United States naval authorities the vessels would have made more or any profit from sea otter hunting in the Bering Sea. It is admitted by the counsel for Great Britain that nothing is so uncertain as the profits of such a venture.

The amount of the demands is based merely on statements made by the interested parties themselves or on statistics and data which afford no sufficient evidence as to the sea otters caught by other British schooners, similarly equipped and manned, hunting during the same period and in the same localities as the three schooners in question intended to hunt.

In these circumstances, this Tribunal is only able to take into consideration the fact of the prohibition itself, by which in violation of the liberty of the high seas the vessels were interfered with in pursuing a lawful, and, it may be, profitable enterprise; but nobody can say whether that enterprise would have been more or less profitable than the one in which they actually engaged on the Russian coast or whether they would have encountered some mishap of the sea. In any case, the result was that the expenses incurred in engaging crews specially trained for this enterprise was unprofitable and wasted.

This Tribunal is of opinion that the following sums will be just and sufficient indemnities for each of the three vessels, viz., for the *Jessie*, \$544 for her special expenses and \$1,000 for the trouble occasioned by the illegal interference; for the *Thomas F. Bayard*, \$750 for her special expenses and \$1,000 for the trouble occasioned by the illegal interference; and for the *Pescawha*, \$500 for her special expenses and \$1,000 for the trouble occasioned by the illegal interference.

As to interest, there is no evidence that any claim was ever presented to the Government of the United States before being entered on the Schedule annexed to the Special Agreement, and according to the Terms of Submission, section four, interest may only be allowed from the date on which any claim has been brought to the notice of the defendant party.

*For these reasons*

This Tribunal decides that the Government of the United States shall pay to the Government of His Britannic Majesty, the sum of one thousand five hundred and forty-four dollars (\$1,544) on behalf of the schooner *Jessie*, the sum of one thousand seven hundred and fifty dollars (\$1,750) on behalf of the schooner *Thomas F. Bayard*, and the sum of one thousand five hundred dollars (\$1,500) on behalf of the schooner *Pescawha*, in each case without interest.

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OWNERS OF THE *ARGONAUT* AND THE *COLONEL JONAS H. FRENCH*  
(UNITED STATES) *v.* GREAT BRITAIN

(*December 2, 1921. Pages 509-514.*)

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SEIZURE AND CONFISCATION OF BOATS AND SEINES, ARREST OF CREWS IN TERRITORIAL WATERS (THREE-MILE LIMIT).—TIDE. Seizure of boats and seines belonging to United States fishing vessels *Argonaut* and *Colonel Jonas H. French*, and arrest of crews of boats, on July 24, 1887, by Canadian Government cutter in territorial waters surrounding Prince Edward Island (Canada). Boats and seines swept by tide inside three-mile limit while fishing outside.

TERRITORIAL WATERS, FISHING, JURISDICTION.—UNIVERSALLY RECOGNIZED PRINCIPLE OF INTERNATIONAL LAW.—GOOD FAITH, PROPER INTERPRETATION AND APPLICATION OF MUNICIPAL LAW, FORFEITURE.—DECISIONS *EX PARTE* OF MUNICIPAL COURT. By treaty, United States renounced fishing rights in Canadian territorial waters (art. 1, Treaty of London, concluded with Great Britain on October 20, 1818). Universally recognized principle of international law that State has jurisdiction over fishing within its territorial waters, and may apply thereto its municipal law and impose such prohibitions as it thinks fit. Canadian municipal law prohibiting foreigners in foreign vessels from fishing within three-mile limit, and providing for sanctions. So far as these cases stand, the proper interpretation and application of Canadian municipal law by Canadian municipal courts (good faith of fishermen, exact character of their acts) is not a question of international law. On March 6, 1888, two decisions *ex parte* rendered by Vice-Admiralty Court of Prince Edward Island condemning boats and seines to be forfeited. No reopening of cases applied for by owners.

EVIDENCE FURNISHED BY EITHER SIDE.—DOCUMENTS, AFFIDAVITS. According to art. 5, para. 4. of Special Agreement. Tribunal is to decide all claims upon

such evidence or information as may be furnished by either Government. Two brief reports of seizures addressed by captain of Canadian Government cutter to United States Consul General at Halifax, Nova Scotia, insufficient proof of legality of seizures. Additional evidence from affidavits sworn by owners, masters and men of *Argonaut* and *French*.

**LACK OF PRUDENCE.—THREAT TO SEIZE FISHING VESSELS.** No anchor on board, though intention was to fish near three-mile limit and strong tides shorewards could have been foreseen. Mere threat to seize *Argonaut* and *French* themselves no basis for indemnity unless manifested by wrongful act.

*Cross-references:* Am. J. Int. Law, vol. 16 (1922), pp. 106-110; Annual Digest, 1919-1922, pp. 176-177.

The Government of the United States claims from the Government of His Britannic Majesty, on account of the wrongful seizure and confiscation of some boats and seines of the American vessels *Argonaut* and *Colonel Jonas H. French* and the consequent loss to the owners of such vessels by reason of such seizures and threatened seizure of the vessels, the sum of \$46,655.75 with interest, being \$24,600 on account of the *Argonaut*, and \$22,055.75 on account of the *Colonel Jonas H. French*.

On the 24th of July, 1887, the *Argonaut* and the *Colonel Jonas H. French*, two American schooners, duly registered and licensed at Gloucester, Massachusetts, United States, were fishing for mackerel southward of East Point, Prince Edward Island, Dominion of Canada, in the vicinity of the Canadian Government cutter *Critic* and some other American fishing vessels.

In the afternoon of that day, the *Argonaut* being off the West River, discovered a school of mackerel and sent one of her boats with a seine to catch them.

It is shown by the affidavits sworn on August 5 and 12, 1887, by the owner, the master, and men of the *Argonaut* (United States memorial, exhibits 7, 8, 9), that the seine was set and enclosed the mackerel at a distance of about four miles from shore (United States memorial, exhibit 7), and also that there was at that time an ebb tide running eastward at the rate of about three miles an hour (*ibid.*).

It appears that the seine being fouled, about one hour elapsed before it was pursed up and the fish secured (United States memorial, exhibit 8), and during that time the aforesaid ebb tide set the boat and seine towards the shore quite rapidly (United States memorial, exhibit 7). In order to avoid difficulties with the Canadian cutter, the seine was taken up into the boat and the fish turned out alive.

At that time the Canadian cutter was about a mile away from the boat. The master of the *Argonaut* went to the *Critic* and asked if they considered the seine and boat within three miles of the shore, informing the captain that the tide had swept them from a position fully a mile outside. The captain of the *Critic* replied that the boat and seine were only two miles off shore. Notwithstanding the explanation of the master of the *Argonaut* that if the seine was inside the limit it was entirely without design on his part but the result of the tide taking it in, the seine and boat were seized and twelve men arrested.

About the same time and place, the schooner *Colonel Jonas H. French* was lying about three and a half miles off shore when she saw mackerel outside of her about a mile (United States memorial, exhibit 14). Two boats went with their seines, which were set around the fish, and one of the boats with two men in it was left in charge of the seine with the mackerel enclosed. These men soon found that they were drifting rapidly with the tide along the shore and also toward the shore, and they had no anchor or other means of preventing the

boat and seine from going with the tide (United States memorial, exhibit 15). Finding that they must inevitably drift inside the three-mile limit, they endeavored to take in the seine. and, while doing so, were arrested by the cutter *Critic*. About three-quarters of an hour had elapsed from the time the boat was left as aforesaid until the seizure (United States memorial, exhibit 15).

On July 29, 1887, two brief printed circulars were addressed by the captain of the *Critic* to the United States Consul General at Halifax, Nova Scotia, stating the fact of the seizures "for violation of the statutes in force in Canada, relating to foreign fishing vessels" (United States memorial, exhibit 2).

Immediately after the seizure of their boats and seines and the arrest of their men, the masters of the *Argonaut* and the *Colonel Jonas H. French* abandoned their fishing trip and returned to their home port in the United States. While returning they heard that it was the intention of the Canadian authorities to seize the schooners themselves wherever they could be found outside the territorial waters of the United States (United States memorial, exhibits 3, 4, 10).

On September 19, 1887, proceedings were begun in the Vice-Admiralty Court of Prince Edward Island for the forfeiture of the boats and seines, and on March 6, 1888, two decisions *ex parte* were rendered condemning the same to be forfeited for having been found to be fishing and to have been fishing and preparing to fish in the Canadian waters within three miles of the shore (British answer, annexes 57, 58).

It is shown by the documents that the owners, although opportunity was given to them to make the necessary application to the Vice-Admiralty Court, did not exercise their right to have the cases reopened and to put in their defence before the court (United States memorial, exhibits 25, 26).

It does not appear that there was any diplomatic correspondence relating to these cases before they were submitted to this arbitration.

#### *In law :*

By article I of the Treaty concluded at London, October 20, 1818, between the United States and Great Britain, it was stipulated that, except in certain localities, without interest in this case, the United States renounced:

"... forever, any liberty heretofore enjoyed or claimed by the inhabitants thereof, to take, dry, or cure fish on or within three marine miles of any of the coasts, bays, creeks, or harbours of His Britannic Majesty's dominions in America not included within the above-mentioned limits; Provided, however, that the American fishermen shall be admitted to enter such bays or harbours for the purpose of shelter and of repairing damages therein, of purchasing wood, and of obtaining water, and for no other purpose whatever".

By the Imperial Statute 59 George III, chapter 38 (1819), article II, it is prohibited to any foreigner in a foreign vessel to fish for or to take any fish within the three-mile limit of the Canadian coast, and by the Revised Statutes of Canada, 1856, chapter 94, sections 1, 2, 3, and 7, certain penalties and the forfeiture of the vessel and the legal prosecutions are provided for in case contravention.

It is a universally recognized principle of international law that a State has jurisdiction over sea-fishing within its territorial waters, and to apply thereto its municipal law, and to impose in respect thereof such prohibitions as it may think fit. The Treaty of 1818 did not make any exception in regard to the inhabitants of the United States in these waters.

The only question then to be decided in this case is whether or not the boats and seines of the *Argonaut* and the *French* were within the three-mile limit.

It is to be noted that, though the Canadian regulations required them to be made (see *David J. Adams* case, United States memorial, p. 358), no official

statement of the circumstances of the alleged offences or of the legal provisions alleged to be contravened, no document drawn up by the officers who carried out the seizures proving the alleged illegal position of the boats and seines, or reporting any bearings or soundings taken at the time are presented by the British Government in justification of the action of their naval authorities. The log book of the cutter *Critic* is not even produced. The only documents presented are the two brief reports, above referred to, stating the fact of the seizures for violation of the statutes in force in Canada, relating to foreign fishing vessels. This is insufficient proof of the legality of the seizures.

However, according to article 5, paragraph 4, of the Special Agreement, this Tribunal is to decide all claims submitted upon such evidence or information as may be furnished by either Government.

In regard to the *Argonaut*, it results from the affidavits of the owner, master and men, produced by the United States (United States memorial, exhibits 7, 8) and above referred to, that, first, the boat and seine were set at four miles off shore; second, that they remained out for about one hour and were drifting shoreward with the tide, and third, that the tide was running to the eastward at from two and a half to three miles an hour.

In his protest, the owner does not contest so much the position of the boat and seine within the three-mile limit as the alleged act of fishing to which the Canadian law was applied; nor does the United States Consul General, when reporting to the Assistant Secretary of State on August 7, 1887, the statements of the men, deny that the boats were seized within the three-mile limit (United States memorial, exhibit 2).

In regard to the boat and seine of the *Colonel Jonas H. French*, the sworn affidavits of the owner, master and men, produced by the United States (United States memorial, exhibits 14 and 15) show, first, that the vessel was three and a half miles from the shore; second, that the mackerel were one mile outside the vessel, so that the boat and seine were four and a half miles from the shore when the seine was set out, and third, that they delayed about three-quarters of an hour, being swept shoreward by the ebb tide, when they were seized.

It must be observed that though the intention was to fish quite near the three-mile limit and though with the exercise of a very small amount of prudence it could have been foreseen that there would be a strong tide setting shorewards, there was on board the boat no anchor or any other means of preventing its drifting within the prohibited zone.

On all the facts presented in these cases, this Tribunal finds that the boats and seines of both vessels were less than three miles from the shore when seized.

The boats and seines of the two vessels being inside the territorial waters, were, from the international law point of view, undoubtedly subject to the municipal law and the jurisdiction of Canada, and the question whether or not, under the circumstances of these cases, taking into consideration the good faith of the fishermen and the exact character of their acts, a proper interpretation and application of the Canadian law was made by the Canadian court is a question of municipal law and not a question of international law to be decided by this Tribunal, so far as these cases stand.

In regard to the contended intention of the Canadian authorities, to seize the two schooners themselves, that mere intention, even if any such existed, cannot by itself be the basis for indemnity unless it was actually manifested by some wrongful act, and, in that respect, no sufficient evidence is offered to establish any order of seizure given, or any other measure of execution taken against the two vessels.

*For these reasons*

This Tribunal decides that the claims be dismissed.

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CHINA NAVIGATION CO., LTD. (GREAT BRITAIN)  
v. UNITED STATES

(*Newchwang case. December 9, 1921. Pages 414-420.*)

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**COLLISION OF VESSELS ON YANGTSE RIVER.—DECISION OF MUNICIPAL COURT: *RES JUDICATA*.** Collision on May 11, 1902, on Yangtse River between steamship *Newchwang*, owned by China Navigation Co., Ltd., a British corporation, and United States Government collier *Saturn*. Dismissal on January 16, 1903, of action for damages brought by United States against company in British Supreme Court of China and Corea in Admiralty at Shanghai. British plea that dismissal settled United States' liability. Whatever be the value of plea of *res judicata* before international tribunal of arbitration, doctrine does not apply since no identity of questions at issue. Shanghai Court, moreover, refused company's application for leave to enter counter-claim.

**EVIDENCE: EVIDENTIAL VALUE OF MUNICIPAL COURT DECISION, BURDEN OF PROOF.—ADMISSION OF LIABILITY.** Findings of Shanghai Court as to facts are evidence of conclusions reached by competent municipal tribunal. It must be remembered, however, that before Court burden of proof on *Saturn*, while before this tribunal on *Newchwang*, and also that fresh evidence has been put before tribunal. Letter carrying private recommendation by Secretary of the Navy to Chairman of Committee on Claims of House of Representatives, never officially published, cannot be regarded as admission of liability, nor can bills introduced into United States Senate and providing for reference of claim to Court of Claims, but never voted upon in the Senate or favorably reported upon by Committee on Claims.

**NEGLIGENCE. FAULT, NAVIGATION.—INTERNATIONAL AND AMERICAN RULES OF THE ROAD: APPLICABILITY ON HIGH SEAS.** Held that *Saturn* was negligent in not keeping a good lookout and in manœuvring wrongly. On the high seas American Rules do not, but International Rules of the Road do, apply to foreign vessels. *Newchwang's* manœuvring when collision inevitable merely a desperate attempt to minimize its effect and not a fault.

**DAMAGES: INDIRECT DAMAGES, WELL-KNOWN PRINCIPLE OF THE LAW OF DAMAGES, LOST PROFITS, LOSS OF USE, DEMURRAGE.** Claim for legal expenses entailed by action brought by United States before Shanghai Court disallowed: such expenses are indirect damages, and according to well-known principle of the law of damages *causa proxima non remota inspicitur*. No sufficient evidence of alleged loss of profits. Compensation for deprivation of use to be computed according to ordinary rule of demurrage at 4d per ton gross tonnage.

**INTEREST: PRESENTATION OF CLAIM.** Tribunal unable to decide on interest, since not clear whether claim officially presented.

*Cross-references:* Am. J. Int. Law, vol. 16 (1922), pp. 323-328; Annual Digest, 1919-1922, pp. 188, 373-374.

*Bibliography:* Nielsen, pp. 411-413; Annual Digest, 1919-1922, p. 374.

This is a claim presented by His Majesty's Government for the sum of £ 4,271. 4s. 8d. with interest from August 27, 1902 (the date on which the claim was first brought to the notice of the United States Government) for damage sustained by the China Navigation Co., Ltd., a British corporation, as the result of a collision which occurred on May 11, 1902, off the southern mouth of the Yangtse River between the British steamship *Newchwang*, owned by the said company, and the *Saturn*, a naval collier, owned and operated by the United States Government.

There is no contest about the ownership of either the *Newchwang* or the *Saturn*, the British nationality of the claimant, or the fact of the collision.

On July 11, 1902, an action for damages was brought by the United States Government against the China Navigation Co., Ltd., in His Britannic Majesty's Supreme Court of China and Corea in Admiralty. On August 16, 1902, an application for leave to enter a counter-claim was filed by the China Navigation Co., Ltd., but on August 20, 1902, an order was made refusing this application for lack of jurisdiction. On January 16, 1903, both parties being represented, the Court decided the case upon its merits, and delivered a judgment as follows:

"This Court doth decree and order that the S. S. *Newchwang* being in no way to blame for the collision referred to in the Plaintiff's petition this suit be dismissed with costs to be taxed" (British memorial, p. 51).

The British Government contend that by reason of this judgment the liability of the United States for the damage and loss suffered by the China Navigation Co., in consequence of the collision is covered by the principle of *res judicata* and, therefore, not open to dispute.

It is unnecessary here to discuss the value of a plea of *res judicata* before an international tribunal of arbitration. It is a well-established rule of law that the doctrine of *res judicata* applies only where there is identity of the parties and of the question at issue. The only matter before His Britannic Majesty's Supreme Court was the liability of the China Navigation Co., Ltd., as owners of the *Newchwang*, whereas the question submitted to this Tribunal is the liability of the United States Government as owners of the *Saturn*. Whatever, therefore, be the connection in fact between the two questions, they are not identical. Further, it is impossible to say that the question of the liability of the United States is concluded by the decision of His Britannic Majesty's Court, when that Court, on the contrary, held that it had no jurisdiction to deal with that question.

In these circumstances it is for this Tribunal to decide whether the United States Government is liable to pay compensation for the said collision. For this purpose it is authorized by article 5 of the Pecuniary Claims Convention to consider such evidence and information as may be furnished by either Government.

Although the decision of His Majesty's Supreme Court is not in any sense *res judicata* in this case, and although the findings of the Court as to the facts upon which liability depends are not binding upon this Tribunal, yet they are evidence of the conclusions reached by a competent municipal tribunal. But, in considering these conclusions, and the evidence upon which they were based, it must be remembered, first, that there the burden of proof was on the *Saturn*, while before this Tribunal it is on the *Newchwang*; and secondly, that evidence has been put before this Tribunal which was not before that Court. In behalf of the United States, the most important fresh evidence is the report of the proceedings of the United States Naval Board of Investigation, dated May 23, 1902, within two weeks after the collision, which laid the blame for the collision on the *Newchwang*. The only evidence presented on the part of Great Britain which was not before the trial court, consists: (a) of certain bills introduced into the

United States Senate providing for the reference of this claim to the Court of Claims, to determine, subject to certain conditions, whether any damages should be paid, and (b) a copy of a letter dated January 30, 1907, addressed by the Secretary of the Navy to the Chairman of the Committee on Claims of the House of Representatives. His Majesty's Government contend that this letter contains an admission of liability which estops the United States from denying responsibility. It appears, however, from a statement made by the Counsel for Great Britain on the oral argument, that this letter was merely a personal or private recommendation to the Chairman of the Committee on Claims, and has never been officially published, and for this reason in the opinion of the Tribunal it can not be regarded as an admission of liability on the part of the United States. As to the bills, it was also stated in the oral argument that none of them were voted upon in the Senate, nor were they even favorably reported upon by the Committee on Claims, to which they were referred.

Dealing now with the merits:

I. *As to the facts:*

It is admitted on both sides that the night was clear and the water smooth and that there was plenty of sea room; it is shown that the regulation lights were burning brightly and the regular watches kept; the force of the tide is not in dispute, and under all these circumstances it is difficult to understand how, with the exercise of ordinary care and skill, the collision occurred.

Notwithstanding a considerable conflict of evidence, and a wide variance between the Preliminary Acts of the two ships and the oral evidence of those on board them, the following facts are clearly established.

On May 11, 1902, at about 11 p.m., the British S. S. *Newchwang*, 894 tons gross tonnage, was proceeding up the Chinese coast from Amoy to Shanghai and had passed through Steep Island Pass, steering north 2° west magnetic. Her speed was 10-12 knots. She sighted at a distance of six miles and about two points on her *port* bow the masthead light of another steamer, which afterwards proved to be the *Saturn*. She held on her course.

At the same time, the United States collier *Saturn*, bound from Shanghai to Cavite, Philippine Islands, had passed Bonham Straits and Elgar Island; her speed was 10-12 knots and she was steering south 3/4 east. She reported no light at all at the time when she herself was sighted by the *Newchwang*.

However, about 20 minutes later the *Saturn* passed another steamer, the *Hoihow*, which was going north in front of and in the same course as the *Newchwang*. The *Saturn* ported her helm and came to starboard in accordance with the Rules of the Road, but so tardily that the captain of the *Hoihow* testified that the two vessels passed at two ships' length apart.

After so passing the *Hoihow*, the *Saturn* resumed her course and it was only then that she sighted the masthead light of the *Newchwang*. At that time the two vessels were less than one and a half miles apart. In the oral argument, not only was it admitted but stress was laid upon the fact that from the time the *Saturn* passed the *Hoihow* at 11.14 p.m., only six minutes elapsed before the collision; that the *Saturn* saw the masthead light of the *Newchwang* at 11.16 p.m., and her red light at 11.17.43 p.m., and that the collision occurred at 11.20 p.m., so that the *Saturn* saw the masthead light of the *Newchwang* only four minutes and her sidelight only two minutes before the collision. The combined speed of the vessels at the time was about 22 knots.

At that moment as soon as she saw the side light on the *Newchang* the *Saturn* ported her helm, as she had done a few minutes before, when she met the *Hoihow*.

The fact that the *Saturn* crossed the *Newchwang* in this way has been contested.

But it seems to the correct inference from the statement in the Preliminary Act of the *Saturn* that when first seen, two minutes, that is, after passing the *Hoihow*, the *Newchwang* bore  $3/4$  of a point off the *Saturn*'s starboard bow—from the admission by Counsel for the United States in the course of the oral argument that it was the duty of the *Saturn* to keep out of the way of the *Newchwang*, from the evidence of her captain ("I sighted light on starboard bow  $1/2$  to  $3/4$  of a point"), and also from the captain's admission that after passing the *Hoihow*, he resumed his course, which was south by  $3/4$  east and then saw the *Newchwang*'s red light. This would have been impossible unless he had crossed her bow from starboard to port. On the other hand the consistent evidence of those on the *Newchwang* is to the effect that they first saw the green light of the *Saturn* on their starboard bow, the *Newchwang*'s course then being north  $2^{\circ}$  west magnetic, and that subsequent to that the *Newchwang* starboarded to clear a junk and did not go back on her course, so that she was getting further away from the *Saturn*.

As soon as the *Saturn* sighted the side lights of the *Newchwang*, i.e., two minutes before the collision, and came to starboard she blew her whistle and reversed her engines. But the collision was already inevitable.

On her side the *Newchwang* tried to minimize the collision by coming to port, but that proved to be useless, and the two ships struck at about right angles.

## II. As to the liability:

It is clear that a good lookout was not kept on board the *Saturn*, from the fact that though more than 20 minutes before the collision she was sighted by the *Newchwang*, at about six miles distance, she herself did not report the *Newchwang* until four minutes before the collision, when the two ships were only one and a half miles apart—and from the fact that she did not report any light of the other steamer, the *Hoihow*, which was passed a few minutes before the collision.

If a good lookout had been kept, the *Saturn* would have sighted the *Hoihow* and, behind her, the *Newchwang*, and after passing the *Hoihow* she would have kept clear of the second steamer. Instead of that, the *Saturn*, not having reported the *Hoihow*, passed her under circumstances of some peril and, having passed her, resumed her course, so that she came upon the *Newchwang* under similar but more dangerous conditions, too late for either ship to avoid an accident.

Accordingly the *Saturn* must be held to be to blame: first, for having neglected to keep a good lookout; secondly, for having resumed her course after passing the *Hoihow*, when she ought to have known that another steamer was following; and thirdly, for having manœuvred too late and render the collision unavoidable.

As to the *Newchwang*, the United States Naval Inquiry blamed that ship, first, for not having answered the *Saturn*'s starboarding whistle. But according to the Rules of the Road no answering whistle ought to have been given by the *Newchwang* unless she was going to alter her course. It is true that this is not the American rule, but on the high seas the American rule does not apply to a foreign vessel; secondly, for not having stopped and reversed her engines; but evidence has shown that she did; thirdly, for having her red light burning dimly; but the evidence has shown that it was burning brightly; fourthly, at all events for not entering into conversation before the collision, and for striking at nearly right angles; but the *Newchwang*'s manœuvre at that moment was a desperate endeavor to minimize, if possible, the effect of a collision which had been rendered unavoidably by the inexplicable action of the *Saturn*.

The *Newchwang* appears to have kept a proper lookout. When she sighted the *Saturn* on her port bow, she had only to keep her course in order to pass

port to port according to the Rules; and her manceuvring when the collision was inevitable was merely as has been said a desparate attempt to minimize its effect and can not be imputed to her as a fault.

### III. *As to the amount of liability:*

The British Government claims not only the amount of the damage suffered by the *Newchwang* and the cost of her repair, but also the various expenses entailed by the action brought by the United States before the Shanghai Court.

It may be that the item for legal expenses might have been claimed in an appeal from the Shanghai decision. But this Tribunal has not to deal with such appeal, and has no authority either to reverse or affirm that decision or to deal with damages arising out of the action brought by the United States. It is true that such expenses are damages indirectly consequent to the collision; but it is a well known principle of the law of damages that *causa proxima non remota inspicitur*.

As to the amount directly arising from the collision, the British Government claim for £ 1,612 as loss of profit and expenses during the time of repair. But no sufficient evidence is adduced to prove the loss alleged and the compensation for the deprivation of use must be computed according to the ordinary rule of demurrage at 4d per ton gross tonnage, that will be for 894 tons, the *Newchwang's* gross tonnage, a sum of £ 774. 16s. for 52 days. According to the account of Farnham, Boyd & Co., Ltd., for executing repairs, the amount of those repairs was Taels 19,251.10, i.e., £ 2,401. 7s. 6d.

As to the interest, it appears in the evidence that a communication was made to the Department of State by the British Embassy at Washington in relation to this matter (British memorial, p. 61), but as a copy of that communication has not been produced the Tribunal is not in a position to say whether or not it was an official presentation of this claim, or to ascertain the date of the communication, and consequently the Tribunal is unable to decide on the question of interest.

### *For these reasons*

The Tribunal decides that the United States Government shall pay to the British Government the sum of three thousand one hundred and seventy-six pounds, three shillings and six pence, (£ 3,176. 3s. 6d.) on behalf of the China Navigation Company, Limited, owner of the S. S. *Newchwang*.

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## OWNERS, OFFICERS AND MEN OF THE *WANDERER* (GREAT BRITAIN) *v.* UNITED STATES

(December 9, 1921. Pages 459-471.)

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SEIZURE OF VESSEL IN ST. PAUL (KODIAK <sup>1</sup> ISLAND).—CONVENTIONAL PROTECTED ZONE OF FUR-SEALING.—DELIVERY OF BRITISH VESSEL TO BRITISH AUTHORITIES.—RELEASE BY BRITISH ADMINISTRATIVE DECISION. British vessel *Wanderer*, taken by United States revenue cutter *Concord* on high seas, towed to St. Paul (Kodiak Island), where on June 10, 1894, declared seized by United States naval authorities for possession of unsealed arms and ammuni-

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<sup>1</sup> The spelling Kodiak used in the decision has become obsolete [Note by the Secretariat].

tion in conventional protected zone of fur-sealing; vessel sent to Dutch Harbor (Unalaska) where, on August 2, 1894, delivered to H.M.S. *Pheasant* who ordered *Wanderer* on August 16, 1894, to report at Victoria, B.C., where vessel without Court proceedings released by British administrative decision.

THE FUNDAMENTAL PRINCIPLE OF INTERNATIONAL MARITIME LAW: VISITATION, SEARCH.—EXCEPTIONS: BURDEN OF PROOF, INTERPRETATION.—DELEGATION OF AUTHORITY BY ONE STATE TO ANOTHER.—BERING SEA AWARD AND REGULATIONS. No nation can exercise right of visitation and search over foreign vessels pursuing lawful vocation on high seas, except in time of war or by special agreement. Agreement must be shown by claimant and be construed *stricto jure*. British Order in Council of April 30, 1894, authorized United States cruisers to seize British vessels for contravention of provisions of British Act of April 23, 1894, and thereby of Bering Sea Award and Regulations of August 15, 1893.

GOOD FAITH OF SEIZING OFFICERS, BUT ERROR IN JUDGMENT.—PROBABLE CAUSE OF SEIZURE.—IMPROPER EXERCISE BY UNITED STATES OFFICERS OF AUTHORITY UNDER BRITISH LAW.—ILLEGALITY OF SEIZURE; DETERMINATION. United States held liable for error in judgment of officers who, though bona fide, seized for act—mere possession, not use, of arms and ammunition—which under British law did not justify seizure, and who thus did not exercise delegated authority. Illegality of seizure and, therefore, United States liability, not conditional upon British Court decision: British naval authorities may release illegally seized vessel by merely administrative decision.

EXTENT OF LIABILITY. Liability of United States for detention extends to August 2, 1894, date of delivery of *Wanderer* to *Pheasant*, since United States naval authorities under British Act and Order in Council had either to bring *Wanderer* before British Court or to deliver her to British naval authorities and nothing shows that on June 10, 1894, when *Wanderer* sent to Unalaska, the United States naval authorities believed that *Pheasant* would be there at *Wanderer's* arrival. Great Britain liable for detention from August 2, 1894.

DAMAGES: LOST PROFITS, TROUBLE, DEDUCTION FROM DAMAGES OF SUM DUE TO DEFENDANT.—EVIDENCE. Since open season began on August 1, United States unlawfully prevented *Wanderer* from sealing only on August 1 and 2, 1894, plus three additional days to reach sealing grounds. Lost profits: average catch of other schooners; average value per skin, no deduction for wages as Great Britain also sues for officers and men; average value of catch per day during season. Liberal estimate of lost profits though evidence indefinite and inconclusive. Allowance made for trouble. Deduction from damages of sum due to United States for unpaid provisions supplied by *Concord* to *Wanderer*.

INTEREST. Interest allowed at 4 % from September 6, 1895, date of first presentation of claim, to April 26, 1912, on sum for lost profits less sum due for provisions.

*Cross-references*: Am. J. Int. Law, vol. 16 (1922), pp. 305-314; Annual Digest, 1919-1922, pp. 177-179.

*Bibliography*: Annual Digest, 1919-1922, p. 179.

This is a claim presented by His Britannic Majesty's Government for \$17,507.36 and interest from November, 1894, for damages arising out of the

seizure and detention of the British sealing schooner *Wanderer*, and her officers, men, and cargo, by the United States revenue cutter *Concord* on June 10, 1894.

The *Wanderer*, a schooner of 25 tons burden, was a British ship registered at the Port of Victoria, B.C.; her owner was Henry Paxton, a British subject and a master mariner. On the 5th of January, 1894, she was chartered for the sealing season of 1894 by the said Paxton to Simon Leiser, a naturalized British subject. Under the terms of the agreement, Leiser had to provision and equip the vessel, and Paxton was appointed as master and to be paid as such; the net profits of the venture were to be divided between them in a fixed proportion.

On January 13, 1894, the *Wanderer* left the Port of Victoria, B.C., and sailed on her sealing voyage in the North Pacific Ocean. She was manned by Paxton as master, one mate, and 14 hunters, including 12 Indians (all of them British subjects), and two Japanese, and appears to have been equipped, at the time of her seizure, with five canoes and one boat for sealing.

On June 9, 1894, at 8.30 a.m., when the vessel was in latitude 58° north and longitude 150° west, and heading west-southwest, en route for Sand Point, she was hailed by the United States revenue cutter *Yorktown*, and boarded by an officer who, acting under instructions hereinafter referred to, searched the schooner, placed her sealing implements under seal, and made an entry in the ship's log stating the number of sealskins found on board to be 400.

On the same day, about seven hours later, i.e., at about 4 p.m., the vessel being in latitude 58° 21' north and longitude 150° 22' west, heading north, wind astern, she was hailed by another United States revenue cutter, the *Concord*, and boarded and searched. During his search the officer discovered hidden on board and unsealed one 12-bore shotgun, 39 loaded shells, and 3 boxes of primers, one of which was already opened. The United States naval officer took possession of the gun and shells and made the following entry in the ship's log:

"Lat. 58.21 N., Long. 150.22 W. June 9th, 1894.

"I hereby certify that I have examined the packages of ammunition, spears, and guns referred to in the preceding page, and found all skins intact, counted the seals, and found the number to be 400.

"E. F. LEIPER

"Lieut., U.S.N., U.S.S. *Concord*."

"Lat. 58.21 N., Long. 150.22 W., June 9th, 1894.

"On further search of the vessel I found concealed on board 12-bore shotgun, 39 loaded shells, and three boxes primers, one of which was opened already.

"E. F. LEIPER

"Lieut., U.S.N., U.S.S. *Concord*"

As the sea was rough, the commanding officer of the *Concord*, at the request of the master of the *Wanderer*, took her in tow to St. Paul, Kadiak Island. She arrived there towed by the *Concord* on June 10th at 10 a.m., and the towline being cast adrift, was about to make sail for a safe anchorage when the *Concord* without any warning ordered her to stand-by and to anchor near by. It appears also from the *Concord*'s log that in the afternoon a committee of inspection went on board the *Wanderer* to ascertain whether she was seaworthy, and that at the same time the master was informed that he was to be seized. At 4 p.m. the commanding officer of the *Concord*, Commander Goodrich, advised the master that his ship and the ship's papers had actually been seized.

The ordinary declaration of seizure was made and notice given that the seizure had been made for the following reasons:

"... subsequent to the warning and certificate aforesaid arms and ammunition suitable to the killing of fur seals were discovered concealed on board . . . and whereas the possession of such unsealed arms and ammunition was in contravention of the Bering Sea Award Act, 1894, clause I, para. 2, and clause III, para. 2, as well as of section 10 in the President's Proclamation . . . (United States answer, exhibit 5).

The master of the *Wanderer* protested against this declaration.

On June 16 Commander Goodrich sent a report to the Commander of the United States Naval Force in the Bering Sea (United States answer, exhibit 4) in which he stated:

"My action is based on the last half of sec. 10 of the Act of Congress April 6; the Bering Sea Award Act, and paras. 1 and 3 of your confidential instructions of May 13th."

To this report were annexed the statements of the officers and men of the *Concord*, who took part in the search, all of which referred merely to the discovery on board of a gun and ammunition hidden and unsealed. On July 1st, the *Wanderer* arrived at Dutch Harbor, Unalaska, where she remained under seizure until August 2nd, when she was handed over to Her Britannic Majesty's ship *Pheasant* (United States answer, exhibits 12, 13).

On August 6th the schooner was sent to Victoria, B.C., and after her arrival there, she was released by order of the British Naval Commander in Chief on the Pacific Station (British memorial, p. 10). The evidence does not disclose how long the *Wanderer* was detained at Victoria by the British authorities before her release was ordered.

The Government of His Britannic Majesty contend that the seizure of the *Wanderer* was illegal; that the alleged reason for it was wholly insufficient, and that the Government of the United States is responsible for the act of its naval officers.

The United States Government, on the other hand, denies all liability; first, because its officers were acting on behalf of the British Government and not of the United States Government; secondly, because there was a bona fide belief that an infraction of the Bering Sea Award Act, 1894, had been committed; thirdly, because the release of the *Wanderer* by the British naval authorities without a regular prosecution before a court rendered it impossible to determine in the only competent way whether the seizure was illegal; fourthly, because even supposing the seizure was made without probable cause, the liability to pay damages would rest upon His Britannic Majesty's Government; fifthly, because the detention of the vessel after July 1, 1894, the date when she arrived at Dutch Harbor, Unalaska, was due to the failure of the British naval authorities to send a vessel there to take charge of the schooner; and sixthly, because there is no basis in law or in fact for the measure of damages.

#### I. *As to the legality of the seizure and liability of the United States:*

The fundamental principle of the international maritime law is that no nation can exercise a right of visitation and search over foreign vessels pursuing a lawful vocation on the high seas, except in time of war or by special agreement.

The *Wanderer* was on the high seas. There is no question here of war. It lies, therefore, on the United States to show that its naval authorities acted under special agreement. Any such agreement being an exception to the general principle, must be construed *stricto jure*.

At the time of the seizure, as the result of the Arbitral Award of Paris, August 15, 1893, and the Regulations annexed thereto, there was in operation between the United States and Great Britain a conventional régime the object of which was the protection of the fur seals in the North Pacific Ocean.

By the Award it was decided, *inter alia*: "that concurrent regulations outside the jurisdictional limits of the respective governments are necessary and that they should extend over the water hereinafter mentioned."

By the Regulations above referred to, it was provided that the two Governments should forbid their citizens and subjects, first, to kill, capture, or pursue at any time and in any manner whatever, the fur seals within a zone of sixty miles around the Pribilof Islands; and secondly, to kill, capture and pursue fur seals in any manner whatever from the first of May to the 31st of July within the zone included between latitude 35° north and the Bering Straits, and eastward of longitude 180°.

Furthermore the same Regulations provide:

"Article 6. The use of nets, firearms and explosives shall be forbidden in the fur-seal fishing. This restriction shall not apply to shotguns when such fishing takes place outside of Bering's Sea during the season when it may be lawfully carried on."

To comply with the Award and Regulations, an Act of Congress was passed in the United States on April 6, 1894. This Act provided:

"Sec. 10. . . if any licensed vessel shall be found in the waters to which this Act applies, having on board apparatus or implements suitable for taking seals, but forbidden then and there to be used, it shall be presumed that the vessel in the one case and the apparatus or implements in the other was or were used in violation of this Act until it is otherwise sufficiently proved".

On April 18, 1894, instructions were given to the United States naval authorities, according to which:

"Para. 6. Any vessel or person . . . having on board or in their possession apparatus or implements suitable for taking seal . . . you will order seized" (United States answer, exhibit 20).

On their side the British Government passed an Act dated April 23, 1894, providing:

"Sec. 1. The provisions of the Bering Sea Arbitration Award . . . shall have effect as if those provisions . . . were enacted by this Act." (United States answer, exhibit 17).

The British Act further provides:

"Sec. 3, para. 3. An order in council under this Act may provide that such officers of the United States of America as are specified in the order may, in respect of offenses under this act, exercise the like powers under this act as may be exercised by a commissioned officer of Her Majesty in relation to a British ship . . ." (United States answer, exhibit 17).

As may be observed, the United States Act and the instructions to its naval authorities did not follow the wording of the Award Regulations exactly, and Her Majesty's Government drew attention to the variance, in a letter addressed by their Ambassador in Washington to the Secretary of State on April 30, 1894:

"... I am directed to draw your attention to paragraph 6 of the draft instructions, so far as it relates to British vessels. The paragraph requires modification in order to bring it, as regards the powers to be exercised by United States cruisers over British vessels, within the limits prescribed by the British Order in Council conferring such powers.

"The Earl of Kimberly desires me to state to you that the Order in Council which is about to be issued to empower United States cruisers to seize British vessels will only authorize them to make seizures of vessels contravening the provisions of the British Act of Parliament, or, in other words, the provisions of the award.

"There is no clause in the British Act corresponding with section 10 of the United States Act of Congress. United States cruisers can not therefore seize British vessels merely for having on board, while within the area of the award and during the close season, implements suitable for taking seal" (United States answer, exhibit 21).

Meanwhile and on April 30, 1894, a British Order in Council was issued providing:

"*Para. 1.* The commanding officer of any vessel belonging to the naval or revenue service of the United States of America, and appointed for the time being by the President of the United States for the purpose of carrying into effect the powers conferred by this article, the name of which vessel shall have been communicated by the President of the United States to Her Majesty as being a vessel so appointed as aforesaid, may . . . seize and detain any British vessel which has become liable to be forfeited to Her Majesty under the provisions of the recited act, and may bring her for adjudication before any such British court of admiralty as is referred to in section 103 of 'The Merchant Shipping Act, 1854' . . . or may deliver her to any such British officer as is mentioned in the said section for the purpose of being dealt with pursuant to the recited Act" (United States answer, exhibit 18).

It appears from the documents that an exchange of views took place between the two Governments in order to arrive at some agreement as to the regulations. On May 4, 1894, an agreement was reached. The previous United States instructions, dated April 18, 1894, were revoked (53 Cong. 2d Sess. Senate Ex. Doc. No. 67, p. 228); a memorandum of the agreement regulations was exchanged (*ibid.*, p. 120; United States answer, exhibit 23) and those regulations were sent by the United States Government to their naval officers (*ibid.*, pp. 126, 226, 228). From these new regulations of May 4, 1894, the provision concerning the possession of arms was omitted.

In these circumstances, the legal position in the sealing zone at the time of the seizure of the *Wanderer* may be summarized as follows: the provisions of the Award in their strict meaning, and those provisions only, had been agreed upon as binding upon the vessels, citizens, and subjects of the two countries, and it was only for contravention of those provisions that the United States cruisers were authorized to seize British vessels.

Such being the state of the law, the question to be determined here is whether or not the *Wanderer* was contravening the aforesaid provisions so as to justify her seizure.

The declaration of seizure does not allege that the *Wanderer* was killing or pursuing or had killed or pursued fur seals within the prohibited time or zone, but that she was discovered to have certain arms and ammunition unsealed and hidden on board. The offense alleged was the possession of such arms and ammunition (United States answer, exhibit 5). The same charge is brought by the notice of the declaration of seizure ". . . whereas in thus having concealed arms and ammunition on board, you were acting in contravention . . ." (United States answer, exhibit 6). In the report of the United States authorities, a report of a merely domestic character, the same view is taken. It is explained by the repeated references to the above quoted section 10 of the United States Act of April 6, 1894.

Inasmuch as it was only *use* and not the mere *possession* of arms and ammunition which was prohibited by the Paris Award and Regulations, it is impossible to say that the *Wanderer* was acting in contravention of them.

Even if it be admitted that in case of contravention the United States officers were empowered to seize on behalf of Her Majesty's Government under the British Act, it is clear that such a delegation of power only gave them authority

to act within the limits of that Act, and as the seizure was made for a reason not provided for by that Act, it is impossible to say that in this case they were exercising that delegated authority.

The bona fides of the United States naval officers is not questioned. It is evident that the provisions of section 10 of the Act of Congress constituted a likely cause of error. But the United States Government is responsible for that section, and liable for the errors of judgment committed by its agents.

Further, contrary to the contention of the United States answer, it must be observed that Her Majesty's Government were under no international or legal duty to proceed against the ship through their Admiralty courts, and not to release her by a merely administrative decision. Under section 103 of the British Merchant Shipping Act, 1854 (United States answer, p. 65), it is only when a ship has become subject to forfeiture that she may be seized and brought for adjudication before the Court, and as the ship in this case was not considered subject to forfeiture, the aforesaid provision had no application.

The United States Government points out that the Government of Her Britannic Majesty were held responsible by Her Majesty's Courts in certain cases of seizures made by the United States authorities under the Paris Award Act, even when those seizures were held to be unjustified in the circumstances. But it must be observed that in those cases the seizure was for acts which, if they had been proved, would have constituted a contravention justifying the seizure; in this case, on the contrary, the seizure was made for an act, namely, the possession of arms, which did not constitute any contravention justifying the seizure. In other words, in the aforesaid cases, it was not contested that the United States authorities acted within the limits of the powers entrusted to them, but it was decided that their action was not justified by the facts.

The contention that the British Government is liable for the detention of the *Wanderer* from and after July 1, 1894, the date when she arrived at Unalaska, until she was delivered to the *Pheasant*, because of the delay of that vessel in reaching that port, is not well founded. According to the power delegated to them under the British Act and Order in Council, the United States naval authorities in case of seizure had either to bring the vessel before a British court or to deliver her to the British naval authorities. Here the United States officers neither brought the *Wanderer* before a British court nor delivered her to a British naval authority before the 2nd of August.

It has been contended by the United States that although the *Wanderer* was sent to Dutch Harbor, Unalaska, about 500 miles to the west of St. Paul, that is to say exactly the opposite direction from where a British court be found, nevertheless, it is shown by a letter of the commanding officer of the American fleet, dated June 13, 1894, that he had been informed that a British man-of-war would be sent to Unalaska about the time the *Wanderer* arrived there. As to this contention, it must be observed that the said letter is dated three days after the *Wanderer* was sent to Unalaska, which was on June 10th. Furthermore, it appears from a letter of the commanding officer of the United States fleet addressed to the secretary of State on May 28, 1894, i.e., 12 days before the seizure, that that officer having been informed by H.M.S. *Pheasant* that she was the British vessel ordered to co-operate in carrying out the concurrent regulations, had himself suggested to the commanding officer of the *Pheasant* that he should make his headquarters at Sitka until June 12th, at St. Paul, Kadiak Island, until June 30th, and after that at Unalaska "as this seems to be the best arrangement that could be made for turning over British sealers that may be seized". This arrangement was communicated to the American fleet on the same day by a circular dated May 28, 1894 (Ex. Doc., 264).

Consequently there is nothing to show that on June 10th, the date when

the *Wanderer* was sent to Unalaska, the United States naval authorities believed the British man-of-war would be at Unalaska at the date of the schooner's arrival.

There still remains to be considered the question of the liability of the United States for damages arising after the *Wanderer* was delivered on August 2nd (United States answer, exhibit 13) to Her Britannic Majesty's ship *Pheasant* at Dutch Harbor, Unalaska.

The above-mentioned Order-in-Council of April 30, 1894, which authorized American officers to seize British sealers for contravention of the Bering Sea Award Act of 1894, provides that vessels seized by such officers either may be brought for adjudication before a British Court of Admiralty, as specified in section 103 of the Merchant Shipping Act of 1854, or may be delivered "to any such British officer as is mentioned in the said section for the purpose of being dealt with pursuant to the recited Act". In this case the latter course was followed, and the *Wanderer* was delivered to the commander of the *Pheasant* on August 2nd, and was ordered by him to proceed forthwith to Victoria, B.C., where there was a British Court having authority to adjudicate in the matter. Upon the arrival of the *Wanderer* there, the customs officers declined to take proceedings against her, and the Admiral in charge of Her Britannic Majesty's ships ordered that she be released from custody.

This Tribunal having held that Her Britannic Majesty's Government were under no international or legal duty to proceed against this ship, and that the release of the ship by administrative action was justified under section 103 of the Merchant Shipping Act of 1854 it follows that the British authorities, rather than the United States authorities, were responsible for the detention of the vessel after she was delivered to their charge on August 2nd. The authority conferred by the above-mentioned Order in Council upon the American officer who seized this vessel was to exercise "the like powers under the Bering Sea Award Act of 1894 as may be exercised by a commissioned officer of Her Majesty in relation to a British ship". In other words, the powers of the British officer and the American officer in relation to the detention of this ship were identical, and consequently the Tribunal having held that the detention of the vessel by the American officer was not justified, must likewise hold that her detention by the British officer was equally unjustified. Inasmuch as the British officer was at liberty to release the vessel, and as the United States is not responsible for her unjustifiable detention by a British officer, the United States is responsible only for damages for detaining the vessel until the 2nd of August.

## II. *As to the consequences of liability and the amount of damages:*

The provisions of article 2 of the Award of the Fur Seal Arbitration Tribunal of 1893, which was adopted by the legislative enactment by the Government of Great Britain and of the United States in 1894, are as follows:

"The two Governments shall forbid their citizens and subjects, respectively, to kill, capture, or pursue in any manner whatever, during the season extending, each year, from the 1st of May to the 31st of July, both inclusive, the fur seals on the high sea, in the part of the Pacific Ocean, inclusive of the Bering Sea, which is situated to the north of the 35th degree of north latitude, and eastward of the 180th degree of longitude from Greenwich . . ." (United States answer, exhibit 16).

It appears, therefore, that from the 10th of June, when this vessel was seized, until the 31st of July, she was prohibited by these provisions from sealing operations in the North Pacific within the limits described, which were fixed by the Award of the Arbitration Tribunal as the limits which included the entire area within which fur sealing might profitably be engaged in during that

period, and she was within those limits when seized. It follows that during the part of her detention for which the United States is responsible, the only period during which she was unlawfully prevented from sealing by the United States authorities, was the period covered by the first two days in August, which followed the termination of the close season on the 31st of July, as fixed by the Award, and the three additional days which should be allowed for the vessel to reach the sealing grounds, if she had been released at Dutch Harbor on August 2nd.

The damages claimed by the claimants as set forth in the British memorial are based upon "a reasonable estimate of the sums which the owners would have received as the proceeds of the voyage if it had been completed, together with interest thereon", and these sums include only the value of the estimated catch for the season if the schooner had not been seized, damages for detention of master and crew, the value of provisions and alleged injuries to guns. It does not appear that any damages were claimed for the detention of the ship during the period prior to the 1st of August, and it is clear that no pecuniary loss on account of any of the items mentioned was suffered by the detention of the ship, or the master and crew during that period, because it is evident from the surrounding circumstances that it was her purpose to occupy that period in proceeding to Bering Sea, and remaining in that vicinity until the open season began on the 1st of August. The value of the prospective catch for the whole season is estimated by the claimants at \$9,080.86 on the basis of 950 skins at 39s. 3d. per skin.

It is shown by the documents that the average catch during the same season of other schooners similarly equipped was about 96 skins per boat or canoe, or 43 skins per man. The *Wanderer* had one boat and five canoes and 14 men, which would make 576 skins, reckoning by boats and canoes, or 602 skins reckoning by men, or striking a mean, 589 skins.

It has been shown that the average value of skins was about \$8.60 per skin in 1894. Consequently on these figures the loss for the season may be estimated at about \$5,000.

As damages are claimed in this case by the British Government not only for the owners but also for the officers and men who by the seizure were deprived of their earnings per skin, no deduction for wages should be made from the aforesaid value per skin.

The exact duration of the season is not stated, but it appears from the evidence that it extended through the month of August and the greater part of September, covering about 40 days, so that the average value of the catch per day can be estimated at about \$125. The evidence offered as a basis for this estimate is indefinite and inconclusive, but the Tribunal is of the opinion that, taking into consideration the illegal detention of this vessel by the United States authorities for a period of nearly two months, it is justified in adopting a liberal estimate of the profits which she would have made on the five sealing days during which she might have hunted, if she had not been unlawfully detained by the United States until August 2nd. This Tribunal, therefore, considers that the damages for this detention should be fixed at \$625 for her loss of profits and \$1,000 for the trouble occasioned by her illegal detention.

As to damages for the detention of the master, mate and men, there is no evidence sufficient to support these claims.

A sum of \$120 is also claimed for injury to guns; but to evidence is afforded sufficient to support this item and it must be disallowed.

As to the sum of \$126.50, the amount of certain provisions, which are said to have been supplied and purchased from H.M.S. *Pheasant*, there is no evidence sufficient to support it.

On the other hand, it appears from a letter dated August 5, 1894, addressed by the commanding officer of the American fleet to the Secretary of the Navy that some provisions valued at \$21.95 supplied by the U.S.S. *Concord* to the *Wanderei* were not paid for (United States answer, exhibit 13). This sum then must be deducted from the total amount of damages to be paid by the United States Government.

*As to interest :*

The British Government in their oral argument admit that the 7 % interest claimed in their memorial must be reduced to 4 % in conformity with the provisions of the Terms of Submission.

It appears from a letter addressed by the Marquis of Salisbury to the British Ambassador in Washington on August 16, 1895, and handed by him to the Secretary of State on September 6, 1895, that this was the first presentation of a claim for compensation in this case. Therefore, in accordance with the Terms of Submission, section IV, the Tribunal is of the opinion that interest should be allowed at 4 % from September 6, 1895, to April 26, 1912, on the \$625 damages allowed for loss of profits, less \$21.95 for the provisions supplied by the U.S.S. *Concord*, namely, on \$603.05.

*For these reasons*

The Tribunal decides that the Government of the United States shall pay to the Government of His Britannic Majesty for the claimants the sum of one thousand six hundred and three dollars and five cents ( \$1,603.05), with interest at four per cent (4 %) on six hundred and three dollars and five cents ( \$603.05) thereof, from September 6, 1895 to April 26, 1912.

#### CHARTERERS AND CREW OF THE *KATE* (GREAT BRITAIN) v. UNITED STATES

(December 9, 1921. Pages 472-478.)

SEIZURE OF VESSEL ON THE HIGH SEAS.—CONVENTIONAL PROTECTED ZONE OF FUR-SEALING. British vessel *Kate* seized by United States revenue cutter *Perry* on high seas on August 26, 1896, for having seal skins on board that appeared to have been shot in conventional protected zone of fur-sealing; vessel towed to Dutch Harbor (Unalaska), where on August 29, 1896, date of arrival, released by United States commanding officer of Bering Sea Patrol, she not having any guns on board; on September 8, 1896, back in locality where seized.

DELEGATION OF AUTHORITY BY ONE STATE TO ANOTHER.—BERING SEA AWARD AND REGULATIONS. British Order in Council of April 30, 1894, authorized United States cruisers to seize British vessels for contravention of provisions of British Act of April 23, 1894, and thereby of Bering Sea Award and Regulations of August 15, 1893.

GOOD FAITH OF SEIZING OFFICER.—REASONABLE GROUND FOR SEIZURE. United States *held* liable for any damages resulting from seizure: while no question of bona fide of seizing officer, his superior officer found no reasonable ground for seizure.

**DAMAGES: LOST PROFITS, TROUBLE, DETENTION OF OFFICERS AND CREW.**

Lost profits: comparison of catch of *Kate* before seizure and after return to locality where seized with catch of schooner *Sieward* in same periods shows *Kate's* efficiency to be less than one-half that of *Sieward*. Fifty per cent of *Sieward's* catch from *Kate's* seizure until her return, less seals taken by *Kate* on way back, taken as probable catch lost by *Kate*. Allowance made for trouble. No pecuniary damages suffered on account of detention of officers and men since lost profits allowed over period of detention.

**INTEREST.** Interest allowed at 4 % from February 15, 1897, date of first presentation of claim, to April 26, 1912, on sum for lost profits.

*Cross-references:* Am. J. Int. Law, vol. 16 (1922), pp. 328-333; Annual Digest, 1919-1922, pp. 188-189.

*Bibliography:* Annual Digest, 1919-1922, p. 189.

This is a claim presented by His Britannic Majesty's Government for \$4,044.75 and interest for damages for the seizure and detention of the ship, cargo, officers, and men of the British schooner *Kate* by the United States steamer *Perry* on August 26, 1896.

The *Kate*, a schooner of 58.11 tons gross, was a British ship registered at the Port of Victoria, B.C.; her owners were Henry F. Bishop and Samuel Williams, native British subjects, and Otto F. Buckholz, a naturalized Canadian having been born in Germany. By charter party dated December 20, 1895, the *Kate* was chartered for the full season of 1896 for a sealing voyage in the waters of the North Pacific Ocean and Bering Sea by Carl G. Stromgren, a naturalized Canadian having been born in Sweden; Emil Ramlose, also a naturalized Canadian having been born in Denmark, and James Cessford, a native Canadian. Under the terms of the charter party, the charterers had to provision and equip the vessel, and one-fifth of the entire catch of skins for the season was to be paid to the owners (British memorial, pp. 4, 21, 22).

On January 15, 1896, the *Kate* left the Port of Victoria, B.C., and sailed on her sealing voyage in the North Pacific Ocean. She was manned by Stromgren as master, Ramlose as mate, and Cessford as second mate, and four seamen and 25 Indians (British memorial, pp. 23, 24), and had 12 canoes (British memorial, p. 9).

On August 23rd, an officer from the United States cutter *Rush* boarded the *Kate* and overhauled the skins (British memorial, pp. 3, 24).

On August 26th, 1896, the *Kate*, while in latitude 57° 33' N., longitude 172° 53' W., was boarded by an officer from the United States revenue cutter *Perry* and seized, and the following entry was made in her log book:

"Seized this day the British schr. *Kate* for having on board two (2) fur sealskins bearing evidence of having been shot in Bering Sea" (British memorial, p. 25).

At the same time the Captain of the *Perry* gave the master of the *Kate* a document (British memorial, p. 6) reading as follows:

"U.S. REVENUE CUTTER SERVICE, STEAMER 'PERRY'.

"Port, at sea, lat. 57.33 N., long. 172.53 W.

"August 26, 1896.

"I, H. D. Smith, a captain of the Revenue Cutter Service of the United States, commanding the United States steamer *Perry*, declare that the British schooner *Kate* of Victoria, whereof Stromgren is master, was this 26th day of August, 1896, boarded by Lieutenant F. J. Haake, R.S.C., who reported to me that said vessel had contravened the provisions of the Bering Sea Award Act,

1894. The following evidence, found upon search, is relied upon to prove such violation of law:

"The aforesaid British schooner *Kate* was found cruising within the area of the Award on the date given, namely, August 26, 1896, in latitude 57.33 N., longitude 172.53 W., from Greenwich, having on board two (2) fur sealskins bearing evidence of having been shot in the Bering Sea.

"Having reason to believe, from the evidence cited, that the aforesaid British schooner *Kate* had contravened the Bering Sea Award Act, 1894, in the following particulars, to wit: in having on board two (2) fur sealskins bearing evidence of having been shot in Bering sea in violation of said Act and article 6 of the Regulations of the Paris Award, incorporated in said Bering Sea Award Act, 1894, I have this day seized the aforesaid British schooner *Kate*, her tackle and cargo, by authority of said Act and Orders in Council issued thereunder.

"H. D. SMITH,

"Captain, R.S.C., Commanding"

The *Perry* took the *Kate* in tow and on August 29, 1896, arrived in Dutch Harbor at Unalaska, and a few hours later the master of the *Kate* was informed that she was released by order of the United States commanding officer of the Bering Sea Patrol, and the following entry was made in her log:

"Released this day the Br. sch. *Kate* by order of Capt. C. L. Hooper, Commanding Bering Sea Patrol; she not having any guns on board."

The *Kate* remained at Unalaska August 30th, and while there the master of the *Kate* prepared and sent through the commander of H.M.S. *Satellite* to Captain Hooper a protest in writting claiming compensation for all loss from the time the *Kate* was absent from the sealing grounds, until she arrived back again (British memorial, p. 26).

On the following day, August 31, the weather being calm, the *Kate* was towed out from Unalaska by H.M.S. *Pheasant*. "On 3rd September, 1896, the sealing grounds having been reached" (British memorial, p. 8, sec. 27), the *Kate* took 21 seals; on September 5th, 7 seals; on September 6th, 9 seals; on September 7th, 20 seals; on September 8th, in approximately the locality where she was seized by the *Perry* on August 26th, she took no seals, and on September 9th, she took 41 seals.

The Government of His Britannic Majesty, on behalf of the charterers and the crew of the schooner *Kate*, claim damages on account of the seizure of the said schooner, contending that it was illegal and without reasonable cause, or any justification whatsoever, and that even had the detention of the vessel been justified owing to circumstances showing guilt, she should have been delivered to the British naval officer at Unalaska, or in his absence taken to Victoria (British memorial, pp. 11, 12).

The United States Government, on the other hand, denies all liability; first, because its officers were acting on behalf of the British Government and not of the United States Government; secondly, because there was a bona fide belief that an infraction of the Bering Sea Award Act, 1894, had been committed; thirdly, because the senior naval officer in command of the American fleet in ordering the release of the *Kate* did so as a matter of grace and favor, and the release of the vessel is no proof that the seizure was unjustifiable; and fourthly, because there is no basis in law or in fact for the measure of damages (United States answer, p. 2).

1. *As to the legality of the seizure and liability of the United States:*

The authorities cited in the declaration of the captain of the *Perry* in making the seizure of the *Kate* were article 6 of the Regulation of the Paris Award, and Bering Sea Award Act of 1894, and the Orders in Council issued thereunder.

Article 6 of the Regulations provides:

"The use of nets, firearms, and explosives shall be forbidden in the fur seal fishing. This restriction shall not apply to shotguns when such fishing takes place outside of Bering's Sea during the season when it may be lawfully carried on" (United States answer, p. 22).

The Bering Sea Award Act of 1894 put into operation the Regulations of the Paris Award, and also provided in section 3, paragraph 3 thereof, that:

"An Order in Council under this Act may provide that such officers of the United States of America as are specified in the order may, in respect of offences under this Act, exercise the like powers under this Act as may be exercised by a commissioned officer of Her Majesty in relation to a British ship" (United States answer, p. 28).

The Order in Council of April 30, 1894, provided in section 1 thereof that:

"The commanding officer of any vessel belonging to the naval or revenue service of the United States of America and appointed for the time being by the President of the United States for the purpose of carrying into effect the powers conferred by this article, the name of which vessel shall have been communicated by the President of the United States to Her Majesty as being a vessel so appointed as aforesaid, may, if duly commissioned and instructed by the President in that behalf, seize and detain any British vessel which has become liable to be forfeited to Her Majesty under the provisions of the recited act, and may bring her for adjudication before any such British court of admiralty as is referred to in section 103 of the 'Merchant Shipping Act, 1854' . . . or may deliver her to any such British officer as is mentioned in the said section for the purpose of being dealt with pursuant to the recited act" (United States answer, pp. 45, 46).

The commanding officers of the United States naval forces in Bering Sea received confidential instructions in a circular to commanding officers, No. 22, dated July 24, 1894, in part as follows:

"Sealing vessels fallen in with after the 31st of July, in the Bering Sea, are to be carefully searched to see if there are any implements on board, not under seal, except spears, that could be used in fur-seal fishing.

"A number of skins are to be taken indiscriminately and examined to see if there are any marks of shot, as cheap firearms, to be thrown overboard with ammunition when escape is found to be impossible, may be carried" (United States answer, exhibit 7).

By instructions from the United States Treasury Department, dated April 11, 1895, the commander of the Bering Sea Fleet was directed:

"It has been charged heretofore, that vessels of the patrol fleet, have not properly performed their duty in the matter of making search of sealing vessels fallen in with. . . . Should you find a skin on board a vessel that bears satisfactory evidence of having been shot within the Bering Sea, you will seize the vessel. . . . The search for skins, and the determination as to whether the animals were killed by spear or shot, is of equal importance with the discovery of firearms and the unlawful use of the same in Bering Sea, under the 'Regulations governing vessels employed in fur-seal fishing during the season of 1895' " (United States answer, exhibit 8).

Any special instructions for the sealing season 1896 are not included in the evidence furnished in this case. The only evidence produced of the instruc-

tions for the season 1896 is a letter from the Secretary of State to the British Ambassador in Washington, dated April 14, 1896, in which, calling attention to the provision of the Order in Council of April 30, 1894, above quoted, it is stated:

"The President has designated the revenue steamers *Bear*, *Rush*, *Perry*, *Corwin*, *Grant*, and *Wolcott* to cruise in the North Pacific Ocean and Bering Sea, including the waters of Alaska within the Dominion of the United States, for the enforcement of the Acts of Congress approved April 6 and 24 and June 5, 1894, . . . during the season of 1896" (United States answer, exhibit 9).

The fact that the *Kate* had among her catch two seal skins that presented the appearance of being shot, when neither guns nor ammunition, except powder for the signal gun, were found on board, did not seem to the commander of the United States Bering Sea Fleet, when the *Kate* was brought to him at Unalaska, "proof of guilt sufficiently strong to justify sending the vessel to court", and he ordered her immediate release; but at the same time he commended the captain of the *Perry* for his strict "obedience to orders to 'seize any vessel having seal skins on board that appear to have been shot'" (United States answer, exhibit 11).

In the circumstances, while there is no question of the bona fides of the officer making the seizure, it is evident that his superior officer did not consider that there was reasonable ground for the seizure. It follows, therefore, that on the evidence presented here it must be held that the seizure of the *Kate* was unjustifiable, and the United States Government is responsible for any damages resulting from this seizure as the case stands.

## II. *As to the measure of damages:*

The estimated probable catch of the *Kate* during the period from August 26 to September 7th, inclusive, is fixed by the claimants as 145 seal skins at a value of \$7.55 each, amounting to \$1,094.75. This estimate is based on the catch of the schooner *Dora Seward*, which had 16 canoes, while the *Kate* had 12, being twelve-sixteenths of the 329 seal skins taken by the *Dora Seward* during that period, less the 102 seal skins taken during the same period by the *Kate*.

A comparison of the catch of the *Kate* with the catch of the *Dora Seward* shows that during the period between August 23rd and 26th, inclusive, the *Kate* took 76 seals and the *Seward* 166; and after the return of the *Kate* to the locality where she was seized, she took during the period between September 8th to 15th, inclusive, 49 seals and the *Seward* 102. As measured by the *Seward*, the efficiency of the *Kate* was somewhat higher after her return, following her seizure, than prior thereto, but the efficiency of the *Kate* was always less than one-half the efficiency of the *Seward*, as shown by a comparison of their catches day by day. Therefore, as the claimants have asked that compensation for loss of catch for the period during which she was illegally prevented from sealing should be based on a comparison with the actual catch of the *Dora Seward* during the same period, the claimants can not complain if fifty per cent (50%) of the catch of the *Dora Seward* is taken as the probable catch lost by the *Kate*.

Inasmuch as the sealing operations of the *Kate* on August 26th were not disturbed, the last canoe not having come on board until 7 p.m. of that day, the total catch being 45 seals, compensation should be allowed for the period of August 27th to September 7th, inclusive, based on one-half of the *Seward's* catch of 247 seals during that period, less the 57 seals taken by the *Kate* during that period, showing a loss of 67 seal skins, which, at the price of \$7.55, represents a loss of \$508.05.

The Tribunal, therefore, considers that the damages for this detention should be fixed at \$508.05 for her loss of profits, and \$500 for the trouble occasioned by her illegal detention.

Inasmuch as the profits for the estimated catch of the *Kate* during the period of detention have been allowed, there was no pecuniary damages suffered on account of the detention of the officers and the crew.

*As to interest :*

The British Government in their oral argument admit that the 7 % interest claimed in their memorial must be reduced to 4 % in conformity with the provisions of the Terms of Submission.

It appears from a note addressed by the British Ambassador at Washington to the Secretary of State, dated February 15, 1897, that this was the first presentation to the Government of the United States of a claim for compensation in this case (United States answer, exhibit 16). Therefore, in accordance with the Terms of Submission, section IV, the Tribunal is of the opinion that interest should be allowed at 4 % on the \$508.05 damages for loss of profits, from February 15, 1897, to April 26, 1912, the date of the confirmation of the schedule.

*For these reasons*

The Tribunal decides that the United States Government shall pay to the Government of His Britannic Majesty, on behalf of the claimants, the sum of one thousand and eight dollars and five cents (\$1,008.05), with interest at four per cent (4 %) on five hundred and eight dollars and five cents (\$508.05) thereof, from February 15, 1897, to April 26, 1912.

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#### LAUGHLIN McLEAN (GREAT BRITAIN) *v.* UNITED STATES

(*Favourite case. December 9, 1921. Pages 515-519.*)

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SEIZURE OF VESSEL ON THE HIGH SEAS.—CONVENTIONAL PROTECTED ZONE OF FUR-SEALING.—DELIVERY OF BRITISH VESSEL TO BRITISH AUTHORITIES, RELEASE BY BRITISH ADMINISTRATIVE DECISION. British vessel *Favourite* seized by United States revenue cutter *Mohican* on high seas on August 24, 1894, for having unsealed shotgun on board in conventional protected zone of fur-sealing; vessel sent to Unalaska where, on August 27, 1894, delivered to H.M.S. *Pheasant*, who ordered *Favourite* to report at Victoria, B.C., where vessel without Court proceedings released by British administrative decision.

IMPROPER EXERCISE BY UNITED STATES OFFICERS OF AUTHORITY UNDER BRITISH LAW.—GOOD FAITH OF SEIZING OFFICERS, BUT ERROR IN JUDGMENT.—ILLEGALITY OF SEIZURE: DETERMINATION. Reference made by Tribunal to reasons stated in award in *Wanderer* case <sup>1</sup>.

EXTENT OF LIABILITY. Liability of United States for detention extends to August 27, 1894, date of delivery of *Favourite* to *Pheasant*. Great Britain held liable for detention from that date.

DAMAGES: LOST PROFITS, TROUBLE. United States unlawfully prevented *Favourite* from sealing from August 24 to August 27, 1894, plus three additional days to reach sealing grounds. Lost profits: average daily catch of *Favourite* between August 1 and 24, 1894. Allowance made for trouble.

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<sup>1</sup> See p. 68 *supra*.

INTEREST. Interest allowed at 4 % from September 6, 1895, date of first presentation of claim, to April 26, 1912, on sum for lost profits.

*Cross-reference:* Am. J. Int. Law, vol. 16 (1922), pp. 301-304.

This is a claim for \$19,443.28 together with interest from November 30, 1894, presented by His Britannic Majesty's Government on behalf of Laughlin McLean, for damages arising out of the seizure of the British sealing schooner *Favourite* by the United States revenue cutter *Mohican* on August 24, 1894, and her subsequent detention.

The *Favourite* was a British schooner registered at the Port of Victoria, and her owner was Laughlin McLean, a British subject and master mariner. In 1894, R. P. Rithets and Company, Limited Liability, a body incorporated under the laws of British Columbia, and managers of the said schooner, fitted the vessel out for a sealing voyage.

After procuring a special sealing licence, the vessel manned by Laughlin McLean as master, and a crew of eight men, sailed from Victoria on June 18, 1894. When the vessel sailed from Victoria, she had on board no firearms except one double-barrel shotgun, the barrels of which had been cut off to about 11 inches. The presence of this gun was noted on the ship's manifest. The vessel proceeded to Kyuquot on Vancouver Island, where a crew of 45 Indian hunters was procured.

After the sealing implements on board had been sealed by Her Majesty's Customs Officers and entry made in her log book, the vessel set sail for Bering Sea on July 4, 1894; entered that sea on August 1st; and after breaking the seals on the implements commenced sealing and continued sealing until August 24, 1894. On that date when in longitude 168.30, latitude 54.27, the vessel was boarded and searched by an officer of the United States revenue cutter *Mohican*, who made the following entry in the ship's log:

"Boarded the *Favourite*. Found log correctly kept. No violations of regulations, as per log; one shotgun unsealed."

The officer then left the *Favourite*, but returned shortly thereafter and directed the master to go on board the *Mohican*, bringing with him all his papers and the gun, with which direction the master complied. The gun was fired and found to shoot very accurately for a distance of 50 yards. Whereupon the master was informed that the vessel was under seizure, for the following reasons, which are stated in the declaration of seizure:

"... for violation of article six (6) of the Award of the Tribunal of Arbitration and of that part of section ten (10) of the Act of Congress approved April 6, 1894, which reads:

"... or if any licensed vessel shall be found in the waters to which this act applies, having on board apparatus or implements for taking seals, but forbidden then and there to be used, it shall be presumed that the vessel in the one case and the apparatus or implements in other was or were used in violation of this Act until it is otherwise sufficiently proved'" (United States answer, exhibit 4).

On August 30, 1894, the commander of the United States naval forces in Bering Sea sent a report to the Secretary of the Navy, in which he stated:

"It is more than likely that the shotgun for which the vessel was seized was intended to be used in projecting signal stars, as the barrels were cut off, reducing them to a length of about 12 inches, but it was found after trial, that it could be used to kill seals much beyond the ordinary range of spear throwing.

"But whether this was the only intention, or whether there was another to use it for killing seals in case it was allowed for signal purposes, I am not prepared to say; but its possession is clearly in violation of the provisions con-

tained in sec. 10 of the Act of Congress approved April 6, 1894" (United States answer, exhibit 7).

To this report were annexed the reports of the officers of the *Mohican* with reference to the seizure of this vessel.

The *Favourite* was immediately sent in the custody of a prize crew from the *Mohican* to Unalaska, and on August 27th was delivered to the commanding officer of the British cruiser *Pheasant* at Unalaska, who ordered the *Favourite* to report to the Collector of Customs at Victoria, B.C.

Upon her arrival at Victoria, the *Favourite* was released by order of Rear Admiral Stevenson, the British Naval Commander-in-Chief on the Pacific Station.

The Government of His Britannic Majesty contend that the seizure of the *Favourite* was illegal and unjustifiable, as neither the Bering Sea Award, nor the regulation made therein or thereunder, nor any legislation or other legal or competent authority, justified or authorized the seizure of the vessel in the circumstances.

The United States Government, on the other hand, denies all liability; first, because its officers were acting on behalf of the British Government and not of the United States Government; secondly, because there was the bona fide belief that an infraction of the Bering Sea Award Act, 1894, had been committed; thirdly, because the release of the *Favourite* by the British naval authorities without a regular prosecution before a court rendered it impossible to determine in the only competent way whether the seizure was illegal; fourthly, because, even supposing the seizure was made without probable cause, the liability to pay damages would rest upon His Britannic Majesty's Government; fifthly, because the detention of the vessel from and after August 27, 1894, the date of its delivery to the commanding officer of the British cruiser *Pheasant* at Unalaska, was due to the action of the British authorities; and sixthly, because there is no basis in law or in fact for the measure of damages claimed.

#### *I. As to the legality of the seizure and liability of the United States:*

On the facts in this case, and for the reasons stated in the award of this Tribunal in the case of the *Wanderer*, claim No. 13, delivered December 9, 1921, this Tribunal holds:

(1) That the seizure of the British ship *Favourite* by United States officers, under section 10 of the Act of Congress approved April 6, 1894, was an improper exercise of the authority conferred upon them by the British Government under the Bering Sea Award Act of 1894, and the Order in Council of April 30, 1894;

(2) That the good faith of the United States naval officers is not questioned, their error in judgment being caused by the provisions of the aforesaid section 10, for which section and the error of judgment committed by its agents thereunder, the United States Government is liable;

(3) That inasmuch as the offence of the *Favourite* did not make her liable to forfeiture, the British Government were under no international or legal duty to proceed against the ship through their admiralty courts, and not to release her by a merely administrative decision; and

(4) That the British authorities, rather than the United States authorities were responsible for the detention of the ship after she was delivered to them on August 27th.

The United States Government, therefore, is liable only for the three days of her detention, namely, from August 24th to August 27th, during which she was under the control of officers of the United States, and the three addi-

tional days which should be allowed for the vessel to return to the sealing grounds if she had been released at Unalaska on August 27th.

II. *As to the amount of damages:*

The damages claimed on behalf of the claimant, amounting to \$19,443.28, as set forth in the British memorial, are based upon "a reasonable estimate of the sums which the owners would have received as the proceeds of the voyage, if it had been completed, together with interest thereon", or, in the alternative, the said amount is claimed "by reason of the loss of time, wages, provisions and outfit for the remainder of the season after the 24th of August, 1894".

It is shown in the British memorial that during the period between August 1st and August 24th, the *Favourite* had taken 1,247 seal skins, the net value of which, as shown by their sale in London was at the rate of \$8.62 per skin. This would make the average daily catch, 52 skins, equivalent to \$448.24 in value. It does not necessarily follow that the *Favourite* would have continued to take seal skins at this daily average during the remainder of her voyage, but the Tribunal is of the opinion that in view of her hunting equipment consisting of 19 canoes and 45 Indian hunters and a crew of eight white men, an estimated allowance of 52 skins per day as an average is not excessive. The Tribunal, therefore, considers that the prospective profits for these six days should be estimated at \$448 per day, making \$2,688 in all, and fixes this amount as damages for her loss of profits with \$500 additional for the trouble occasioned by her illegal detention.

*As to interest:*

The British Government in their oral argument admit that the 7 % interest claimed in their memorial must be reduced to 4 % in conformity with the provisions of the Terms of Submission.

It appears from a letter addressed by the Marquis of Salisbury to the British Ambassador in Washington on August 16, 1895, and handed by him to the Secretary of State of the United States on September 6, 1895, that this was the first presentation of a claim for compensation in this case. Therefore, in accordance with the Terms of Submission, section IV, the Tribunal is of the opinion that interest should be allowed at 4 % from September 6, 1895, to April 26, 1912, on \$2,688 damages allowed for loss of profits.

*For these reasons*

This Tribunal decides that the Government of the United States shall pay to the Government of His Britannic Majesty, on behalf of the claimants, the sum of three thousand one hundred and eighty-eight dollars (\$3,188) with interest on two thousand six hundred and eighty-eight dollars (\$2,688) thereof at four per cent (4 %) from September 6, 1895, to April 26, 1912.

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JESSE LEWIS (UNITED STATES) *v.* GREAT BRITAIN

(David J. Adams case. December 9, 1921. Pages 526-536.)

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SEIZURE OF FISHING VESSEL IN DIGBY BASIN (NOVA SCOTIA).—CONDEMNATION OF VESSEL AND CARGO BY MUNICIPAL COURT, FORFEITURE. Seizure of United States vessel *David J. Adams* on May 7, 1886, by Canadian authorities in

Digby Basin, Nova Scotia. Vessel and cargo condemned as forfeited by Vice-Admiralty Court at Halifax on October 28, 1889, for having entered Digby port for the purpose of procuring bait. No appeal against decision.

**TERRITORIAL WATERS, FISHING, JURISDICTION.—BINDING FORCE OF:** 1. MUNICIPAL LAW DESIGNED TO IMPLEMENT TREATY; 2. INTERPRETATION OF LAW AND TREATY BY MUNICIPAL COURTS.—**IMMUNITY OF JURISDICTION:** FUNDAMENTAL PRINCIPLE OF JURIDICAL EQUALITY OF STATES.—**DENIAL OF JUSTICE.—EXHAUSTION OF LOCAL REMEDIES.** By treaty United States, renouncing fishing rights in Canadian territorial waters, secured access of American fishermen to Canadian bays and harbours for several purposes but not for procuring bait (art. 1, Treaty of London, concluded with Great Britain on October 20, 1818). British law designed to implement treaty is binding on any person within British jurisdiction so far as consistent with treaty. The same applies to interpretation and application of the said law by municipal Courts. On the ground of juridical equality of States, however, such interpretation, so far as it implies interpretation of treaty, does not bind United States. This Tribunal, moreover, has not to deal with the way in which municipal law has been applied by municipal Courts, except in case of denial of justice, which may not be invoked unless local remedies exhausted. In this case, owner of vessel renounced right to appeal. Duty of this Tribunal is to interpret treaty from international point of view.

**INTERPRETATION OF TREATY: TERMS, INTENTION, NEGOTIATIONS.—FAILURE TO ENFORCE MUNICIPAL LAW, ACKNOWLEDGMENT OF RIGHT, *MODUS VIVENDI*, PUBLIC WARNING OF FORTHCOMING ENFORCEMENT, GOOD FAITH.** Meaning of treaty, determined according to clear wording; no sufficient evidence of contrary intention of High Contracting Parties; report of American Plenipotentiaries cited. British Act of 1819, implementing treaty, rarely enforced. Acknowledgment by United States in 1877 that American fishermen enjoyed access to Canadian ports for purchasing bait only by sufferance. Tolerance continued under Treaty of Washington (1877-1885) and *modus vivendi* (ending January 1, 1886). On March 5, 1886, before beginning of fishing campaign 1886, public warning of forthcoming enforcement by Canadian Government, reproducing text of 1818 Treaty. Master of *David J. Adams* not bona fide.

**EXTRAJUDICIAL ACTION.—*ACTIO IN REM*** Tribunal suggests that Great Britain consider allowance, as an act of grace, of adequate compensation, though proceedings which resulted in confiscation of *David J. Adams* constituted *actio in rem* against vessel and not against owner.

*Cross-references:* Am. J. Int. Law, vol. 16 (1922), pp. 315-323; Annual Digest, 1919-1922, pp. 237-238, 331-332, 335-336.

*Bibliography:* Nielsen, pp. 524-525; Annual Digest, 1919-1922, p. 238.

The United States Government claims from His Britannic Majesty's Government the sum of \$8,037.96 with interest thereon from May 7, 1886, for loss resulting from the seizure of the schooner *David J. Adams* by the Canadian authorities in Digby Basin, Nova Scotia, on May 7, 1886, and the subsequent condemnation of the vessel by the Vice-Admiralty Court at Halifax on October 20, 1889.

#### I. *As to the facts:*

The *David J. Adams*, a fishing schooner (United States memorial, p. 316), of 66 register tonnage, owned by Jesse Lewis, an American citizen of Gloucester, Massachusetts, United States of America; Alden Kinney, likewise an American

citizen, being the master, sailed from Gloucester on or about April 10, 1886, for cod and halibut fishing on the Western Banks, lying to the south-east of Nova Scotia, in the North Atlantic Ocean, with special instructions to the master not to enter into Canadian ports (United States memorial, pp. 182, 185, 248). After remaining on the Banks for about 12 days, the vessel proceeded to Eastport, Maine, United States of America, to obtain bait and other supplies, but being unable to procure at Eastport her needed supply of bait, she proceeded to Nova Scotia's shore, namely, to Annapolis Basin (United States memorial, pp. 249, 309). On the morning of May 6, 1886, contrary to the owner's instructions, she entered Annapolis Basin, and when entering the Gut, she heard from another boat that there was bait at Bear River (United States memorial, p. 309). Then she anchored above the mouth of Bear River (United States memorial, pp. 269, 273, 288, 309). While the schooner was lying at anchor, the master with some men of the crew went on shore, and addressing a Canadian fisherman, Samuel D. Ellis, he said that he wanted to know whether he had any bait, and on the affirmative answer of Ellis, he asked him whether he would sell it to him.

On the refusal of Ellis, because it was against the law and he could not sell to Americans, Kinney replied "that the schooner had been an American, but the English had bought her". Having been told by Ellis that the price was \$1.00 a barrel, he offered \$1.25, and so he bought four barrels of herring which had been caught the same morning (United States memorial, p. 275). The same Kinney addressed, likewise, a certain Robert Spurr: he asked him who owned the bait, and the said Robert Spurr, showing about four and a half barrels of bait in a boat anchored in a weir, said it belonged to his father, William Spurr, and to his partner, George Vroom. The master of the *David J. Adams* bought those four and a half barrels and engaged the next morning's catch at the rate of \$1.00 per barrel. On May 7th, as she was preparing to leave Digby Basin, the schooner was boarded by the chief officer of the Canadian cruiser *Lansdowne*, who asked the master what he was in for and if he had any bait on board; the master answered that he was in to see his people (United States memorial, pp. 253, 289), and that he had no bait on board; then the said officer told Kinney that he had no business to be there; he asked him if he knew the law, and being answered affirmatively (United States memorial, pp. 254, 258), he ordered the said master to proceed beyond the limits and returned to his cruiser. Being ordered by the commander of the cruiser to board the schooner again and to examine her thoroughly, the same officer went alongside the schooner and told the master it was reported that he had bought bait. On the formal denial of Kinney the officer proceeded to make a search, and having found bait, apparently perfectly fresh, was told by the master it was ten days old. Leaving the schooner again, the officer went to report to his commanding officer, and, having so reported, was ordered to return to the schooner with Captain Charles T. Dakin, of the *Lansdowne*, who after putting the same questions and having received the same denials from the captain, returned to the *Lansdowne*, once more leaving the schooner free. But on their report the commanding officer of the Canadian Cruiser ordered the schooner to anchor close to the *Lansdowne*. The following day, i.e. on May 8th, the schooner was declared to be seized (United States memorial, pp. 253, 254, 259).

On the same day the vessel was removed to St. Johns, New Brunswick, and three days later she was taken back again to Digby.

On May 7th a process in an Admiralty suit against the schooner was served on the vessel for: (1) violation of the convention between Great Britain and the United States signed at London on October 20th, 1818; (2) for violation of the Act of the British Parliament, being chapter 38 of the Acts passed in

the 59th year of the reign of his late Majesty, George III. and being entitled "An Act to enable His Majesty to make regulations with respect to the taking and curing of fish in certain parts of the coasts of Newfoundland and Labrador, and in his said Majesty's other possessions in North America, according to a convention made between His Majesty and the United States of America;" and (3) for violation of chapter 72 of the Acts of the Parliament of the Dominion of Canada made and passed in the year 1883, and entitled "The Customs Act, 1883", and the Acts of the said Parliament of the Dominion of Canada in amendment thereof (United States memorial, p. 202).

In the meantime, the Secretary of State of the United States having been informed by the shipowner of these occurrences, the American Consul General at Halifax, acting on the instructions of the Secretary of State, proceeded to Digby to inquire into the facts. He seems to have encountered some difficulties in ascertaining what were the grounds on which the Canadian authorities were basing the seizure (United States memorial, pp. 39, 42, 43, 47) and it appears from the documents (United States memorial, pp. 78, 79, 89) that the charges against the schooner were alternatively said by the Canadian authorities to be a violation of the Fisheries Stipulations in force between the British Government and the United States Government, and of the Canadian Fisheries Acts, and a violation of the Canadian Customs Acts. On the other hand, the Consul General must have had some difficulty in ascertaining the true facts, since in the master's affidavit of May 13th, is the solemn and misleading declaration that he did not buy bait when anchored above Bear River (United States memorial, p. 44).

A diplomatic correspondence ensued with the United States Government protesting against what it contended to be a misinterpretation of the Treaty of 1818 by the Canadian Government and His Britannic Majesty's Government contending that, as the case of the *David J. Adams* was still *sub judice*, diplomatic action was to be suspended for the time being. After having been somewhat delayed, by reason of certain negotiations which took place in 1886-1888 between the two Governments concerning fisheries, the action for forfeiture of the *David J. Adams* and her cargo was decided on October 28, 1889, by the Vice-Admiralty Court at Halifax. The ship and her cargo were condemned as forfeited to Her Britannic Majesty for breach and violation of the convention and the various Acts relating thereto, and ordered to be sold at public auction, and expressly on the following motives (United States memorial, p. 326):

"That the said vessel [*David J. Adams*] . . . did on or about the 6th day of May, A. D. 1886, enter into Annapolis Basin, . . . and that the said vessel *David J. Adams* and those on board the said vessel did so enter for purposes other than the purpose of shelter or of repairing damages, of purchasing wood or of obtaining water, and that the said vessel *David J. Adams* and those on board of the said vessel did within three marine miles of the shores of the said Annapolis Basin on the said 6th day of May A.D. 1886, prepare to fish within the meaning of the convention between His late Majesty, George III, King of the United Kingdom . . . and the United States of America, made and signed at London on the 20th day of October, A.D. 1818, and within the meaning of . . . [British Act 59, George III, c. 38, and Canadian Acts, 31 Vict., chap. 61 (1868), 33 Vict., chap. 15 (1870), 34 Vict., chap. 23 (1871)], . . . and contrary to the provisions of the said convention and of the said several Acts, and that the said vessel *David J. Adams* and her cargo were thereupon seized within three marine miles of the shores of the Annapolis Basin . . .".

It is not contested that no appeal was taken against that decision.

Now this case is presented before this Tribunal under the following conditions:

By reason of certain conditions of fact and for various other considerations, while by the Treaty of London of October 20th, 1818, the United States renounced the liberty of fishing in Canadian waters, except on certain specified coasts, the access of American fishermen to the British territorial waters of Canada was conventionally regulated between the American and British Governments as follows:

"The United States hereby renounce forever, any liberty, heretofore enjoyed or claimed by the inhabitants thereof, to take, dry or cure fish on, or within three marine miles of any of the coasts, bays, creeks, or harbours of His Britannic Majesty's Dominions in America not included within the above-mentioned limits: Provided, however, that the American fishermen shall be admitted to enter such bays or harbours for the purpose of shelter and of repairing damages therein, of purchasing wood, and of obtaining water, and for no other purpose whatever" (United States memorial, p. 375).

Great Britain and Canada, acting in the full exercise of their sovereignty and by such proper legislative authority as was established by their municipal public law, had enacted and were entitled to enact such legislative provisions as they considered necessary or expedient to secure observance of the said Treaty; and, so far as they are not inconsistent with the said Treaty, those provisions are binding as municipal public law of the country on any person within the limits of British jurisdiction. At the time of the seizure of the *David J. Adams* such legislation was embodied in the British Act of 1819 (59 George III, c. 38), and the Canadian Acts of 1868 (31 Vict. 61), 1871 (34 Vict., c. 23).

Great Britain and Canada, acting by such proper judicial authority as was established by their municipal law, were fully entitled to interpret and apply such legislation and to pronounce and impose such penalty as was provided by the same, but such judicial action had the same limits as the aforesaid legislative action, that is to say so far as it was not inconsistent with the said Treaty.

In this case the question is not and cannot be to ascertain whether or not British law has been justly applied by said judicial authorities, nor to consider, revise, reverse, or affirm a decision given in that respect by British courts. On the contrary, any such decision must be taken as the authorized expression of the position assumed by Great Britain in the subject matter, and, so far as such decision implies an interpretation of said treaty, it must be taken as the authorized expression of the British interpretation.

The fundamental principle of the juridical equality of States is opposed to placing one State under the jurisdiction of another State. It is opposed to the subjection of one State to an interpretation of a Treaty asserted by another State. There is no reason why one more than the other should impose such an unilateral interpretation of a contract which is essentially bilateral. The fact that this interpretation is given by the legislative or judicial or any other authority of one of the parties does not make that interpretation binding upon the other party. Far from contesting that principle, the British Government did not fail to recognize it (United States memorial, p. 119).

For that reason the mere fact that a British court, whatever be the respect and high authority it carries, interpreted the treaty in such a way as to declare the *David J. Adams* had contravened it, cannot be accepted by this Tribunal as a conclusive interpretation binding upon the United States Government. Such a decision is conclusive from the national British point of view; it is not from the national United States point of view. On the other hand, the way in which the Canadian Acts, enacted to enforce the Treaty, had been applied by the Canadian courts, and penalties have been imposed, is a municipal question, and this Tribunal has no jurisdiction to deal with them. The only exception would be the case of a denial of justice. But a denial of justice may

not be invoked, unless the claimant has exhausted the legal remedies to obtain justice. As has been shown, the claimant in this case renounced his right to appeal against the decision concerning his vessel. Then the duty of this international Tribunal is to determine, from the international point of view, how the provisions of the treaty are to be interpreted and applied to the facts, and consequently whether the loss resulting from the forfeiture of the vessel gives rise to an indemnity (oral argument, p. 157).

According to the British view, the stipulation of the Treaty of 1818 according to which the American fishermen shall be admitted to enter the Canadian bays and harbors for shelter, repairing damages, purchasing wood, obtaining water, "and for no other purpose whatever", means that the American fishermen have no access to the said bays and harbors for purchasing bait.

On the other hand, the United States Government contends that the right of access as such is not prohibited to the American fishermen by the Treaty, except so far as it is inconsistent with the prohibition of taking, drying or curing fish within the three-mile limit, accepted by the United States in that Treaty. The four cases (shelter, repairs, wood and water) of admittance, are cases where admittance is secured by the Treaty and cannot be refused or prohibited by local legislation.

In other words, according to the American view the United States Government had renounced by the Treaty their former liberty to fish in Canadian territorial waters. That renunciation has a counterpart the obligation of the Canadian Government to admit American fishermen for shelter, repairs, wood, and water and for no other purpose. That is to say, that Canada has no obligation to admit the said fishermen for any other purpose than these four—that Canada may very well prohibit the entrance for any other purposes; but, so long as entrance for the purpose of purchasing bait is not prohibited by Canadian legislation, it must be considered as the legal exercise of the right of access belonging to any American ship.

In this Tribunal's opinion, a stipulation which says that fisherman "shall be admitted" for certain enumerated purposes and "for no other purpose whatever" seems to be perfectly clear and to mean that for the specified purposes the fishermen shall be admitted and for any other purposes they had no right to be admitted, and it is difficult to contend that by such plain words the right to entrance for purchasing bait is not denied.

No sufficient evidence of contrary intention of the High Contracting Parties is produced to contradict such a clear wording.

It has been said in support of the United States contention that "if the language of the Treaty of 1818 is to be interpreted literally, rather than according to its spirit and plain intent, a vessel engaged in fishing would be prohibited from entering a Canadian port 'for any purpose whatever, except to obtain wood or water, to repair damages, or to seek shelter' ". And also that "the literal meaning of an isolated clause is often shown not to be the meaning really understood or intended" (United States memorial, pp. 56, 57).

Such an intention of the negotiators to contradict the literal meaning of the Treaty does not appear in the evidence presented in this case. It appears from the report dated October 20, 1818, from Gallatin and Rush, the two American Plenipotentiaries (British answer, pp. 27, 28), that they had in view to procure for the American fishermen fishing on the fishing grounds outside the three-mile limit off Nova Scotia coasts, the privilege (that is to say, the exceptional right) of entering the ports for shelter.

But, assuming the construction contended for by the United States Government, it must be considered that as early as 1819, that is to say, immediately after the Treaty, the British Act of 1819 (59 Geo. III, c. 36, section III) expressly

enacted that the entrance into the Canadian bays and harbors should not be lawful. This act says:

"Be it enacted that it shall be lawful for any fishermen of the said United States to enter into such bays or harbours of His Britannic Majesty's Dominions in America as are last mentioned for the purpose of shelter, and repairing damages therein, and of purchasing wood, and of obtaining water, and for no other purposes whatever."

If the entrance for the other purposes is not lawful, it is difficult to say that such entrance is not prohibited.

It is true that, according to the various documents produced, either by reason of arrangements between the American and British Governments or for political or economic reasons the enforcement of the prohibition resulting from that statute was practically rare, and it results from the documents that the entering of American fishermen into the Canadian ports for the purpose of purchasing bait was at certain periods of time commonly practiced.

But it has been shown that, at least in 1877, before the Halifax Commission, it was admitted by the United States that the American fishermen were enjoying access to the Canadian ports for purchasing bait "only by sufferance", and could at any time be deprived of it "by the enforcement of existing laws or the re-enactment of former oppressive statutes". And the United States Government stated at that time that it was not aware "that the former inhospitable statutes have ever been repealed. Their enforcement may be renewed at any moment" (British answer, p. 11).

During the period extending from 1877 to 1886, the fisheries articles of the Treaty of Washington (May 6, 1871; United States memorial, p. 392), superseded the Treaty of 1818 as regards the prohibition of fishing and the tolerance for purchasing bait was continued.

On January 31st, 1885, the United States Government denounced the Washington convention, which was declared to be terminated on July 1st, 1885 (British answer, p. 60), but in order not to disturb the fishing campaign of 1885 a *modus vivendi* was agreed upon by the two Governments to end on January 1, 1886, and the notes exchanged on that occasion show that the purchasing of bait was to continue during that time and that the Canadian authorities should abstain from impeding the local traffic incidental to fishing during the remainder of the season of 1885 (United States memorial, pp. 397, 400). At the same time the Canadian Government proposed to the United States Government that a mixed commission should settle by agreement the various fishing difficulties existing between the two countries and the *modus vivendi* was proposed from the Canadian side, based on a favorable Presidential recommendation for that proposal (United States memorial, p. 401; British answer, p. 62).

The Senate of the United States did not agree to that proposition.

At the termination of the transitory régime which purported to avoid an "abrupt transition" in the existing state of things (United States memorial, p. 399), in the early days of March, 1886, and before the beginning of the fishing campaign of 1886, the Canadian Government gave a public warning, dated March 5th, 1886 (United States memorial, p. 367), reproducing the text of the 1818 Treaty. The same warning also called attention to the provisions of the Canadian Act, 1868, respecting fishing by foreign vessels, but not to the special provisions of the Act of 1819 concerning the entrance by the fishermen into the Canadian harbors. The British Government requested the United States Government to give also a public warning; but it answered that the proclamation of the President already given on January 31st, 1885, constituted a "full and formal public notification", and it was not necessary to repeat it (British answer, pp. 62, 63).

Such was the state of things when the owner of the *David J. Adams* was deprived of his vessel.

The United States Government contends that even assuming the existence of the prohibition of entering into Canadian harbors for purchasing bait, the seizure was, on the facts in this case, a violation of international law, because "as a matter of international law, where for a long continued period a Government has, either contrary to its laws or without having any laws in force covering the case, permitted to aliens a certain course of action, it cannot, under the principles of international law, suddenly change that course and make it affect those aliens already engaged in forbidden transactions as the result of that course and deprive aliens of their property so acquired, without rendering themselves liable to an international reclamation" (oral argument, p. 751; see also p. 47).

But it seems difficult to apply such a principle based upon the bona fides of foreigners to this case where (a) the master of the schooner was not an alien already engaged in the country in a transaction suddenly forbidden; (b) the said master entered the Canadian harbor in violation of his own shipowner's instructions (United States memorial, pp. 182, 185, 248); (c) the said master admitted that he knew the Canadian law (United States memorial, pp. 254, 258); (d) the said master, in order to induce his vendor to sell him the bait, falsely declared that his vessel had been bought by Englishmen and was no more an American one; (e) the said master falsely declared that he entered the harbor to see his relatives (United States memorial, pp. 253, 289); that he had no bait on board (United States memorial, pp. 254, 263); that he strongly denied that he had bought bait (United States memorial, pp. 254, 259); that the bait, which was afterwards revealed by the search, was ten days old (United States memorial, pp. 254, 263, 289, 290, 302), and even after the seizure, he tried to deceive the United States Consul General by asserting under oath that he did not purchase or attempt to purchase bait while at anchor above Bear River (United States memorial, pp. 46, 269, 273, 288, 309); (f) the said master took away the ship's papers (United States memorial, p. 45), which afterwards he refused to give to the Canadian authorities (United States memorial, p. 316); and where, as it is clearly shown, this master made desperate efforts to avoid the consequences of an act which he knew was illegal.

If, on the other hand, such an attitude of the master of the *David J. Adams* is compared with the public proclamations by the Canadian Government as well as by the United States Government (United States memorial, p. 367; British answer, pp. 62, 63), it does not appear that this was a case of a sudden and unexpected change of a Government's conduct towards a foreigner suddenly surprised by that change.

Furthermore, and without interfering with what the Canadian authorities, acting under their municipal rights of jurisdiction, held to be the proper application of their legislation and the penalties thereunder, and without admitting any foundation in this case for a contended denial of justice, for the reasons above stated, this Tribunal cannot refrain from observing that if the unlawfulness of the entrance in the Canadian ports was effectively provided for in the Act of 1819, in accordance with the Treaty of 1818, on the other hand the penalty of forfeiture for buying bait was enacted for the first time by the Act of 1886 (49 Vict., c. 114; United States memorial, p. 386), posterior to the seizure of the *David J. Adams*.

Further, if the consequences resulting to the owner of the *David J. Adams* from the confiscation so pronounced are considered, they appear as being particularly unfortunate and unmerited.

It results from the documents (United States memorial, p. 181) that Jesse Lewis was a poor, aged man, who was possessed of no means of any moment or value other than the said schooner, that his wife was an invalid, and that after his vessel was seized he was compelled to go to sea to earn a living for himself and his wife (United States memorial, p. 183). And, further, he appears as having been perfectly innocent of his master's conduct, whom he had expressly prohibited from entering Canadian ports, as it has been shown.

It is true, the proceedings which resulted in the confiscation of the *David J. Adams* constituted an *actio in rem* against the vessel and not against the owner; but finally all the consequences of the affair were inflicted on the owner and his abandonment of his right of appeal which might have succeeded as to the penalty, seems to have been partly due to his absence of pecuniary means.

Under these circumstances, this Tribunal thinks it is its duty to draw the special attention of His Britannic Majesty's Government to the loss so incurred by Jesse Lewis and it ventures to express the desire that that Government will consider favorably the allowance as an act of grace to the said Jesse Lewis or to his representatives, on account of his unfortunate misfortune, of adequate compensation for the loss of his vessel and the damages resulting therefrom. That compensation, this Tribunal earnestly urges upon the attention of the British and Canadian Government.

*For these reasons*

The tribunal decides that, with the above recommendation, the claim presented by the United States Government in this case be disallowed.

## GEORGE RODNEY BURT (UNITED STATES) *v.* GREAT BRITAIN

*(Fijian Land Claims. October 26, 1923. Pages 588-598.)*

CESSION OF SOVEREIGNTY, ANNEXATION, SUCCESSION OF STATES: PRIVATE PROPERTY RIGHTS ACQUIRED PREVIOUS TO.—INTERPRETATION OF (PRIMITIVE) MUNICIPAL LAW.—EVIDENCE.—DENIAL OF JUSTICE: GOOD FAITH, PROCEDURE, VIOLATION OF LAW. Purchase in 1868 by Burt, United States citizen, of 3,750 acres in Fiji Islands from native chiefs. Evidence: three deeds and certificate. Cession of sovereignty in 1874 by native chiefs to Great Britain. Burt's claim for recognition and respect of property rights in 1884 disallowed by British Governor in Council on the ground that native chiefs had no power to grant private title to lands. *Held* by Tribunal that chiefs had such power and that title, originally valid, had subsisted, since evidence shows no abandonment of claim by Burt. *Held* also that Great Britain, though its authorities were bona fide and procedure employed in dealing with land titles was the customary and appropriate one, by refusing to recognize title failed to carry out obligation which, under international law, it assumed as succeeding Power in the islands: Tribunal looks only to general result which was reached.

DAMAGES: ACCURATE DETERMINATION. LOST PROFITS, LUMP SUM. The amount of damages necessarily unsusceptible of accurate determination (speculative valuation, prospective profits). lump award made.

*Cross-references:* Am. J. Int. Law, vol. 18 (1924), pp. 814-821; Annual Digest, 1923-1924, pp. 78-79.

*Bibliography:* Annual Digest, 1923-1924, p. 79.

I. On the tenth day of October, 1874, Great Britain acquired by peaceful cession "the possession of and full sovereignty and dominion over" the Fiji Islands. The deed of cession executed by Thakombau (or Cakobau), the then reputed overlord Chief or King in Fiji, and by twelve other natives styled the "high chiefs" of the islands reads as follows:

Whereas, divers subjects of Her Majesty the Queen of Great Britain and Ireland have from time to time settled in the Fijian group of islands, and have acquired property or certain pecuniary interests therein; and whereas the Fijian Chief Thakombau, styled Tui Viti and Vunivalu, and other high chiefs of the said islands, are desirous of securing the promotion of civilization and Christianity, and of increasing trade and industry within the said islands; and whereas it is obviously desirable in the interests as well of the natives as of the white population that order and good government should be established therein; and whereas the said Tui Viti and other high chiefs have conjointly and severally requested Her Majesty the Queen of Great Britain and Ireland aforesaid to undertake the government of the said islands henceforth; and whereas, in order to the establishment of British government within the said islands, the said Tui Viti and other the several high chiefs thereof, for themselves and their respective tribes, have agreed to cede the possession of and the dominion and sovereignty over the whole of the said islands, and over the inhabitants thereof, and have requested Her said Majesty to accept such cession; which cession the said Tui Viti and other high chiefs, relying upon the justice and generosity of Her said Majesty, have determined to tender unconditionally, and which cession, on the part of the said Tui Viti and other high chiefs is witnessed by the execution of these presents, and by the formal surrender of the said territory to Her said Majesty; and whereas His Excellency Sir Hercules George Robert Robinson, Knight Commander of the Most Distinguished Order of Saint Michael and Saint George, Governor, Commander in Chief, and Vice Admiral of the British Colony of New South Wales and its dependencies, and Governor of Norfolk Island, hath been authorized and deputed by Her said Majesty to accept on her behalf the said cession:

Now these presents witness.

1. That the possession of and full sovereignty and dominion over the whole of the group of islands in the South Pacific Ocean known as the Fijis (and lying between the parallels of latitude of fifteen degrees south, and twenty-two degrees south of the Equator, and between the meridian of longitude of one hundred and seventy-seven degrees west, and one hundred and seventy-five degrees east of the meridian of Greenwich), and over the inhabitants thereof, and of and over all ports, harbours, havens, roadsteads, rivers, estuaries, and other waters, and all reefs and foreshores within or adjacent thereto, are hereby ceded to and accepted on behalf of Her said Majesty the Queen of Great Britain and Ireland, her heirs and successors, to the intent that from this time forth the said islands and the waters, reefs, and other places as aforesaid, lying within or adjacent thereto, may be annexed to and be a possession and dependency of the British Crown.

2. That the form or constitution of government, the means of the maintenance thereof, and the laws and regulations to be administered within the said islands, shall be such as Her Majesty shall prescribe and determine.

3. That, pending the making by Her Majesty, as aforesaid, of some more permanent provision for the government of the said islands, His Excellency Sir Hercules George Robert Robinson, in pursuance of the powers in him vested, and with the consent and at the request of the said Tui Viti and other high chiefs, the ceding parties hereto, shall establish such temporary or provisional Government as to him shall seem meet.

4. That the absolute proprietorship of all lands, not shown to be now alienated, so as to have become bona fide the property of Europeans or other foreigners, or not now in the actual use or occupation of some chief or tribe, or not actually required for the probable future support and maintenance of some chief or tribe, shall be and is hereby declared to be vested in Her said Majesty, her heirs and successors.

5. That Her Majesty shall have power, whenever it shall be deemed necessary for public purposes, to take any lands upon payment to the proprietor of a reasonable sum by way of compensation for the deprivation thereof.

6. That all the existing public buildings, houses, and offices, all enclosures and other pieces or parcels of land now set apart or being used for public purposes, and all stores, fittings, and other articles now being used in connexion with such purposes, are hereby assigned, transferred, and made over to Her said Majesty.

7. That, on behalf of Her Majesty, His Excellency Sir Hercules George Robert Robinson promises: (1) that the rights and interests of the said Tui Viti and other high chiefs, the ceding parties hereto, shall be recognized, so far as is consistent with British sovereignty and colonial form of government; (2) that all questions of financial liabilities and engagements shall be scrutinized, and dealt with upon principles of justice and sound public policy; (3) that all claims to titles of land, by whomsoever preferred, and all claims to pensions or allowances, whether on the part of the said Tui Viti and other high chiefs, or of persons now holding office under them or any of them, shall in due course be fully investigated and equitably adjusted.

In witness whereof, the whole of the contents of this instrument of cession having been, previously to the execution of the same, interpreted and explained to the ceding parties hereto, by David Wilkinson, Esq., the interpreter nominated by the said Tui Viti and the other high chiefs, and accepted as such interpreter by the said Sir Hercules George Robert Robinson, the respective parties hereto have hereunto set their hands and seals.

Done at Levuka, this 10th day of October, in the year of our Lord 1874.

(Signed) (L.S.) CAKOBAU, R.

*Tui Viti and Vunivalu*

(L.S.) MAAFU

(L.S.) TUI CAKAU

(L.S.) RATU EPELI

(L.S.) VAKAWALETABUA, TUI BUA

(L.S.) SAVENAKA

(L.S.) ISIKELI

(L.S.) ROKO TUI DREKETI

(L.S.) NACAGILEVU

(L.S.) RATU KINI

(L.S.) RITOVA

(L.S.) KATUNIVERE

(L.S.) MATANITOBUA

(Signed) (L.S.) HERCULES ROBINSON

I hereby certify that, prior to the execution of the above instrument of cession, which execution I do hereby attest, I fully and faithfully interpreted and explained to the ceding parties hereto, the whole of the contents of the said document (the several interlineations on p. , line , and on p. , line of the manuscript having first been made), and that such contents were fully understood and assented to by the said ceding parties. Prior to the execution of the said instrument of cession, I wrote out an interpretation of the same in the Fijian language, which interpretation I read to the several chiefs, who

one and all approved thereof. A copy of such interpretation is hereto annexed marked (A).

Dated this 10th day of October, A.D. 1874.

(Signed) D. WILKINSON  
Chief Interpreter

II. Immediately after the cession, Great Britain established the appropriate machinery to investigate and pass upon the validity of titles to land. This machinery consisted of a board of land commissioners whose findings and conclusions were subject to review by the Governor in Council. Somewhat later provision was made for rehearing on a proper petition before a final Tribunal made up of the Governor and the members of his Council, with the Chief Justice of the Colony and the Native Commissioner sitting with them. It appears that between 1874 and 1882 more than 1,300 claims were thus considered and passed upon. Under the normal procedure where a claim was allowed a Crown grant covering the land involved was issued; where a claim was disallowed a Crown grant *ex gratia*, covering a portion of the land claimed, was sometimes made.

III. George Rodney Burt, a native citizen of the United States, came to the Fiji Islands in 1856 and, excepting the period from 1871 to 1874, hereinafter more particularly referred to, resided in the islands continuously until 1894. He at first carried on a general trading business and later engaged in farming on a comparatively large scale for this region. In 1862 he took up land on the upper Rewa River and is said there to have established the first real plantation in the islands. In 1866 he went to the Sigatoka River district and purchased a tract of land called Kavokai Nagasau, afterwards sold by him to a German subject who eventually obtained a Crown grant for it. In 1868 Burt purchased another tract known as Emuri and situated on the opposite side of the Sigatoka River from Kavokai Nagasau. It is the title to the Emuri tract, consisting of 3,750 acres, which is involved in this controversy.

IV. The purchase of Emuri is evidenced by three deeds and a certificate, running to Burt and his partner Underwood who was subsequently bought out by Burt. These papers are set forth in the appendix to the United States memorial at pp. 187-195. The first deed was executed on February 27, 1868, for a consideration of \$200 in merchandise. The description of boundaries being found unintelligible, a second deed, dated June 2, 1868, was executed, ostensibly to remedy this defect. The consideration in this latter instrument is given as \$220 in trade, apparently including the \$200 previously paid. Still later a third deed, dated October 28, 1868, was obtained by Burt in order to extend the boundaries of the tract. The consideration named in this final transfer is \$320 which included the \$220 already paid, and \$100 in gold paid down on the execution of the deed. The certificate referred to deals with a complication arising from a conveyance by other parties to some part of the land in question, and is a declaration by the principal chief signing the deeds to the effect that such conveyance was null and void.

The grantors in these deeds were Ratu Kini, who seems to have been at the time the undisputed paramount and ruling chief of the territory in which Emuri lies, and certain other subordinate chiefs or heads of tribes supposed to have an interest in the land. While the evidence is to some extent conflicting on the question of the voluntary execution of the deeds by some of the grantors other than Ratu Kini, and as to the receipt of any part of the consideration by such other grantors, we are satisfied that Burt and Underwood secured from the ruling chiefs such title to Emuri as they had power and right to give.

V. Burt and his partner entered into possession of the land in February, 1868, and proceeded to make substantial improvements. Buildings were erected, planting was done, and about 200 head of livestock were put on the property, approximately 500 acres being thus actually occupied during 1868 (memorial, p. 201). This occupation which the land commissioners specifically found to be "substantial" (memorial, p. 201) subsisted for some ten months when it was interrupted in January, 1869, by an incursion by a savage mountain tribe, described as the most unruly element in the islands. The buildings were burned, the land was devastated, and Burt barely escaped with his life. He went back six months later, but was not permitted by the members of this mountaineer tribe to resume operations or gather his crop of cotton; and he was, therefore, obliged to go away from the plantation and seek other remedies. Evidence produced at the hearing shows that early in 1869 Burt appealed to the United States authorities and presented a bill for damages in the sum of \$69,000 for raids and depredations of the natives, and that an investigation of the matter was conducted by Commander Truxton of the U.S. warship *Jamestown*. Commander Truxton found that Burt had been damaged to the extent of \$50,000, and referred the claim to Washington for such action as the United States Government might see fit to take. It also appears from the same evidence that at the beginning of April, 1869, Burt was in Sydney, New South Wales, attempting to raise money to resume operations in Fiji. He then went to the United States and during 1871 pressed his claim before the State Department in Washington. The proceedings before the Department were evidently protracted and it was not until June, 1873, that the final answer of the State Department was given. In substance the United States Government declined to incur the expense or risk of collecting Burt's claim, but it acceded to his request that the American Consular Agent in Fiji be directed to place no obstacle in his way.

In 1874 Burt was back in Fiji. Conditions meanwhile in the islands had manifestly remained more or less chaotic. An attempt had been made to set up an effective government through the creation of a native confederacy, but it can hardly be said that public order and a settled government, satisfactory either to the natives or to the white population, had been established. Perhaps the best evidence of this is to be found in the deed of cession of October 10, 1874, which recites the obvious desirability "in the interests as well of the native as of the white population that order and good Government should be established".

The record contains a deed dated in July, 1874, from Burt to one Ives of Coldwater, Michigan, purporting to sell Emuri for a consideration of \$10,200. It seems to be a reasonable inference that this transaction was in effect a transfer of the property as security for a loan. Evidently Ives was a personal friend; Burt left him a small sum of money in his will. Ives is not shown ever to have been in Fiji or to have had any other interest in the islands; and in 1879 he executed a deed, releasing the property to Burt for the same consideration, to wit, \$10,200. Whether this is the proper construction of the transaction or not, we are of the opinion that for the purposes of this case the situation was not essentially affected by it.

In 1875, when the title stood in Ives, Burt filed with the Board of Land Commissioners a claim for a Crown grant in Ives' name but over Burt's own signature. This claim was not pressed and was never brought on for hearing. From 1875 on for a number of years the whole subject of land titles was in the hands of the local British authorities, and claims were being considered in the order in which they were filed. The process was clearly a lengthy and somewhat complicated one. In 1879 a time limit was fixed for the filing of claims, and Burt, in that year and after the release to him from Ives, filed his claim to

Emuri in his own right. In May, 1880, the Board of Land Commissioners disallowed the Burt claim but recommended that he be given an *ex gratia* grant for 160 acres. In July of that year the Governor in Council, in a decision which was not published at the time, approved the finding of the Land Commissioners but cut the *ex gratia* grant down to 100 acres, whereupon Burt went into possession of the 100 acres and made substantial improvements. In November, 1882, a petition for a rehearing was presented by the Native Commissioner on behalf of two natives claiming an interest in the land. This rehearing was not gazetted until March, 1883, and a decision was not given until April, 1884, when the claim was disallowed in its entirety, and Burt was excluded from the 100 acres which he had occupied a year and a half earlier.

VI. On these facts the precise question before this Tribunal is whether Great Britain, as the succeeding Power in the islands under the deed of cession of 1874, failed in any respect to observe and carry out any obligation toward Burt which it may be properly said, from the point of view of international law, to have assumed. If Burt had at the time a valid title to the lands, it is plain that under all the circumstances the Government was bound to recognize and respect it. In this connexion we do not concern ourselves with the methods and the procedure adopted and employed in dealing with land titles. We have no criticism to make in this regard; on the contrary we feel that good faith is rightly attributable to the authorities at every stage and that the procedure was the customary and appropriate one for handling a situation of this nature. We look only to the general result which was reached and note that this result was the ultimate denial of Burt's right.

VII. We therefore come to the particular question involved: whether Burt had at the time of the cession such an interest as to entitle him to invoke the obligation of the succeeding Power. His title to Emuri, resting as it did upon a conveyance from the ruling chiefs of the territory in which the land was situated, naturally depended upon the power of such chiefs to convey. It has been strenuously contended by counsel for Great Britain that, in the then existing state of land tenures in Fiji, the chiefs acting alone could not convey the equivalent of a fee-simple title to land. It is asserted that under the native custom a certain class, known as "taukeys" and defined as occupiers of the soil, had specific rights which could not be alienated without their express consent. It was, therefore, urged that inasmuch as the taukeys were not parties to the deeds, no valid title could have been conveyed. The record contains much in the way of opinion and argument upon this question. Various theories were advanced both at the time of the cession to Great Britain and afterwards. As time passed, the taukei view commanded more and more attention, and some years after the cession seems to have been rather definitely taken by the local authorities. We think it must be recognized that in this period of transition from primitive native custom to the white man's law it would be difficult, if not quite impossible, to lay down at any particular moment of time an exact definition of land polity in the Fiji Islands. We entertain grave doubts about the existence at any time of an intelligible system of feudal tenures or a consistent law of real property, as we understand it, among the natives. If there is any one fact which stands out with striking prominence during the entire period anterior to the cession it is that the law of the club pretty effectually dominated the situation. On the other hand there are well authenticated instances in which the chiefs themselves took fairly high ground in this matter and regarded themselves virtually as trustees for their people. They certainly assumed the right to dispose of land as they chose, but sometimes they did so with a commendable caution and in a spirit of great fairness to their subjects. We find Thakombau

stating frankly that all that was needed in such a case was his own word and that whether he ought to give his word and would do so was the real question. In discussing the question of the cession to Great Britain with his own chiefs, he declared that they must consider it with the utmost care because, as he said, "what we do today can not be undone tomorrow". It stands without dispute that the most solemn and consequential act affecting land and sovereignty in the islands was performed on the theory that the chiefs had the power to act. The British authorities of the day did not proceed hastily in this momentous transaction; they took advice on the point. They had before them the conflicting theories and deliberately adopted the view that the chiefs were competent to convey. Sir Hercules Robinson, Sir John Thurston and Sir Arthur Gordon may be considered on this record to have committed themselves clearly in this respect at the critical moment of the cession. We can not help feeling that, on the whole case, the chiefs had the power, and that the distinction between want of power and possible abuse of power goes far towards reconciling the conflicting views. One hesitates to believe that the people on the ground, either whites or natives, in their practical dealings were or could under the circumstances be profoundly influenced by ideal considerations on the subject of land tenures. They were confronted not by a theory, but by an actual condition, and we do not feel called upon at this distance of time to take up the academic task of laying down and applying principles which would evidently run so decidedly against the current of actual dealings on the spot.

At this point it is proper to note that the Land Commissioners in 1880 solemnly held that if the signatures of the three chiefs attached to the deed of June 2, 1868, were "genuine and were obtained bona fide, they were undoubtedly the proper persons to have executed the grant".

VIII. Passing now to the question of the subsistence of Burt's right up to the date of the cession to Great Britain, we have only to enquire whether a reasonable construction of the evidence shows any abandonment by him of his claim. The inference to our minds is irresistible that if he had not been dispossessed of Emuri by the wrongful, violent act of an uncontrollable mountain tribe—an event which the Land Commissioners found to have no bearing upon his title—he would have continued in occupation, and it is not an unwarranted assumption to say that if the cession to Great Britain had taken place in 1869, Burt would have almost automatically received a Crown grant. We fail to find anything in the subsequent events which indicates any intention on his part to abandon; on the contrary he diligently prosecuted his claim so far as the circumstances and his limited resources permitted, and was at no stage of the proceedings in default. He stood upon his rights under the conveyances from the chiefs, and, on the view which we take, the Crown authorities by refusing to recognize his title, failed to carry out the obligation which Great Britain, as the succeeding Power in the islands, must be held to have assumed.

IX. The damages are necessarily unsusceptible of accurate determination. The memorial of the United States presents the maximum possible claim. The demand is for \$232,929.50 with interest from April 25, 1884. We can not avoid the impression that the bill as presented comprises a large element of speculative valuation and prospective profits, and we have reached the conclusion that upon the whole case full justice would be done by a lump award of £ 10,000 or its equivalent in dollars as of the date of the award.

*Now, therefore:*

The Tribunal decides that the British Government shall pay to the United States the sum of £ 10,000.

BENSON ROBERT HENRY (UNITED STATES) *v.* GREAT BRITAIN*(Fijian Land Claims. November 2, 1923. Pages 599-605.)*

CESSION OF SOVEREIGNTY, ANNEXATION: PRIVATE PROPERTY RIGHTS ACQUIRED PREVIOUS TO.—EVIDENCE: BURDEN OF PROOF. Cession of sovereignty over Fiji Islands by native chiefs in 1874. Petition presented by Henry, United States citizen, for Crown grant to 480 acres in island of Fiji. Petition disallowed by Governor in Council in 1887. Claim for compensation made before Tribunal. Burden of proof: claimant must prove that on date of cession of sovereignty he was proprietor in his own right of 480 acres in question. *Held* that no evidence brought to that effect.

*Cross-reference:* Am. J. Int. Law, vol. 18 (1924), pp. 821-827.

This is a claim for compensation, preferred by the Government of the United States of America on behalf of one, Benson Robert Henry, an American citizen, arising out of the disallowance of his title to 480 acres of land in the island of Fiji. We propose to state the facts of this case only in detail sufficient to explain the character of the claim and to elucidate our decision which turns, as will presently appear, on one single question, namely, whether on October 10, 1874, the date of the cession of Fiji to Great Britain, the claimant was, in his own right, proprietor of the lands in question or any part of them.

In September, 1855, Commander Boutwell, of the United States Navy, whose ship was then visiting Levuka, imposed upon the chief Cakobau the payment of about £9,000 as compensation for destruction and theft by Fijian natives of property belonging to American citizens. This sum was to be paid in 12 months. In 1867 only a small portion of it had been paid; and on July 12 of that year Cakobau signed a document hypothecating certain lands as security for payment of the balance.

In 1868 two gentlemen, by name Brewer and Evans, arrived in Fiji from Melbourne as agents for the Polynesia Company, Limited, of Melbourne, then about to be formed; and on July 23, 1868 a charter was granted them, as such agents, by Cakobau, who is chief signatory, with the ratification and confirmation of six principal chiefs under Cakobau.

By the material portion of that charter, Brewer and Evans undertook on behalf of the said company to provide for the payment of the compensation, already referred to, to the United States of America; and, in consideration thereof, Cakobau ceded, granted, and transferred to Brewer and Evans as trustees for the said proposed company about 200,000 acres of land as specified in the schedule. Paragraph 4 of the schedule is as follows:

"4. Also Suva, its harbour, territories, and district, commencing from Lami, running along the coast towards Rewa, to the township of Kalabo, and running inland to the Waimanu" (memorial, p. 259).

The lands so described include those in respect of which Henry's claim arises.

This charter was accompanied by the following agreement:

"The Company agree not to alienate any of the land until the whole of the American debt is paid. Should the amount not be paid within the time specified in the agreement of the Company with Dr. Brewer, the land reverts to King Thakombau" (memorial, p. 259).

On the following day, July 24, Evans and Brewer executed an agreement under seal, by which they undertook to pay the balance of the compensation due from Cakobau to the United States of America, the first instalment on their return to Melbourne, the second and final instalment on or before July 24,

1869. These instalments were, in fact, paid by the Polynesia Company, Limited, on July 13, 1869, and on November 19, 1870, respectively.

By a deed dated July 13, 1869, Cakobau and one Natika, with the ratification and confirmation of nine other chiefs and landowners, who also signed, conveyed to the Polynesia Company, Limited, certain lands at Suva to the extent of about 27,000 acres, wherein were included the 480 acres in respect of which this claim for compensation is made.

The Polynesia Company, Limited, having been formed, issued its regulations in November, 1869, under which land warrants were to be issued to shareholders entitling them to "select" lands in districts declared by the Company "open for settlement". The Suva lands were declared open for settlement. No shareholder might make more than one frontage selection in the Suva district; and any selection with a sea frontage was limited to 160 acres.

On August 12, 1870, Jacob Brache, a director of the Polynesia Company, Limited, T. Copeland and the claimant Henry entered into the following agreement at Melbourne:

*"Articles of Agreement"*

"Melbourne, Australia

"August 12, 1870

"We, the undersigned Jac. Brache and T. Copeland and B. R. Henry, do agree to associate ourselves together for the purpose of selecting land in Fiji from shares and land warrants of the Polynesian Company Limited now held by the said Jac. Brache and for said purposes do hereby agree to send B. R. Henry to Fiji to select and locate upon such lands as he may deem best for agricultural purposes and we further agree to give to B. R. Henry in consideration of his services when the association is entered in and agreed to, one-third of one hundred and sixty of the above-named shares, and Thos. Copeland agrees to pay J. Brache one hundred and forty pounds sterling for eighty of the above shares if the said B. R. Henry reports that land can be cultivated in Fiji profitably and to the mutual advantage of each of the undersigned.

"J. Brache (in trust)

"T. Copeland

"B. R. Henry"

(in memorial, p. 264).

On the same day, in pursuance of this agreement. Henry signed a receipt in these terms:

"Melbourne, August 12, 1870.

"Received from Mr. Jacob Brache one hundred and sixty shares in Polynesia Company Limited with land warrants for six hundred and forty acres and also, warrants for six town lots, such shares and warrants to be held in trust by the undersigned in accordance with the Articles of Agreement between Jacob Brache, Thomas Copeland, and Benson Robert Henry, dated August 12, 1870; also another warrant for six town lots by the Polynesia Company Limited in the name of Franz Bleaker and are in the name of Charles Brache all the above mentioned shares and land warrants to be held in trust by the undersigned.

"B. R. Henry

"Numbers of issue of shares, viz.: 504, 505, 507, 508, 509, 510, 511; 17 land warrants, viz.: 382, 129A, 190A, 466, 468, 469, 470, 471, 472, 473, 214A, 189A" (memorial, p. 268).

This document is ungrammatical and confused; and the number of warrants specified in the footnote is irreconcilable with the receipt itself. In our opinion, the first sentence of the receipt refers to the four land warrants Nos. 586, 587, 588 and 589 hereinafter mentioned.

In December, 1870, the claimant Henry and Copeland arrived in Suva and selected four lots of 160 acres each, represented by warrants numbered 586 to 589 inclusive. Two contiguous lots, the warrants for which were numbered 586 and 588 fronted on the Tamavua River, and are hereinafter referred to as the Tamavua Block; two other contiguous lots, further south, fronting on Sauva Harbour, are hereinafter referred to as the Harbour Block, and were covered by warrants 587 and 589.

Warrant No. 586 passed into the possession of Jacob Brache and was lost. The land held thereunder formed the subject matter of a conveyance from the Polynesia Company, Limited, to the claimant Henry date April 12, 1875. Warrant No. 588 is made out to Charles Brache and his assigns, and is endorsed under date of December 23, 1870, by Henry, as attorney for Charles Brache, to Copeland. Warrant No. 587 is made out to Henry and his assigns and is endorsed with an assignment in blank by Henry, also under date of December 23, 1870, thus becoming negotiable. Warrant No. 589 is made out to T. Copeland and his assigns and is not endorsed. It is with the 480 acres under warrants 586, 587 and 588 that this claim is concerned.

On July 29, 1873, Henry and Copeland executed a power of attorney to Jacob Brache, authorizing him, *inter alia*:

"... for us and in our names and as our names and as our acts and deeds to sign, seal and deliver all deeds and documents, receipts &c. and receive all moneys, lands, warrants, and conveyances of land to which we may become entitled in virtue of our shares in the Polynesia Company Limited and selections made by us in Suva, Fiji, under the regulations of the aforesaid company, also to vote and act for us at all meetings of the Polynesia Company Limited and to sue and be sued in our behalf (in all matters relative to the aforesaid company) . . ." (memorial, p. 279).

On August 12, 1873, Jacob Brache, acting under this power, assigned all right, title, and interest of Copeland and Henry in both the Harbour and Tamavua Blocks to Charles Brache, to be held in trust for a certain proposed company until certain payments were made to Jacob Brache by Henry and Copeland. There is no evidence that these payments were ever made.

In April, 1874, Henry pledged the Harbour Block warrants, Nos. 587 and 589, to one Simmonds for £ 45, and shortly afterwards in that year left Fiji; nor, except that he is alleged to have been subsequently in communication with his attorney in Fiji, Mr. Scott, is he heard of again till 1898, when, in connexion with proposed action by the United States State Department on his behalf in the matter of his Fiji land claims, he swears in Oregon an affidavit containing statements of doubtful accuracy.

In October, 1874, Fiji was ceded to Great Britain and the Lands Commission was instituted by Great Britain to inquire into existing land titles in Fiji in accordance with the undertaking contained in the deed of cession.

In December, 1874, Jacob Brache redeemed the pledged Harbour land warrants from Simmonds, who enclosed a receipt to Brache in the following letter:

*"Receipt for £ 43. 17s. 5d.*

"Mr. Jacob Brache

"Dear Sir,

December 7, 1874

"I hereby acknowledge to have received from you (and for which you have a separate receipt) the sum of £ 43. 17s. 5d. for money advanced by Mr. W. Simmonds, of Suva, to Mr. B. R. Henry, of Suva, on certain warrants of land selected by him for you, and which said warrants I have handed to you.

"Yours truly,

"C. SIMMONDS"

(British answer p. 9).

The suggestion underlying this letter, that the original selection of Suva lands by Copeland and Henry was made on behalf of Jacob Brache, is repeated in another letter written to Jacob Brache by Copeland, which is in these terms:

"My dear Mr. Brache,

Levuka, June 21, 1875.

"Yours of the 31st ultimo to hand. I enclose you the power of attorney, signed as requested, and sincerely trust you will come out of the Polynesia 'spec' all right.

"T. A. COPELAND

"P.S. The Governor and Land Commissioner have arrived. I shall put in my application for the Suva Block, and send you full power of attorney. It is the only way left to secure you the block" (answer, p. 10).

And again, in a letter to the Commissioner of Lands, Fiji, dated Melbourne, September 28, 1875, Jacob Brache, referring to Copeland's 160 acres of the Harbour Block, writes:

"... As I am the holder of the said warrant under assignment, the title for such land must naturally pass in my hands" (answer, p. 12).

Some correspondence between Jacob Brache and the Lands Commission ensued; and on January 13, 1876, Jacob Brache, as attorney for one Alfred Asbeck, presented a petition for a Crown grant in respect of the Harbour Block alleging therein that Asbeck on September 1, 1873, had purchased these lands from Copeland and Henry and had paid £ 160 for them. This petition was heard in March, 1878, and, no evidence being offered, was disallowed.

On January 28, 1880, Jacob Brache preferred two more petitions to the Lands Commission, one, as attorney on behalf of Henry and Copeland, in respect of the Harbour Block of 320 acres; another, on behalf of Henry, in respect of the Tamavua Block of 320 acres. The two petitions were heard and were disallowed by the Governor in Council on January 31, 1882. The Tamavua Block petition was reheard and dismissed on August 21, 1883. In connexion with the rehearing of the Harbour Block petition, a question was raised as to the authority of Mr. Jacob Brache to represent Henry and Copeland. The point was argued before the Council on November 23, 1886, when Mr. Scott, as counsel for the petitioners, states that he appeared in a twofold position, representing Brache: (1) as attorney for Henry and Copeland; (2) as being pecuniarily interested in the claim (answer pp. 194, 195). This petition, as being one in which the Crown had an interest, was referred, under ordinance XXV, of 1879, to the Acting Chief Justice, who delivered an opinion to the effect that the claim be disallowed. This opinion was confirmed and the petition

disallowed by the Governor in Council on September 12, 1887. These appear to us to be all the facts necessary for the decision of this claim.

For the purpose of our decision we make the following assumptions:

1. That Cakobau and his co-signatories gave a valid title in the Suva lands to the Polynesia Land Company Limited.
2. That the Polynesia Land Company Limited gave to their transferees valid titles in the Suva lands.
3. That a land warrant was a good muniment of title, whether perfected by a conveyance or not.
4. That no breach of the regulations of the Polynesia Land Company Limited had been committed.
5. That the title of the transferees of the Polynesia Land Company Limited was not affected by the fact that the payment of the second instalment of the indemnity by the Polynesia Land Company to the United States of America was made 16 months after the appointed date.

We now address ourselves to the decisive question:

Was the claimant Henry on October 10, 1874, the date of the cession of Fiji to Great Britain, proprietor, in his own right, of the 480 acres of land in question or of any part of them?

The onus of satisfying the Tribunal on this point lies on the claimant.

Our answer to that question is in the negative.

The reasonable inference in our opinion to be drawn from Henry's operations and conduct, viewed in the light of the documents, and, in particular, of:

- (1) The land warrants themselves;
- (2) The agreement between Jacob Brache, Copeland and Henry dated August 12, 1870 (memorial, p. 264);
- (3) The receipt signed by Henry dated August 12, 1870;
- (4) The assignment by Jacob Brache to Charles Brache dated August 12, 1873 (memorial, p. 316);

is that Henry was acting from the beginning, whether he be correctly described as trustee or as agent, not on his own behalf. In any case, the evidence falls far short of discharging the onus of proof which is imposed upon the claimant.

But, further, even if it be assumed that, in the first instance, Henry acquired these 480 acres of land for himself, having regard to the facts and documents already referred to and to the sale on September 1, 1873, for valuable consideration of Henry's 160 acres of the Harbour Block to Alfred Asbeck (answer, p. 14), we can not, in the absence of any explanation of these transactions by Jacob Brache, find ground to warrant us in making any award in favour of the claimant.

*Now therefore:*

The decision of the Tribunal in this case is that the claim of the Government of the United States of America be disallowed.

## HEIRS OF JOHN B. WILLIAMS (UNITED STATES) v. GREAT BRITAIN

(*Fijian Land Claims. November 8, 1923, Pages 606-611.*)

CESSION OF SOVEREIGNTY, ANNEXATION: PRIVATE PROPERTY RIGHTS ACQUIRED  
PREVIOUS TO.—INTERPRETATION OF (PRIMITIVE) MUNICIPAL LAW.—

EVIDENCE: DOCUMENTS, VALIDATION, DELETIONS.—CONTRACT: INTERPRETATION, FACTS, FAIRNESS, INTENTION OF PARTIES.—DAMAGES: LUMP SUM. Conveyance in 1846 to Williams, United States Commercial Agent in Fiji, of three lands of 100, 20 and 1,000 acres in Fiji Islands by native chiefs. Cession of sovereignty in 1874 by native chiefs to Great Britain. Subsequent claims for Crown grants concerning three lands disallowed.

Since conveying chiefs were rebels and fugitives and therefore unable to give good titles, deeds for first two lands signed by them not valid. Endorsement by two native landholders adds nothing to their legal effect. Property, moreover, in dispute: Williams occupied two lands not before intervention in 1855 by United States naval commander, who also obtained endorsements on two deeds from chiefs of Vutia. Circumstances, however, largely rob endorsements of value as evidence of free consent to conveyance. Two further documents signed in 1856 by two Vutia chiefs merely acknowledge conveyances executed in 1846 and do not affect Williams' title. *Held* that no title proved sufficient to justify favourable award.

Grantors of third land were in position to give good title. Property not in dispute. Land conveyed to Williams and two others whose names deleted, while no evidence that Williams, who died in 1860, survived two others. *Held* that deed created tenancy in common, not joint tenancy: fairness, facts, intention of parties. Award made for one third of compensation due in respect to whole property. Lump sum allowed.

*Cross-reference:* Am. J. Int. Law, vol. 18 (1924), pp. 827-831.

This claim is preferred by the Government of the United States of America on behalf of the heirs of J. B. Williams, asking for compensation arising out of the disallowance of that gentleman's title to certain lands in Fiji.

The lands in question are: (1) 100 acres in the island of Laucala; (2) the island of Nukulau, 20 acres; (3) 1,000 acres at Nukubalavu in the island of Viti Levu.

Mr. J. B. Williams appears to have gone to Fiji about the year 1840; he became United States Commercial Agent there, and died there in 1860.

1. As to the *Laucala* land, the claimants produce four documents as the foundation of Williams' title.

The first is a conveyance, dated June 1, 1846, from the chief Cokana Uto or Phillips to Williams and Ichabod Handy, for a consideration of \$50.20 in trade (memorial, p. 329). This deed is endorsed by mark, by two natives, Koromoves and Korotabaleo, who, as "landholders, acknowledged and consented to the sale". These two persons similarly endorsed the Nukulau conveyance and are referred to by Mr. Carew, the Land Commissioner, in his report on that petition, in the following terms:

"They appeared to have followed Cokana Uto about for the purpose of confirming sales of land made by him whether his own property or that of others and it appears from evidence in other claims to have been a matter of indifference to them" (memorial, p. 393).

The second Laucala deed is a conveyance, in consideration of some articles in trade, from Koquaraniqio to Williams and Handy, dated September 25, 1846.

Both Cokana Uto and Koquaraniqio at the respective dates of their conveyances were rebels against and fugitives from the paramount chief of Rewa.

There is no evidence of occupation of Laucala by Williams or anyone else in right of Williams till in the year 1855 or 1856. That occupation took place under the following circumstances.

In September, 1855, the United States ship *John Adams*—Commander Boutwell—visited Fiji in order to take punitive measures against the natives for the destruction and theft of American citizens' property, amongst such property being Mr. Williams' house on Nukulau. Commander Boutwell seized the occasion to investigate Williams' title to Laucala which was in dispute. In his report to the Secretary of the Navy (memorial, p. 362), after referring to the recent disturbances, he says:

"On learning these facts I determined to make the natives build our consul another house; pay the value of \$1,200 in pigs, gum, and fish, for the loss of his property; and reinstate Mr. Williams in possession of his land, the two small islands of Nukulau and Lauthala, which he had purchased and had deeds for. I examined the interpreter who had made the purchase for the consul and his deeds (and) decided that the land belonged to our consul but was informed by Mr. Moore that the chiefs of Rewa and Vutia disputed the claim of Mr. Williams and Mr. Handy (an American) to this land. On September 18 I had an interview with the chiefs of Rewa on board, who acknowledged that the land had been sold to Mr. Williams, and on the 19th I had an interview with the chiefs of Vutia, who not only consented to Mr. Williams' claim, but countersigned the deeds."

These countersignatures, by mark, appear under an endorsement on the two deeds referred to testifying that:

"This matter of the land has been settled to our satisfaction".

Commander Boutwell also endorsed and signed statements to the effect that the title of Williams and Handy was, in his opinion, good.

Without enquiring in detail into the actions of Commander Boutwell, and quite apart from native evidence, the circumstances in which these endorsements were made appear to us largely to rob them of value as evidence of free assent to the conveyances in question. Nor is Commander Boutwell's opinion of Williams' and Handy's title fortified by the fact that, according to his own report, he interviewed the chiefs after having determined to reinstate Mr. Williams in his disputed property.

But Williams was not yet satisfied as to his title, and two more documents were drawn up in identical terms and signed on the same day, the first by a Vutia chief, by name Ko Ra Daka Waqa, dated September 2, 1856, the other, by another Vutia chief, by name Tunu, dated October 2, 1856, and witnessed by one Charles Rounds. The following is the text of the earlier document:

"Lauthala Rewa, September 2, 1856.

"I, Ko Ra Daka Waqa, one of the chiefs of Vutia do hereby acknowledge the purchase and payment by John B. Williams and Ichabod Handy of all that tract and parcel of land called Lauthala Point, or Island, all that part lying south of the creek called Vunia Vaudra which communicates with Rewa River and the bay on the west side of Lauthala, the said creek being navigable for boats at high water, and being the first approach from the anchorage in the roads; the receipt for the goods in payment whereof was previously acknowledged as per deed granted the first day of June and twenty-fifth day of September in the year 1856. To have and to hold the above-released premises to the said John B. Williams and Ichabod Handy their heirs and assigns to them and their use and behoof for ever.

"Witness to signature:  
CHARLES ROUNDS

his  
Ko RA DAKA WAQA ×  
mark."

There is no evidence of either of these documents having been explained to the signatory, or of any consideration having passed. But, apart from their value as evidence, it is somewhat difficult to appreciate their effect as muniments of title. They do not purport to be conveyances, or anything more than acknowledgments of the conveyances executed and the consideration paid in 1846. If the deeds of 1846 are valid and *bona fide* conveyances, these documents are superfluous; if the former are not valid and *bona fide* conveyances, the latter do not make them so.

Williams died on June 10, 1860, and Dr. Isaac Mills Brower took charge of his estate and granted leases of the Laucala lands, as Williams had done in some instances between 1856 and 1860.

After the cession of Fiji to Britain in 1874, the Land Commission was instituted to investigate and report on the titles to land granted by natives to foreigners; and in 1875, the heirs of J. B. Williams presented a petition for a Crown grant of the Laucala lands in question. It was heard and disallowed in 1878. The petition was reheard in 1880 and the disallowance affirmed (answer, p. 100).

We find that:

1. Neither of the two grantors under the deed of 1846 was, at the respective date of those deeds either *de facto* or *de jure*, in a position to give a good title to the Laucala land;

2. The endorsements on the two deeds of 1846 add nothing to their legal effect;

3. The title to these lands was in dispute in September, 1855;

4. There was no occupation of the Laucala land by Williams or on Williams' behalf till late in 1855 or in the year 1856;

5. The two deeds of 1856 do not affect Mr. Williams' title which stands or falls by the two conveyances of 1846.

It is pointed out in the memorial (p. 58), that: "four subclaims to land on Laucala, obtained by purchase from Williams and presented by Messrs. Burt, Hennings, and Ryder, were allowed", the suggestion being that there is some *inconsistency between disallowing the title of Williams and allowing titles of purchasers from him*. There is no such inconsistency. These three purchasers proved substantial occupation and, thereupon, they were entitled under the principles followed in Fiji land cases even in the absence of strict title, to a Crown grant *ex gratia*.

With regard to occupation of Laucala by Williams or in his right, no Crown grant *ex gratia* was made; and the refusal of such a grant is not a matter for the consideration of this Tribunal. It may be said that the fluctuating fortunes of native chiefs in civil war afford but slender foundation for any conclusion in one direction or the other as to their right to convey lands, but, apart from that feature of this claim, we think that no title is proved sufficient to justify an award in favour of the claimants. The claim in the Laucala case is, therefore, dismissed.

2. With regard to the *Nukulau* claim, it is to be noted that the Land Commissioner reported favourably upon it, though it was disallowed by the Governor in Council both on the report and after rehearing. With this exception, the facts are substantially the same as in the Laucala claim.

The deed alleged to found Williams' title is a grant of the island of Nukulau by Cokana Uto or Phillips to Williams and Andrew Breed and Samuel T. House, for a consideration of £ 30 in trade, and dated June 8, 1846 (answer, p. 101). Qaranigio endorsed the deed on September 11, 1848:

"Nukulau, September 11, 1848.

"I acknowledge and consent to the sale of the within-named land, Nukulau, payment having been made to Cokana Uto, myself one piece blue and orange print, twelve dollars.

"Witnesses:

"JOHN H. DANFORD  
"DAVID WALKER"

"QARAINQIO,

"his X mark

(Answer, p. 102)

At these respective dates Cokana Uto and Qarainqio were rebels against and fugitives before the paramount chief of Rewa and, therefore, unable to give good title to Nukulau.

Koromovei and Korotabalea endorsed on this conveyance an acknowledgment and consent similar to that on the Laucala deeds.

Commander Boutwell endorses this deed as follows:

"Having examined this deed I consider John B. Williams' title to the land good.

"E. B. BOUTWELL

"Commanding U.S.S. *John Adam*

"Lauthala Roads

"September 17, 1855"

Our observations therefore on the Laucala deeds of 1846 and our first three findings in that case apply to this claim also.

The claim therefore in this case is dismissed.

3. *Nukubalavu*. This claim is different.

Kaibau and Koroiduadua, the grantors of this land under a conveyance of October 12, 1846, for a consideration of \$46 in trade, were in a position to give a good title.

There is little or no evidence of dispute about the property, and, probably in consequence of that very fact, Commander Boutwell plays no part in this claim. As in the Nukulau case, the conveyance was to Williams, Breed and House, the two latter names having been erased wherever they occur throughout the deed, presumably by Williams who profited thereby. Having regard to the fact that these same erasures occur both in the Nukulau and the Nukubalavu deeds at an interval of four months, they must have been made after the execution of the latter deed. There is no evidence that Williams survived Breed and House. If, therefore, this deed were taken as creating a joint tenancy in the strict sense, this would be sufficient to defeat this claim. But in our opinion, it would be fairer and more in consonance with the real facts of the case and the intentions of the parties to treat the deed as creating a tenancy in common, with the result that the heirs of J. B. Williams are entitled only to one third of the compensation which we find to be due in respect of the whole property. The range of value is very wide. The claim is for \$10,000; the valuation of Messrs. Page, Scott, and Joske in 1882 (memorial, p. 390) is £ 2,000; that of Mr. Allardyce in 1893 (answer, p. 26) is as follows:

"*Nukubalavu*. This block is situated on the south coast of Vanualevu and is of no particular value. If put up to auction it would not fetch above a few pounds."

We think that the justice of the case would be met by an award of a lump sum of £ 150.

*Now, therefore:*

The decision of the Tribunal in these cases is:

(1) *Laucala*. That the claim of the Government of the United States of America be disallowed.

(2) *Nukulau*. That the claim of the Government of the United States of America be disallowed.

(3) *Nukubalavu*. That the British Government shall pay to the Government of the United States of America the sum of £ 150.

# ISAAC M. BROWER (UNITED STATES) *v.* GREAT BRITAIN

*(Fijian Land Claims. November 14, 1923. Pages 612-616.)*

CESSION OF SOVEREIGNTY, ANNEXATION; PRIVATE PROPERTY RIGHTS ACQUIRED PREVIOUS TO.—INTERPRETATION OF (PRIMITIVE) MUNICIPAL LAW.—EFFECTIVE OCCUPATION. Purchase in 1863 by two United States citizens of six small islands in Fiji from Fiji chieftain. Purchase in 1870 of a half interest in same islands by Brower. United States citizen. Cession of sovereignty in 1874 by native chiefs to Great Britain. Subsequent claim for Crown grant presented by Brower disallowed in 1881. *Held* that chieftain had power to give title (reference made to Burt case, see p. 93 *supra*) and that, since islands never had been inhabited, no question as to their effective occupation by Brower could arise.

CONTRACT: INTERPRETATION, MOST REASONABLE VIEW.—PRESENTATION OF CLAIM ON BEHALF OF INTERESTED PARTY. Terms of arrangement entered into by Brower with two individuals some time before disallowance of claim for Crown grant. In the absence of precise facts, the Tribunal interpreting the arrangement takes the most reasonable view. *Held* that title to a half interest was properly vested in Brower at time of cession of sovereignty and at date of filing of claim before Tribunal and that Great Britain, as succeeding Power in the islands, under the obligation assumed at time of cession should have recognized title.

DAMAGES: SPECULATIVE AND PRECARIOUS VALUE, NOMINAL DAMAGES. Since value of islands rested entirely upon rumour of buried treasure, only nominal damages awarded.

*Cross-reference:* Am. J. Int. Law, vol. 18 (1924), pp. 832-835.

This claim is presented by the United States on behalf of Isaac M. Brower for the sum of \$1,250, with interest. It arises out of the disallowance of Brower's application for a Crown grant to certain lands in Fiji. The facts are as follows:

In 1863, two American citizens, Thompson and Gillam, purchased from a Fiji chieftain known as Tui Cakau a group of small islands, six in number, forming a part of the Fijian group. The islands were designated on the charts as the Ringgold Islands, the native appellation being Yanuca-i-Lau, meaning "bad islands". They were not inhabited. Not more than three of them were of any potential value, the rest being described as "mere rocks" (memorial, p. 439) or "sand banks" (memorial, p. 424). The natives appear to have gone there intermittently to get turtles.

The circumstances surrounding the purchase were somewhat peculiar. Gillam and Thompson came to Fiji apparently with the idea that buried

treasure existed on these islands. They first consulted with Brower, United States Consul, who directed them to Tui Cakau as the owner. They then bought the islands from Tui Cakau, paying \$250, in Chilean ten-dollar gold pieces. The purchasers at once went to the islands and spent about two months digging over the ground evidently in a vain search for treasure. At the end of this period they abandoned the enterprise and went away from Fiji, leaving in Brower's hands a blank deed of sale. Brower subsequently sold under this deed to one Barber, who put an agent named Macomber in charge to maintain a sort of constructive possession with the intention of some day going there to occupy them (memorial, p. 423).

In 1870, Brower bought a half interest from Barber for the sum of £ 30, and in 1873 the remaining half interest was sold to one Halstead.

On October 23, 1875, immediately after the cession of Fiji to Great Britain, Brower and Halstead applied for a Crown grant. In November, 1880, the application was denied by the Land Commissioners on the grounds of: (1) insufficient and fictitious occupation; (2) long-continued adverse occupation (memorial, p. 421).

In 1881, at the request of Brower, there was a rehearing at which further evidence was adduced, and in October of that year a final judgment of disallowance was rendered.

Upon the final hearing in 1881, the attorney for Brower and Halstead asked leave to amend the petition and to substitute the names of two half-castes called Valentine for that of Brower, and the amendment was allowed (memorial, p. 431).

Some three years previously it seems that Brower had entered into some arrangement, the terms of which are not found in the record, for the disposal of his interest to the Valentines for the sum of £ 100. After the failure to secure a Crown grant the Valentines sued Brower in the Supreme Court of Fiji for the repayment of the £ 100, and in August, 1884, recovered judgment. This phase of the subject is dealt with as follows in the report made by George H. Scidmore, United States Special Agent:

"Previous to the hearing of this claim by the Fiji Land Commission Brower entered into a contract with William Valentine and his two brothers (half-castes by an American father and native mother) for the sale of his (Brower's) interest in the islands, and received from the Valentines £ 100. Brower prosecuted the claim before the Commission in his own name, but failed to obtain a Crown grant. He was subsequently sued in the Supreme Court of Fiji by the Valentines for the repayment of said £ 100, and, in August, 1884, they recovered judgment for that amount, with interest and costs" (memorial, p. 433).

On these facts it is contended by counsel for Great Britain: first, that good title to the islands was never secured because Tui Cakau had no power to dispose of them; and second, that in any event no recovery in Brower's favour can be had because before final judgment in the proceedings for a Crown grant he had withdrawn in favour of the Valentines.

On the question of the chief's power to give title we are of opinion that the facts bring this case within the principles laid down in the decision of the Burt case already made by this Tribunal. Tui Cakau was conceded to be the paramount chief of the district in which the Ringgold islands lay. Quoting again from the Scidmore report:

"Tui Cakau was paramount chief of Cakau-drove, and these islands were within his dominions. His capricious will was the supreme law there, and the time, labour, property, wives, children and lives of his people were at his mercy" (memorial, p. 434).

The final judgment of disallowance states:

"We do not doubt that the purchase in question was honestly made nor that any rights which attach to the possession of the deed has, after passing through several hands properly vested in the present claimants. We are however of opinion that Tui Cakau had no right to sell these lands without the consent of the taukeis . . ." (memorial, p. 431).

The right of the paramount chiefs to sell without taukei consent has been fully dealt with in the opinion in the Burt case already mentioned.

It is hardly necessary in this connexion to discuss the subject of occupation, for a careful examination of the record discloses nothing rising to the dignity of effective occupation either by natives or by the purchasers, although there is evidence indicating that the latter took steps to maintain possession by placing their agents from time to time upon the islands, and that Tui Cakau at their request on one or two occasions undertook to keep the natives off. The islands were to all intents and purposes uninhabited. We consider, therefore, that the title was vested in Brower and Halstead at the time of the cession to Great Britain.

The issue founded upon Brower's alleged withdrawal from the situation requires especial attention. Did the subsequent proceedings, particularly the Valentine transaction, operate to defeat his claim? We are somewhat in the dark as to just what took place between Brower and the Valentines. According to Scidmore, a contract for the sale of Brower's interest was entered into. Whether there was an out and out conveyance by deed is not clear. It may have been an arrangement conditioned upon the final issuance of a Crown grant. Whatever it was we may assume that the Valentines were regarded as the real parties in interest at the time of the substitution in 1881. The effect of the transaction was manifestly a matter of dispute; otherwise the subsequent litigation between Brower and the Valentines would not have taken place. It is contended that if Brower made a sale and the title failed because of the refusal to issue a Crown grant a proper pleading of this act of the State would have been a perfectly good defence to the Valentine suit for recovery of the purchase price and that therefore title can not be regarded as having properly reverted in Brower. The difficulty with this contention is that facts sufficient to support it are not before us. We do not know what the precise arrangement with the Valentines was: we do not know whether they brought suit for damages for breach of contract to convey or whether they sued for recovery of the purchase money under some condition expressed in the deed. We do not know whether the plea above referred to was made and disallowed by the Court, or whether Brower neglected to take advantage of such a defence, if it existed. It seems idle to speculate on these matters in the absence of the facts. The most reasonable view is that Brower did try to dispose of his interest; that the transaction was upset by the failure to secure a Crown grant and that the final result was to place him exactly where he stood in the beginning. The effort to sell was abortive and he was obliged to pay back what he had received. We find no evidence that the title definitely passed to the Valentines and remained in them; but their complete disappearance from the situation raises an obvious presumption against the supposition that Brower's interest actually passed to them.

We hold that the title to a half interest in the Ringgold islands was properly vested in Brower at the time of the cession to Great Britain; that this title should have been recognized by Great Britain as the succeeding Power in the islands under the obligation assumed at the time of the cession; and that Brower was the holder of the title at the date of the filing of the claim against Great Britain by the United States.

Passing to the question of damages, it is plain that the islands forming the subject matter of this claim had only a speculative and precarious value. Nobody had ever taken the trouble to occupy and settle upon them. There is no evidence of any improvements. In their natural state they apparently formed only a fishing ground for turtle. The chart indicates that they were little more than reefs or points of rock. Their value apparently rested entirely upon a rumour of buried treasure. The original purchase for a fantastic consideration paid in gold pieces is explainable on no other theory. The subsequent dealings were clearly based upon the same speculative consideration. The treasure tradition evidently persisted and the same fictitious valuation is reflected in the purchase by Brower of a half interest for £ 30, and in the purported transfer of that interest to the Valentines for £ 100. With the lapse of time the islands as such did not assume any real value, for as late as 1898, Mr. Allardyce, the Colonial Secretary and Receiver-General, made the following report upon them:

"These are six small islands of the Ringgold group. They are mere islets with a few cocoanut trees on them. They are situated in a remote portion of the Colony at a distance of about 180 miles from Suva. If put up to auction, I doubt if there would be a single bid for them" (answer, p. 11).

In these circumstances, we consider that notwithstanding our conclusion on the principle of liability, the United States must be content with an award of nominal damages.

*Now, therefore:*

The Tribunal decides that the British Government shall pay to the United States the nominal sum of one shilling.

#### EASTERN EXTENSION, AUSTRALASIA AND CHINA TELEGRAPH COMPANY, LIMITED (GREAT BRITAIN) *v.* UNITED STATES

(November 9, 1923. Pages 73-81.)

SEA WARFARE.—DESTRUCTION OF PRIVATE PROPERTY IN TIME OF WAR.—SUBMARINE CABLES, INTERNATIONAL CONVENTION FOR THE PROTECTION OF—, GENERAL PRINCIPLE OF INTERNATIONAL LAW, COMMUNICATIONS OVER HIGH SEAS, NEUTRALS, CONTRABAND, BLOCKADE. Destruction by United States naval authorities on May 2, 1898, in Manila Bay, during Spanish-American War, of submarine cables owned by neutral company *held* legitimate. Unlimited right of destruction in time of war recognized by article 15 of International Convention for the Protection of Submarine Cables of 1884. Such right also based upon general principle of international law entitling belligerent to deprive enemy of communications over high seas, whether or not communications kept up by neutrals (contraband, blockade).

NECESSARY WAR LOSSES.—REQUISITION, EXPROPRIATION, ANGARY, SEIZURE OF NEUTRAL-OWNED CARGO.—NEUTRALITY AND PUBLIC SERVICE.—INTERNATIONAL CHARACTER OF SUBMARINE CABLES.—EQUITY. COMITY, AWARENESS OF RISK, DISCRIMINATION BETWEEN (1) ALIENS, (2) OWN NATIONALS AND ALIENS. Destruction in time of war of neutral-owned submarine cables *held* not to give rise to legal right of compensation. No analogy with requisition, expropriation, or exercise of right of angary. No analogy either with seizure

of neutral-owned cargo: the Company, operating as a Spanish public service under the authority of the Spanish Government, cannot be regarded as a neutral. For the same reason, the Company's cables lack international character.

No compensation due on the ground of equity, the Company having been well aware of its own risk. It is perfectly legitimate for a Government, in the absence of any special agreement to the contrary, to afford to subjects of any particular Government treatment which it refused to subjects of other Governments or to reserve to its own subjects treatment which is not afforded to foreigners.

APPLICABLE LAW, FRAMING OF NEW RULES BY TRIBUNAL. Duty of Tribunal is not to lay down new rules.

*Cross-references:* Am. J. Int. Law, vol. 18 (1924), pp. 835-842; Annual Digest, 1923-1924, pp. 415-419.

*Bibliography:* Nielsen, pp. 40-72; Annual Digest, 1923-1924, p. 419.

This is a claim presented by His Britannic Majesty's Government on behalf of the Eastern Extension, Australasia and China Telegraph Company, Limited, a British corporation, for a sum of £ 912. 5s. 6d., being the amount which this company had to expend upon the repair of the Manila-Hong Kong and the Manila-Capiz submarine telegraph cables which had been cut by the United States naval authorities during the Spanish-American War in 1898.

The facts are as follows:

Under concessions granted by the Spanish Government and dated, respectively, December 14, 1878, and April 14, 1897, the Eastern Extension Company had laid down certain submarine telegraph cables connecting Manila and Hong Kong and Manila and Capiz, which the Company was operating in 1898.

In April, 1898, war broke out between the United States and Spain, and on May 1, 1898, the United States naval forces, under the command of Commodore afterwards Admiral, Dewey, entered Manila Bay and destroyed or captured the Spanish warships lying in that harbour. On the same day (United States answer, p. 14, exhibit 5) Commodore Dewey, through the British consul at Manila, proposed to the Spanish Captain General that both the United States and the Spanish authorities should be allowed to transmit messages by cable to Hong Kong. That proposition having been refused, on the morning of the following day, viz., on May 2, 1898, the Manila-Hong Kong cable was cut by order of the American Commodore, this cutting being effected within Manila Bay and consequently within the territorial waters of the enemy.

On May 10 the Company, acting on a formal order of the Spanish Government under the provisions of the concession above referred to, sealed the end of the cable at Hong Kong, thereby preventing any use of the cable by the United States forces. Subsequently, the United States Navy Department proposed to the Company to re-establish cable communication between Manila and Hong Kong, and the Company refused, informing the American Navy Department that the Company was under the orders of the Spanish Government and that the transmission of messages from the Philippine Islands to Hong Kong had been prohibited by that Government (United States answer, p. 12, exhibit 2). Furthermore, as appears from the oral argument on behalf of His Britannic Majesty's Government (notes of the 11th sitting, p. 251), the British Government themselves, acting in the interest of shipping, subsequently asked the Madrid Government if they would consent to the reopening of the cables; but the Spanish Government refused to accede to this request except on terms which the United States could not accept.

On May 23 the Manila-Capiz cable was cut, also inside Manila Bay.

These facts are not contested; and further it is admitted on behalf of Great Britain that the severance of the cable between Manila and Hong Kong, as well as between Manila and Capiz, was a proper military measure on the part of the United States, taken with the important object of interrupting communication whether with other parts of the Spanish possessions in the Philippine Islands or with the Spanish Government and the outside world.

The question is whether or not the United States Government is bound to pay to the Company, as damages, the cost incurred by the Company in repairing the cables.

The British Government admits that there was not in existence in 1898 any treaty or any rule of international law imposing on the United States the legal obligation to pay compensation for the cutting of these cables, but they contend that, under article 7 of the Special Agreement establishing this Tribunal, such compensation may be awarded on the ground of equity, and that the United States Government, having paid compensation to some other foreign cable company for similar cuttings during the same war, is therefore legally bound to compensate the British company, and, finally, that in the absence of any rule of international law on the point, it is within the powers, if it be not the duty, of this Tribunal to lay down such a rule.

The United States Government contends that the cutting of the cables by its naval authorities was a necessity of war giving rise to no obligation to make compensation therefor; that the United States were entitled to treat the said cables as having the character of enemy property, on the ground that their terminals were within enemy territory and under the control of the enemy's military authorities, and that the sealing of the terminal at Hong Kong, on neutral territory, was a hostile act of itself impressing this cable with enemy character. Further, the United States Government contends that there is no rule of international law imposing any legal liability on the United States, but that, on the contrary, the action of the United States naval authorities and the refusal to pay compensation are justified by international law and that the United States Government is not bound to pay compensation to the British company merely because more favourable treatment was meted out to another foreign company, the facts underlying whose claim were, in any case, different. Further, the United States Government say that it is not the duty, nor within the power, of this Tribunal to lay down any new rule of international law, but only to construe and apply such rules or principles as existed at the time of the cutting of these cables.

It may be said that article 15 of the International Convention for the Protection of Submarine Cables of 1884, enunciating the principle of the freedom of Governments in time of war, had thereby recognized that there was no special limitation, by way of obligatory compensation or otherwise, to their right of dealing with submarine cables in time of war. In our opinion, however, even assuming that there was in 1898 no treaty and no specific rule of international law formulated as the expression of a universally recognized rule governing the case of the cutting of cables by belligerents, it can not be said that there is no principle of international law applicable. International law, as well as domestic law, may not contain, and generally does not contain, express rules decisive of particular cases; but the function of jurisprudence is to resolve the conflict of opposing rights and interests by applying, in default of any specific provision of law, the corollaries of general principles, and so to find—exactly as in the mathematical sciences—the solution of the problem. This is the method of jurisprudence; it is the method by which the law has been gradually evolved

in every country resulting in the definition and settlement of legal relations as well between States as between private individuals.

Now, it is almost unnecessary to recall that principle of international law which recognizes that the legitimate object of sea warfare is to deprive the enemy of those means of communication, which the high seas, in their character as *res nullius* or *res communis* afford to every nation. The user by the enemy of that communication by sea, every belligerent, if he can, is entitled to prevent, subject to a due respect for innocent neutral trade; he is even entitled to prevent its user by neutrals, who use it to afford assistance to the enemy either by carrying contraband, by communicating with blockaded coasts, or by transporting hostile despatches, troops, enemy agents, and so on. In such cases the neutrals do not, properly speaking, lose their neutral character; but their action itself loses that character, such action being, as it is said, impressed with a hostile character. Thus it may be said that a belligerent's principal object in maritime warfare is to deprive the enemy of communication over the high seas while preserving it unimpeded for himself.

It is difficult to contend in the same breath that a belligerent is justified by international law in depriving the enemy of the benefit of the freedom of the high seas, but is not justified in depriving him of the use of the seas by means of telegraphic cables.

Not only does the cutting of cables appear not to be prohibited by the rules of international law applicable to sea warfare, but such action may be said to be implicitly justified by that right of legitimate defence which forms the basis of the rights of any belligerent nation.

It is contended, however, that the cutting, however legitimate, may create an obligation to compensate the neutral owner of the cable; and various instances are, or may be, given of legitimate acts which, it is said, do create such an obligation. We do not think that the instances given furnish a just analogy. In those instances, the right is not absolute but limited, and is in reality only itself acquired in consideration of the payment of compensation, and has no existence as a right apart from the obligation to make compensation. Such is the case in respect of requisition, either for the purposes of ownership or user; of expropriations, or, to take a case from maritime law, of the exercise of the right of angary.

Reference has been made to certain opinions (Dupuis, *Revue générale du droit international public*, vol. 10, p. 546) which seem to suggest that in the case of cables which connect enemy and neutral territories and are the property of neutrals, the right of a belligerent to cut ought to be exercised subject to the obligation to pay compensation, since it is not certain that the transmission of messages by the enemy over the cable has the consent of the neutral owner, against whom the belligerent is acting, and who may in fact be innocent. In such a case, it is suggested, the neutral owner of a cable is in the same position as the neutral owner of cargo which may or may not be used for warlike purposes and against whom there is no evidence of intention to assist the enemy, and who, if such cargo be seized, must be paid for it. In the first place, it is a matter of controversy whether or not such rule as to the neutral owner of such cargo in fact exists; secondly, such a rule, if it does exist, is in practice inapplicable to submarine cables, having regard to their peculiar character; thirdly, the facts postulated for the application of the suggested rule do not exist in this case.

The cables in this case were laid and operated, not only by permission or concession granted to a neutral by the Spanish Government, but they were, under those concessions, legally to be considered from the Spanish point of view as "works of public utility" (Schedule of Conditions of March 28, 1898, article 3). The Spanish Government expressly reserved to itself "the right of

organizing over the cable service such a system of supervision as it deems best" (*ibidem*, article 4; Schedule of Conditions of December 14, 1878, article 8). The receiving and transmitting stations had to be situated in the offices of the State (Conditions of 1878, article 6). The Spanish Government had reserved the right, belonging in any case to any State over its own national telegraph lines, and recognized by international telegraph conventions, of suspending the transmission of messages dangerous to the security of the State (Conditions of 1878, article 12); and it was expressly stipulated that the operation of the cable was to be carried out at the risk of the Company, which received in exchange certain privileges, a certain monopoly, and certain exemptions from taxes and imports (Conditions of 1898, article 3). Finally, the order given to the Company to seal the terminal at Hong Kong and the mere fact that the Company considered itself legally bound to obey that order, notwithstanding the fact that this terminal was in a neutral country, the refusals of the Company and the Spanish Government, made respectively to the United States Government and to the British Government, to reopen the lines, appear to be conclusive evidence that the Company was in reality operating, not in the character of a private neutral commercial undertaking subject only to certain local regulations, but as an actual Spanish public service, as completely under the authority of the Spanish Government as would have been any State service. In such circumstances it does not seem possible to regard this Company as ignorant of, or as not having consented to, the use of the cable for military purposes by the Spanish military authorities, or as entitled to avail itself of neutral character in order to claim compensation for the cutting of its cables. The fact is that this Company could not act as a neutral, without violating its concession.

It has been said (see the opinion of Sir Robert T. Reid and Mr. Henry Sutton, British memorial, pp. 12 and 13) that if the cables had been the ordinary property of neutrals, that fact, under the ordinary rule, would have been fatal to this claim, but that the ordinary rule does not apply to such property as these cables, which are of an international character. But it seems difficult to concede such international character to these cables which were under the absolute control and authority of a particular State. If they afforded communication between different countries and nations and in that sense, were international, they were not more international than a packet boat or any other ship trading between various countries.

According to the terms of the concessions, these cables possessed the character of Spanish works of public utility, and if, as private ordinary property, they were subject to destruction without compensation in case of necessity of war, *a fortiori* they were so as an enemy public utility undertaking.

As to the contention that, having regard to the terms of article 7 of the Special Agreement providing for the settlement of these claims, this Tribunal is to decide, "in accordance with treaty rights and with the principles of international law and of equity", compensation in this case should be paid on the ground of equity, the following observations may be made:

If the strict application of a treaty or of a specific rule of international law conducts to a decision which, however justified from a strictly legal point of view, will result in hardship, unjustified having regard to the special circumstances of the case, then it is the duty of this Tribunal to do their best to avoid such a result, so far as it may be possible, by recommending for instance some course of action by way of grace on the part of the respondent Government.

In this case it is to be observed that the Eastern Extension Company was well aware of its own risk in Spanish territory. As has been shown, their concessions expressly provided for it. The various advantages, privileges, exemptions and

subsidies accorded them by the Spanish Government form the consideration in exchange for which the Company assumed the risk of being treated in time of war as a Spanish public service with all the consequences which that position implied.

In the opinion of this Tribunal there is no ground of equity upon which the United States should be adjudged to pay compensation for the materialization of this risk in the form of an act of war the legitimacy of which is admitted.

The British Government contend that, as a matter of right, the Eastern Extension Company is entitled to receive compensation because some other foreign cable company, viz., La compagnie française des câbles télégraphiques, working cables between the United States of America, Haiti, and Cuba, received from the United States Government compensation for the cutting of its cables. It is urged that, when acts of war by a belligerent have resulted in personal injury to individuals in certain territory or in damage to their property in that territory, if the Government of that territory pays the claims of the nationals of one country, it must also pay the claims of the nationals of other countries without discrimination (oral argument, pp. 261 and 262); and further, as the argument would seem to imply (oral argument, p. 264), that if it be established that a Government has paid compensation to its own citizens, then it is bound to pay compensation to foreigners whose person or property was damaged; and authority is said to be found for the last proposition in cases arising out of the Mexican insurrection.

Whether viewed as a general principle, or in its particular application to the facts of this claim, such a proposition appears to us to be impossible of acceptance. It is perfectly legitimate for a Government, in the absence of any special agreement to the contrary, to afford to subjects of any particular Government treatment which is refused to the subjects of other Governments, or to reserve to its own subjects treatment which is not afforded to foreigners. Some political motive, some service rendered, some traditional bond of friendship, some reciprocal treatment in the past or in the present, may furnish the ground for discrimination. We do not know that the provisions of the French or Belgian law, reserving to their own nationals a right to reparation for war losses, gave rise, or could give rise, to any protest by resident foreigners, any more than could the fact that, by special agreement, the Belgians in France and the French in Belgium have been reciprocally admitted to the same treatment in their respective countries. An instance of such discrimination is furnished by the proclamation of Lord Kitchener of Khartoum, dated May 31, 1902, on the final surrender of the Boer forces. In that instrument it is provided (paragraph 10) that a commission would be appointed for the purpose of assisting the restoration of the people to their homes and helping those who, owing to war losses, were unable to provide for themselves; and that for that purpose a sum of money should be placed at the disposal of the commission. The final clause of that paragraph provides as follows:

“No foreigner or rebel will be entitled to the benefits of this clause”.

It appears from the documents in this case that the repairs of the French cables in question had been effected with all expedition and at the express request of the United States authorities and for American strategic purposes (Senate document No. 16, 58th Congress, 2nd session, pp. 22 and 23); that, unlike the British cables, the French cables were used by the American naval authorities and had afforded them direct communication with President McKinley (*ibidem*); and that the French cable company had rendered the United States valuable services during the operations of 1898 (letters from the French Embassy at Washington, November 15, 1901; November 28, 1902; February 19, 1903; March 12, 1903).

There is no evidence that the Eastern Extension Company can avail itself of a similar plea. The French case is a good example of the payment of compensation, on grounds of equity and comity, which did not exist in the British case.

From these considerations it does not appear that the contention of the British Government on this point is in any way justified.

As to the contention of the British Government that, in the absence of any rule governing the matter of cable cutting, it is the duty of this Tribunal to frame a new rule, we desire to say:

First, the duty of this Tribunal, in our opinion, under article 7 of the Special Agreement, is not to lay down new rules. Such rules could not have retroactive effect, nor could they be considered as being anything more than a personal expression of opinion by members of a particular Tribunal, deriving its authority from only two Governments;

Secondly, in any case this Tribunal, as has been already stated, is of opinion that the principles of international law, applicable to maritime warfare, existing in 1898, are sufficient to enable us to decide this case.

*Now, therefore:*

The Tribunal decides that the claim of His Britannic Majesty's Government be disallowed.

## CUBA SUBMARINE TELEGRAPH COMPANY, LIMITED (GREAT BRITAIN) *v.* UNITED STATES

(*November 9, 1923. Pages 82-84.*)

SEA WARFARE.—DESTRUCTION OF PRIVATE PROPERTY IN TIME OF WAR.—SUBMARINE CABLES, INTERNATIONAL CONVENTION FOR THE PROTECTION OF—, GENERAL PRINCIPLE OF INTERNATIONAL LAW.—NECESSARY WAR LOSSES.—DISCRIMINATION BETWEEN: (1) ALIENS, (2) OWN NATIONALS AND ALIENS.—APPLICABLE LAW, FRAMING OF NEW RULES BY TRIBUNAL. Destruction by United States naval authorities on May 11 and July 11, 1898, at the entrance of Cienfuegos Harbour and in San Juan Channel, Cuba, during Spanish-American War, of submarine cables, and of cable house on land. Reference made to decision in Eastern Extension case, see p. 112 *supra*.

NEUTRALITY AND PUBLIC SERVICE, EQUITY, AWARENESS OF RISK. Character of Company as Spanish public service more apparent than in Eastern Extension case. *Held* that destruction was fully justified and that equity was on the side of the United States in its refusal to pay damages.

*Cross-reference:* Am. J. Int. Law, vol. 18 (1924), pp. 842-844.

*Bibliography:* Nielsen, pp. 40-72.

This is a claim presented by His Britannic Majesty's Government on behalf of the Cuba Submarine Telegraph Company Limited, a British corporation, for a sum of £ 8,174. 17s. 9d., being the amount which this Company had to expend upon the restoration of the submarine cables, connecting various places on the island of Cuba, which had been cut by the United States naval authorities during the Spanish-American war of 1898.

The facts are as follows:

Under concessions granted by the Spanish Government and respectively dated December 31, 1869, and September 29/30, 1895, the Cuba Submarine

Telegraph Company was operating in 1898 certain submarine telegraph cables connecting La Habana, Santiago de Cuba, Cienfuegos, Manzanillo and various other places in the island of Cuba.

In April, 1898, war broke out between the United States and Spain. At the very beginning of the war a proclamation of the President of the United States, dated April 22, 1898, declared a blockade of the north coast of Cuba, including all ports on that coast between Cárdenas and Bahía Honda and the port of Cienfuegos on the south coast of Cuba. That blockade was maintained from that time by the United States naval forces.

On May 11, 1898, by command of the United States superior naval officer, the cables on the eastern side of Colorado Point at the entrance to Cienfuegos Harbour were cut and the cable house on land was destroyed by the American naval forces under heavy fire and in circumstances of considerable difficulty. All communication by ocean cable with Cienfuegos was thus interrupted. On July 11, 1898, the cable connecting Santa Cruz del Sur, Trinidad, Cienfuegos and La Habana with the stronghold of Manzanillo on the east of Cuba was similarly cut in the San Juan Channel; this cutting not only prevented telegraphic communication between the above-mentioned points but, according to the report addressed to the American commanding officer, was to have the great moral effect of checking the inland traffic with Manzanillo and certainly to prevent the calling of reinforcements then in the west to resist the ultimate American attack and the capture of Manzanillo. It may be observed that all these cuttings took place inside enemy territorial waters.

These facts are not contested, nor, from the point of view of the successful conduct of operations by the United States naval and military forces in Cuba, is the importance of interrupting the telegraphic communications between enemy ports denied.

As in the case of the Eastern Extension, Australasia and China Telegraph Company, the question is whether or not the United States Government is bound to pay as damages to the Cuba Company the cost of repairing the said cables and appurtenances.

The contentions of the British Government and of the United States Government are practically the same in both cases, and it would be superfluous to repeat all that has been said in this Tribunal's decision relating to the Eastern Extension Company's claim as to the application of international law, equity, the treatment afforded by the United States Government to the French cable company and the alleged duty of this Tribunal to frame some new rule of international law on this subject. It seems to be sufficient to refer to that decision.

Some particular remarks may, however, be made.

In this case the character of the Company's enterprise as a Spanish public service having a military and strategic interest is more clearly apparent. The transmission of the official correspondence of the Spanish Government was obligatory and gratuitous, the managers and directors being appointed by that Government (Schedule of 1869, articles 4 and 11); inspection of any kind of the contents of the official communications was prohibited; Spanish authorities had the right to inspect every description of correspondence and to refuse to allow the forwarding of despatches prejudicial to the security of the State; all ciphers or secret keys were excluded from all private correspondence (*ibidem* article 12), but, going further still, the service and preservation of the line within the Spanish dominions were reserved to the Spanish authorities and when, in 1895, some new cables were conceded to the Cuba Company, it was expressly explained in the report presented on September 27, 1895, to Her Majesty the Queen Regent of Spain by the Spanish Minister of Colonies, that the cables were to be laid in order to remove some military difficulties presented

by the existing land lines and specified by the Spanish military superior authorities. It was, therefore, according to that report, "indispensable to meet this necessity by replacing the land telegraph lines by submarine cables, which will permit the maintenance at all times of connexion and communication between the strategic points of the island"; and among them, those situated on the south coast between Cienfuegos and Santiago de Cuba were mentioned as being not of less need and importance.

In these circumstances the right of the United States to take measures of admittedly legitimate defense against these means of enemy communication was fully justified; if some compensation was due to the Company for the damage done to the cable, it was for the Spanish Government to make it, always supposing that such compensation had not been already considered in the terms agreed upon under the concessions. In our opinion, not only is there no ground of equity upon which an award should be made against the United States, but equity appears to us to be on the side of the United States in their refusal to pay the damages claimed.

*Now, therefore:*

The Tribunal decides that the claim be disallowed.

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ROBERT E. BROWN (UNITED STATES) *v.* GREAT BRITAIN

*(November 23, 1923. Pages 187-202.)*

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INTERPRETATION OF MUNICIPAL LAW BY INTERNATIONAL TRIBUNAL, DENIAL OF JUSTICE. EXHAUSTION OF LOCAL REMEDIES, EQUITY. Proclamation issued on June 18, 1895, by President of South African Republic designating certain tract of land, called Witfontein, as public gold field beginning July 19, 1895. Suspension of proclamation on July 18, 1895, by Executive Council at Pretoria. Application for 1,200 prospecting licences, made under the proclamation by Mr. Robert E. Brown, United States citizen, on July 19, 1895. Licences refused on the ground of suspension of proclamation. Pegging out of 1,200 mining claims by Brown who, notwithstanding refusal of licences, asserted title. Second proclamation issued on July 20, 1895, by State President adjourning opening of Witfontein until August 2, 1895. Suit brought on July 22, 1895, before High Court of the South African Republic by Brown demanding licences to cover 1,200 claims already pegged off. Resolution adopted on July 26, 1895, by Second Volksraad approving withdrawal of first proclamation and issuance of second one, and declaring that no person who had suffered damage should be entitled to compensation. Third proclamation issued on July 31, 1895, by State President further adjourning opening until August 30, 1895. New government regulations for distributing mining claims by lot drawn up on August 15, 1895, and made applicable to Witfontein on August 20, 1895. Alternative claim for damages in the original action filed by Brown in October, 1895. Judgment in Brown's favour on January 22, 1897, the Court setting aside resolution of July 26, 1895, as unconstitutional, ordering issuance of licences, and inviting Brown to pursue alternative claim for damages by motion in the event of his being unable to peg off 1,200 mining claims. Licences for 1,200 mining claims of no practical value issued on February 9, 1897. Damages sought by Brown by motion, notice of which given on December 10, 1897. Chief Justice dismissed from

office by State President on February 16, 1898, under so-called testing law of February 26, 1897. Judgment delivered on March 2, 1898, denying motion, with leave to start new action. No further attempt by Brown to get relief in Courts. *Held* that Brown acquired rights of substantial character under laws and regulations in force on July 19, 1895, and that numerous steps taken by Executive Department, Volksraad and Judiciary with obvious intent to defeat Brown's claims constitute denial of justice. No failure to exhaust local remedies—merely a matter of equity and never a bar under terms of submission—since futility of further proceedings demonstrated.

**CONQUEST, ANNEXATION, SUCCESSION OF STATES: PRIVATE RIGHTS ACQUIRED PREVIOUS TO—, PENDING CLAIMS. LIQUIDATED DEBTS, SUZERAINTY.** Conquest by Great Britain of territory of South African Republic, annexation on September 1, 1900. *Held* that for wrongs done to Brown by former State Great Britain not liable, neither as a succeeding State (no undertaking to assume such liability, pending claim instead of liquidated debt; no obligation to take affirmative steps to right those wrongs), nor as a former suzerain over South African Republic. Claim disallowed.

*Cross-references:* Am. J. Int. Law, vol. 19 (1925), pp. 193-206; Annual Digest, 1923-1924, pp. 66-70.

*Bibliography:* Nielsen, pp. 162-186.

The United States claims £ 330,000, with interest, from Great Britain on account of the alleged denial of certain real property rights contended to have been acquired in 1895, by one Robert E. Brown in the territory of the South African Republic which was conquered and annexed by Great Britain on September 1, 1900.

The material facts are as follows:

Brown, an American citizen, and a mining engineer by profession, went to South Africa in the year 1894. He became interested in gold mining prospects, and in 1895 devoted particular attention to a piece of property known as the Witfontein farm through which, in his judgment as well as in that of many others, the principal gold-bearing reef of that region was supposed to run. Under the prevailing system governing the disposal and acquisition of mining rights, the State, being the owner of all minerals, subject to certain preferential rights of the land proprietors, was accustomed from time to time by proclamation to throw open for the prospecting and location of mining claims specified tracts of land. Such tracts were thereby formally designated as public gold fields and, in accordance with the terms of the proclamations, any and all persons were privileged to apply for prospecting licenses to be issued by an official designated as the Responsible Clerk of the district in which the land lay.

On June 18, 1895, a proclamation was duly issued by the State President declaring the eastern portion of the Witfontein farm a public digging under the administration of the Responsible Clerk at Doornkop, such proclamation to take effect on July 19, 1895 (memorial, p. 54). There was apparently wide interest in this field, and many individuals and corporations proceeded to take advantage of the proclamation. Brown made elaborate preparations for the opening by placing on the land a large number of agents, and among other things, arranged to transmit by heliograph to Witfontein from Doornkop, about 20 miles away, the news of the actual granting of licences so that his agents might act without delay and stake out claims in advance of all competitors. These arrangements being perfected, Brown himself appeared at the office of the Responsible Clerk at Doornkop at 8.30 o'clock on the morning of July 19, 1895, and made a formal application for 1,200 prospecting licences. The Clerk declined to issue the licences, and postponed further action until

10 o'clock of the same morning, stating that he was awaiting definite advices from the seat of government. Brown thereupon handed to the Clerk a written demand for 1,200 licences (memorial, p. 88). Shortly thereafter, and before 10 o'clock, the Clerk received a telegram from the seat of government announcing the withdrawal of the proclamation under which Witfontein had been thrown open as a public digging. Brown again protested and made a tender of the money for the licences, which was refused. He then heliographed his agents at Witfontein to go ahead and peg out the claims (memorial, p. 61), himself proceeding to the scene where he arrived about noon.

Pursuant to his instructions, 1,200 mining claims were in fact pegged, and Brown subsequently asserted title to them on the ground that the withdrawal of the original proclamation was invalid and that the Clerk had no right to refuse issuance of the licences. Other parties acted in the same manner (memorial, p. 64).

It appears that on the day preceding the opening of Witfontein under the proclamation, to wit: on July 18, 1895, the Executive Council at Pretoria, by resolution, provided for the suspension of the proclamation (memorial, p. 83); and on July 20, 1895, the State President, on the advice of the same Council, caused a second proclamation to be published in the *Official Gazette*, adjourning the opening of Witfontein for the period of fourteen days, to wit: until August 2, 1895 (memorial, pp. 81-82).

On July 22, 1895, Brown began a suit in the High Court of the South African Republic demanding the licences to cover the 1,200 claims which he had in fact already pegged off (memorial, p. 52).

On July 26, 1895, the Second Volksraad, one of the two legislative chambers of the Republic having jurisdiction over these matters, adopted the following resolution approving the action of the Executive Department in withdrawing the original proclamation and in issuing the second proclamation (memorial, p. 85):

"The Second Volksraad, regard being had to the communication of the Government dated July 26, 1895, in the matter of the provisional suspension of the proclamation of Witfontein, No. 572, district Krugersdorp, Luipaards Vlei, No. 682, district Krugersdorp, and Palmietfontein, No. 697, district Potchefstroom, and regard being further had to the Executive Council resolution, article 516, of today's date, whereby a certain draft resolution is submitted by the Executive Council to the Honourable the Second Volksraad for approval and acceptance;

"Resolves to agree to the proposal of the Executive Council contained in the said resolution and further resolves to accept the said draft resolution as submitted by the Executive Council as the resolution of the Second Volksraad."

On July 31, 1895, a third proclamation was issued by the State President further adjourning the Witfontein opening until August 30, 1895 (memorial, p. 86).

Meanwhile an entirely new plan, for distributing mining claims by lot, was drawn up on August 15, 1895 (memorial, p. 165; answer, p. 213); and on August 20, 1895, the regulations for drawing by lot were made specifically applicable to Witfontein (memorial, p. 168). The claims of Witfontein were accordingly disposed of under the lottery plan.

The defendants in the suit begun by Brown, being the State Secretary and the Responsible Clerk, answered on August 14, 1895, setting up the resolutions and proclamations above referred to (memorial, p. 55). In October, 1895, Brown filed in the same action, a claim in the alternative for damages amounting to £ 372,400. He also filed a replication asserting the invalidity of the proclamations and resolutions relied upon by the defendants (memorial, p. 58). The

defendants then interposed a formal answer to the alternative claim. The case came on for trial November 15, 1895 (memorial, p. 60); and on January 22, 1897, judgment was given in Brown's favour in the following terms:

"BE IT HEREBY ORDERED

"That judgment be and is hereby granted in favour of the plaintiff with the costs of this action."

"The Responsible Clerk at Doornkop is ordered to issue prospecting licenses to the plaintiff on payment of the necessary moneys, in order to be enabled thereunder to peg 1,200 claims on the eastern and proclaimed portion of the farm Witfontein" (memorial, pp. 74-75).

The opinion of the Court was delivered by Chief Justice Kotze (memorial, p. 20). A separate opinion reaching the same conclusion was filed by one of the other members of the Court, Justice Morice (memorial, p. 40). Briefly, the Court held: that the original proclamation was valid and duly published according to law; that it could not be withdrawn or set aside save by a new proclamation duly published in the same manner; that the order suspending the operation of the proclamation not being published in the *Official Gazette* until the day after the date fixed for the opening, was ineffectual; and that there was consequently no legal warrant for refusing the licenses on July 19, 1895. The concluding paragraph of the opinion by the Chief Justice was as follows:

"The plaintiff is entitled to be placed by the Court in as nearly as possible the same position in which he would have been on the morning of the 19th July, 1895. He has framed his claim, by means of a subsequent amendment, in the alternative, that the Responsible Clerk at Doornkop shall be ordered, upon receipt of the necessary moneys, to issue to the plaintiff a licence for 1,200 prospecting claims upon the proclaimed portion of Witfontein, or otherwise that the sum of £ 372,400 shall be paid to him as and by way of damages. The plaintiff is clearly entitled to the licence, whereby he will be able to peg off 1,200 prospecting claims on the eastern portion of Witfontein. Nothing definite was said during the argument about the measure of damages, and no special grounds have been submitted to us on behalf of the Government, why, in the event of the Court deciding in favour of the plaintiff, it would be impossible for him to proceed to peg off the 1,200 claims, which he has already informally pegged off. The evidence, so far as it relates to this point, leaves no doubt that if the plaintiff had obtained the licence to which he was entitled, he would have been able to have properly pegged off the 1,200 prospecting claims, which as a matter of fact he did peg off. That certain persons also lay claim to some of these 1,200 prospecting claims by virtue of *vergunningen*, is a question which can at some future time be settled between them and the plaintiff and, if need be, decided by the Court. It cannot affect our judgment in this case. Should it appear that it has become impossible for the plaintiff to peg off under the prospecting licence the 1,200 specific claims, either in whole or in part, which he had already pegged on the 19th of July, 1895, it will become necessary for the Court to determine the amount of damages. We can do no more at present, for although the plaintiff is entitled to compensation against the State, by reason of the unlawful conduct of an official acting upon instruction of the Government, the onus of showing, with more or less definiteness and as nearly as possible the amount of the damages lies on him, and the evidence, which he has submitted on this point, is too vague and uncertain to enable us to base any satisfactory calculation thereon. In the event of the Court being called upon to fix the damages later on, further and more satisfactory evidence with respect thereto will, after notice served upon the Government, have to be laid before us. For the present there must be judgment

in favour of the plaintiff, with costs. The Responsible Clerk at Doornkop is ordered to issue to the plaintiff upon due payment of the necessary amount, a prospecting licence for 1,200 claims on the eastern and proclaimed portion of the farm Witfontein" (memorial, pp. 39-40).

Justice Morice, while concurring in the judgment, took the position that Brown acquired no right to specific claims by reason of the actual pegging after the licences had been refused him on July 19, 1895 (memorial, p. 48).

At the time the judgment was rendered, Brown was not in South Africa, and his interests were in the hands of one Oakes, who, in his behalf, proceeded on January 25, 1897, to tender £ 300 for 1,200 licenses (memorial, p. 93), whereupon, after some delay in order to permit the Responsible Clerk to receive final instructions, on February 9, 1897, the licences for 1,200 prospecting claims good for one month were issued, bearing, however, the following endorsement:

"These claims cannot be removed, as they encroach upon the 'owners' and 'vergunning' cls." (memorial, p. 97).

Under this licence, though the evidence on the point is doubtful, it would seem that the 1,200 claims pegged in the first instance were repegged (memorial, pp. 94-95; further British memorandum, pp. 12, 15).

The customary privilege of renewal being denied, Brown's representative found the licence of no practical value, and was obliged to fall back upon the alternative claim for damages.

At this point it becomes necessary to note the wider significance of the decision in Brown's case. It will have been observed that the resolution of the Second Volksraad above quoted not only approved the second proclamation of the State President, but declared in effect that all peggings under the original proclamation were unlawful and that no person who had suffered damage in the circumstances should be entitled to compensation. It was contended by the defendants that this resolution of a single chamber has the legal force of law, and in this connexion article 32 of Law No. 4 of 1890 was invoked, reading as follows:

"The legal force of a law or resolution published by the State President in the Gazette may not be disputed saving the right of the people to make petitions with regard thereto."

In answer to this contention it was pointed out that under the Grondwet or Constitution of the Republic the terms of the Gold Law under which the original proclamation had been issued could not be altered except by legislative enactment. The issue was thus sharply raised as to whether the High Court had the duty and power to uphold the Constitution by setting aside *legislative* enactments and resolutions in conflict therewith.

In the previous case of McCorkindale's Executors *v.* Bok (answer, p. 263), Chief Justice Kotze himself had denied the power of the Court in this respect, but in subsequent decisions (memorial, p. 25), he had stated that the views expressed in the McCorkindale case would no longer be supported. He now undertook, in an opinion which exhibits great industry and ability, to deal with this constitutional question at length, and reached the conclusion, which accords with American practice, that the Constitution was supreme and that acts in conflict therewith must be declared void by the Court. Even before this decision, and while the case was pending, the President of the Republic had interviewed the Chief Justice and threatened to suspend him from office in the event of his failure to uphold the right of the Executive and Legislative Departments to override the Constitution (memorial, p. 143). There now ensued an amazing controversy between the Court and the Executive. We do not propose to examine the details of this unique judicial crisis. It is sufficient

to note that the result was the virtual subjection of the High Court to the executive power. An obedient legislature immediately enacted, at the demand of the Executive, the so-called testing law, dated February 26, 1897, and effective March 1 of that year, the terms of which were as follows:

"1. As long as the People has not clearly made it known to the satisfaction of the first Volksraad that it wishes to alter the existing condition the existing and future laws and Volksraad resolutions shall be recognized and respected by the Judiciary in agreement with article 80 of the Grondwet (Constitution) of 1896, and the Judiciary has not the competency to refuse to apply a law or Volksraad resolution because such law or resolution is, in the opinion of the Judge, either in form or substance in conflict with the Grondwet, in other words the Judiciary shall not have the competency and has never had it, either by the Grondwet (Constitution) or by any other law to arrogate to itself the so-called testing right.

"2. The Judges, Landdrosts and other members of the Judiciary shall, in future, take the following oath before accepting office:

"I promise and swear solemnly to act faithfully to the people and the laws of this Republic, and in my position and office to act justly, equitably, without respect of persons in accordance with the laws and Volksraad resolution and to the best of my knowledge and conscience; not to arrogate to myself any so-called testing right; not to accept from anyone any gift or favour if I have reason to suspect that it was made or shown to me to persuade me in my judgment or action in favour of the person so giving or favouring, and that in my other capacities than as Judge I shall obey according to law the commands of those placed over me, and, in general, my only object shall be the maintenance of law, justice, and order to the furtherance of the prosperity, welfare, and independence of law and people. So truly help me God almighty."

"The Members of the High Court and the Landdrosts shall take the oath before the President and Members of the Executive Council.

"3. The Judge who does not act in accordance with article I of this law shall be considered to have committed an official offence as mentioned in article 86 of the Grondwet of 1896.

"4. The President is hereby authorized to ask the present Members of the Judiciary, or to cause them to be asked, if they consider it to be in accordance with their oath and their duty to decide in accordance with the existing and future laws and Volksraad resolutions, and not to arrogate to themselves the so-called right of testing, and further instructs the President to discharge from their office those Members from whom he has received either a negative, or, in his opinion, an insufficient, or within a specified time, no answer at all.

"5. Volksraad resolution shall, in this law, be understood to mean both resolutions of the old Volksraad and resolutions of the First and also of the Second Volksraad, which are in force in virtue of article 31, Law No. 4, 1890, now article 79 of the Grondwet of 1896. 'People' shall be understood to mean the fully enfranchised Burghers of the South Africa Republic.

"6. This law shall not impair rights which may have been obtained by sentences of the High Court before the passing of this law.

"7. This law shall come into operation immediately after publication in the *Staatscourant*." (answer, pp. 313-315).

The enactment of this law was the prelude of the state of so-called legal anarchy, which endured for approximately a year, and eventually led to the armed intervention of Great Britain and the ultimate annexation of the South African Republic. In this period a vigorous but vain fight for the independence of the

judiciary was made by the bench, the bar, and the press (memorial, pp. 103-145). The Executive authority pursued its main object relentlessly and on February 16, 1898, the recalcitrant Chief Justice was finally dismissed from office by the President, acting under the provisions of the Law of 1897 (memorial, p. 112). One of his associates also resigned, but the other Justices of the Court seem to have accepted the situation. Throughout this controversy the Brown case was referred to as the turning point, and the 1897 law as the actual instrument by which the independence of the High Court was destroyed. At least so far as the "Uitlanders" were concerned there is much justification for the assertion that effective guarantees of property rights had disappeared, and that the capricious will of the Executive had become the sole authority in the land. That these intolerable conditions led directly to the war, in which the independence of the State itself was suppressed, is a matter of history.

In the meantime, reverting to the chronology of this litigation, Brown, being unable to find any other relief, proceeded, by motion in the original action, as suggested by the Chief Justice at the conclusion of his opinion, to bring up the question of damages. Notice of the motion was given on December 10, 1897 (memorial, p. 52). The case did not come on to be heard until March 2, 1898, after the dismissal of the Chief Justice and the reorganization of the Court with Justices sworn to abandon all right to test laws and resolutions by reference to the Constitution. The disposition to defeat Brown's claim at any cost was at once disclosed by the Government's attitude upon this hearing. Although Brown had been invited specifically by the High Court, in the event of his being unable to secure the claims, to proceed upon notice (memorial, p. 40), for the purpose of bringing forward his alternative claim for damages, the Government now contended and the Court decided that such procedure was improper and that the only way in which he could proceed was by the institution of a new suit for damages. It will be remembered that the alternative claim for damages had been made in the action and issue joined upon it. Furthermore, the Court had permitted the same procedure by notice and motion in another suit brought by the Elias Syndicate on almost identical facts. This precedent was waived aside, as appears from the report of the hearing, on the ground that after judgment the Responsible Clerk had, in the Elias Syndicate case, refused to issue the licences for the reason that there was no open land to which they could be made applicable, while in the Brown case the Clerk had, in fact, issued a licence (memorial, pp. 77-79). Another possible distinction was rather vaguely referred to, based upon the difference in wording of the two judgments. The Brown judgment, as above indicated, did not embody the Chief Justice's direction to proceed by notice for the determination of damages, while the Elias Syndicate judgment contained a clause reserving the question of damages (memorial, p. 224). On the strength of these technical distinctions the Court declined to permit Brown to follow the course adopted in the other litigation and suggested by the former Chief Justice; and judgment was delivered denying the motion and imposing costs, with leave to start a new action (memorial, p. 80).

The significance of this disposition of the motion by the reconstituted High Court has been the subject of much argument. Brown's attorneys at the time took the position that the effect of this second order of judgment was to throw him out of court and deprive him of the benefit of his previous judgment. He was advised by counsel that in any new action instituted for damages the Government could plead the Volksraad resolutions, and that the new court would be obliged, under the oath provided in the 1897 law, to give the resolution full effect in any such suit begun at that time. It will be remembered that the Volksraad resolution heretofore quoted specifically provided that no compensation

should be awarded to any person claiming to have been damaged by the withdrawal of the original proclamation; and it was evidently the opinion of counsel that, there having been no judgment fixing the damages in the action wherein the licences were ordered to be issued, and no reference whatever to damages in that judgment, no protection would be afforded Brown under article 6 of the 1897 law, stating that rights obtained by sentences of the High Court before the passing of the law could not be impaired. At any rate, Brown did, upon advice of his counsel (memorial, p. 146), abandon any further attempt to get relief in the courts. The advice was clear and emphatic. Attorney Hofmeyr said:

"Under the practice of our courts it is not open to question that if Brown had availed himself of the leave to issue a new summons the Government would have been entitled by their pleas to reopen the whole question in dispute, and have a retrial of the case, in other words, Brown's judgment of the 22nd of January which had not been appealed against would have been practically reopened. It was quite manifest that the attitude of the Court was distinctly hostile to Brown, and that the judgment was entirely unjustifiable. Such being the case the only conclusion to be arrived at is that it would have been quite impossible for Brown to obtain justice before a court capable of giving such a decision. I therefore advised Brown that in my opinion it was quite useless for him to proceed further with his action or to expect redress from the courts in the Transvaal. In other words, I believe that Brown did everything possible to obtain redress in the Transvaal courts and it was only when it became perfectly apparent that the Court had determined not to grant him redress that he desisted on the advice of his counsel and solicitors from throwing away further money in the prosecution of his claim" (memorial, p. 171).

Mr. Wessels, counsel who argued the motion in Brown's behalf, gave his opinion as follows:

"In my opinion the decision was absolutely incorrect, absolutely against precedent, and perfectly unjustifiable. I now argue this way—if Brown has to encounter such extraordinary difficulty from the Court in a matter of mere formal procedure in an adjective question how much greater difficulty will he not have to encounter when he comes before the Court with a question where precedent is difficult, and where the substantive nature of his action will have to be tried" (memorial, pp. 147-148).

And there the matter rested, save for efforts made to obtain redress through diplomatic channels.

On October 28, 1898, Brown addressed a memorial to Her Majesty the Queen of England in her capacity as suzerain over the South African Republic (answer, p. 357). This document was transmitted to the Secretary of State for the Colonies (memorial, p. 154) and a reply dated December 15, 1898, stated that the proper course for Brown, as an American citizen, was to bring the matter in the first instance to the notice of his own Government (memorial, p. 155). Thereupon a memorial was in turn addressed to the Secretary of State of the United States, but no diplomatic action was taken at this stage, because the war intervened (memorial, pp. 155-156).

After the annexation, and on September 8, 1902, another memorial was presented to the British Governor of the Transvaal Colony (memorial, p. 151).

On July 17, 1902, the Attorney General of the Colony gave an opinion, the material portion of which is as follows:

"It appears to me that Mr. Brown did not exhaust all his legal remedies as he did not issue a new summons as ordered by the Court.

"It is clearly impossible for Your Excellency to comply with his request that licences be issued to him for the claims, as these claims are at present

lawfully held by third persons under the Gold Law, and any interference with the title of the present holders would give rise to a general feeling of insecurity. If Mr. Brown considers he has any legal right to obtain possession of the claims, or that he is entitled to damages, the Supreme Court is open to him and he may take any proceedings he may be advised to" (memorial, p. 158).

The Government of the United States took up the question with the British Government, and on November 14, 1903, Lord Landsdowne from the Foreign Office wrote to the American Ambassador as follows:

"With reference to my note of the 23rd May last I have the honour to inform you that His Majesty's Government have given their most careful consideration to the claim of the late Mr. R. E. Brown, a United States citizen, against the Government of the late South African Republic.

"This claim appears to be based in the first instance on an alleged liability of the late Government of the Transvaal in damages for not granting a concession to Mr. Brown. The Court of the late Government refused redress and Mr. Brown's claim seems in the second instance to be based on an alleged wrong by reason of the corrupt or illegal action of the Court at the dictation of the Executive.

"As regards the first ground, His Majesty's Government are unable to find that it has ever been admitted that a conquering State takes over liabilities of this nature, which are not for debts, but for unliquidated damages, and it appears very doubtful to them whether Mr. Brown's claim could be substantiated at all or in any case for any substantial amount.

"As regards the second ground, it has never so far as His Majesty's Government are aware been laid down that the conquering State takes over liabilities for wrongs which have been committed by the Government of the conquered country and any such contention appears to them to be unsound in principle.

"In these circumstances His Majesty's Government are unable to admit that the late Mr. Brown has any claim under international law against that Government of the Transvaal as successor to the Government of the South African Republic" (memorial, p. 159.)

The claim was included in the schedule for submission to arbitration by this tribunal under clause I, as a claim based on the denial in whole or in part of real property rights.

Two main questions arise on these facts:

First, whether there was a denial of justice in any event; and

Secondly, whether in case a denial of justice is found, any claim for damages based upon it can be made to lie against the British Government.

On the first point we are of opinion that Brown had substantial rights of a character entitling him to an interest in real property or to damages for the deprivation thereof, and that he was deprived of these rights by the Government of the South African Republic in such manner and under such circumstances as to amount to a denial of justice within the settled principles of international law. We fully appreciate the force of the argument to the contrary which has been made on technical grounds. It may well be said that at no time did Brown acquire and hold any title or right to specific mining claims; that at most he was entitled to a licence under which he might have located and become the owner of particular claims; that the actual pegging of claims in his behalf on July 19, 1895, was unsupported by any licence, and therefore had no legal effect; that the judgment of January 22, 1897, established merely his right to a licence and gave him no title to particular claims; that the alternative demand for damages was never liquidated; and that his legal remedies were not completely exhausted inasmuch as he never followed up the claim for damages by taking out a new summons in accordance with leave granted by the order of

March 2, 1898. Notwithstanding these positions, all of which may, in our view, be conceded, we are persuaded that on the whole case, giving proper weight to the cumulative strength of the numerous steps taken by the Government of the South African Republic with the obvious intent to defeat Brown's claims, a definite denial of justice took place. We can not overlook the broad facts in the history of this controversy. All three branches of the Government conspired to ruin his enterprise. The Executive Department issued proclamations for which no warrant could be found in the Constitution and laws of the country. The Volksraad enacted legislation which, on its face, does violence to fundamental principles of justice recognized in every enlightened community. The judiciary, at first recalcitrant, was at length reduced to submission and brought into line with a determined policy of the Executive to reach the desired result regardless of Constitutional guarantees and inhibitions. And in the end, growing out of this very transaction, a system was created under which all property rights became so manifestly insecure as to challenge intervention by the British Government in the interest of elementary justice for all concerned, and to lead finally to the disappearance of the State itself. Annexation by Great Britain became an act of political necessity if those principles of justice and fair dealing which prevail in every country where property rights are respected were to be vindicated and applied in the future in this region.

We do not regard as a decisive factor Brown's failure or inability to acquire specific claims, nor are we inclined to refine over a possible distinction between a right to specific real property, and the right to acquire such a right. We prefer to take a broader view of this situation, and we hold that through compliance with the laws and regulations in force on July 19, 1895, Brown acquired rights of a substantial character, the improper deprivation of which did constitute a denial of justice. Certainly the High Court, in its decision, so regarded them.

We are not impressed by the argument founded upon the alleged neglect to exhaust legal remedies by taking out a new summons. At best this argument would, under the Terms of Submission which control us here, be merely a matter to be taken into account as one of the equities, and could not be considered as in any sense a bar. In the actual circumstances, however, we feel that the futility of further proceedings has been fully demonstrated, and that the advice of his counsel was amply justified. In the frequently quoted language of an American Secretary of State:

"A claimant in a foreign State is not required to exhaust justice in such State when there is no justice to exhaust" (Moore's *International Law Digest*, vol. VI, p. 677).

On this branch of the case we are satisfied, therefore, that there was a real denial of justice, and that if there had never been any war, or annexation by Great Britain, and if this proceeding were directed against the South African Republic, we should have no difficulty in awarding damages on behalf of the claimant.

Passing to the second main question involved, we are equally clear that this liability never passed to or was assumed by the British Government. Neither in the terms of peace granted at the time of the surrender of the Boer Forces (answer, p. 192), nor in the Proclamation of Annexation (answer, p. 191), can there be found any provision referring to the assumption of liabilities of this nature. It should be borne in mind that this was simply a pending claim for damages against certain officials and had never become a liquidated debt of the former State. Nor is there, properly speaking, any question of State succession here involved. The United States plants itself squarely on two propo-

sitions: first, that the British Government, by the acts of its own officials with respect to Brown's case, has become liable to him; and, secondly, that in some way a liability was imposed upon the British Government by reason of the peculiar relation of suzerainty which is maintained with respect to the South African Republic.

The first of these contentions is set forth in the reply as follows:

"The United States reaffirms that Brown suffered a denial of justice at the hands of authorities of the South African Republic. Had it not been for this denial of justice, it may be assumed that a diplomatic claim would not have arisen. But it does not follow that, as is contended in His Majesty's Government's answer, it is incumbent on the United States to show that there is a rule of international law imposing liability on His Majesty's Government for the tortious acts of the South African Republic. Occurrences which took place during the existence of the South African Republic are obviously relevant and important in connexion with the case before the Tribunal, but the United States contends that acts of the British Government and of British officials and the general position taken by them with respect to Brown's case have fixed liability on His Majesty's Government." (reply, p. 2.)

Again on page 8 of the reply it is said:

"The succeeding British authorities to whom Brown applied for the licences to which he had been declared entitled by the Court also refused to grant the licences, and therefore refused to carry out the decree of the Court which the United States contends was binding on them. And they have steadfastly refused to make compensation to Brown in lieu of the licences to which the Court declared Brown to be entitled, failing the granting of the licences."

The American Agent quoted these passages in his oral argument (transcript of 17th sitting, November 9, 1923, pp. 337-338) and disclaimed any intention of maintaining "that there is any general liability for torts of a defunct State" (*ibid.*, p. 339). We have searched the record for any indication that the British authorities did more than leave this matter exactly where it stood when annexation took place. They did not redress the wrong which had been committed nor did they place any obstacles in Brown's path; they took no action one way or the other. No British official nor any British court undertook to deny Brown justice or to perpetuate the wrong. The Attorney General of the Colony, in his opinion, declared that the courts were still open to the claimant. The contention of the American Agent amounts to an assertion that a succeeding State acquiring a territory by conquest without any undertaking to assume such liabilities is bound to take affirmative steps to right the wrongs done by the former State. We cannot indorse this doctrine.

The point as to suzerainty is likewise not well taken. It is not necessary to trace the vicissitudes of the South African State in its relation to the British Crown, from the Sand River Convention of 1852, through the annexation of 1877, the Pretoria Convention of 1881, and the London Convention of 1884, to the definitive annexation in 1900. We may grant that a special relation between Great Britain and the South African State, varying considerably in its scope and significance from time to time, existed from the beginning. No doubt Great Britain's position in South Africa imposed upon her a peculiar status and responsibility. She repeatedly declared and asserted her authority as the so-called paramount Power in the region; but the authority which she exerted over the South African Republic certainly at the time of the occurrences here under consideration, in our judgment fell far short of what would be required to make her responsible for the wrong inflicted upon Brown. Concededly, the general relation of suzerainty created by the Pretoria Convention of 1881 (reply, p. 26), survived after the concluding of the London Convention

of 1884 (reply. p. 37). Nevertheless, the specific authority of the suzerain power was materially changed, and under the 1884 Convention it is plain that Great Britain as suzerain, reserved only a qualified control over the relations of the South African Republic with foreign powers. The Republic agreed to conclude no "treaty or engagement" with any State or nation other than the Orange Free State, without the approval of Great Britain, but such approval was to be taken for granted if the latter did not give notice that the treaty was in conflict with British interests within six months after it was brought to the attention of Her Majesty's Government. Nowhere is there any clause indicating that Great Britain had any right to interest herself in the internal administration of the country, legislative, executive or judicial; nor is there any evidence that Great Britain ever did undertake to interfere in this way. Indeed, the only remedy which Great Britain ever had for maladministration affecting British subjects and those of other Powers residing in the South African Republic was, as the event proved, the resort to war. If there had been no South African war, we hold that the United States Government would have been obliged to take up Brown's claim with the Government of the Republic and that there would have been no ground for bringing it to the attention of Great Britain. The relation of suzerain did not operate to render Great Britain liable for the acts complained of.

*Now, therefore:*

The decision of the Tribunal is that the claim of the United States Government be disallowed.

# RIO GRANDE IRRIGATION AND LAND COMPANY, LIMITED (GREAT BRITAIN) *v.* UNITED STATES

*(November 28, 1923. Pages 336-346.)*

**PRELIMINARY MOTION: PROCEDURE.—JURISDICTION: POWER OF TRIBUNAL TO DECIDE ON OWN.—APPLICABLE LAW, INTERPRETATION OF MUNICIPAL LAW.—PRIVATE INTEREST IN CLAIM.—PRESENTATION OF CLAIM: PROCEDURE.** Lease on May 30, 1896, by American company to English company of irrigation undertaking in New Mexico. Preliminary motion to dismiss claim for absence of British interest and breach of rules of procedure in presentation of case. British objection that no written application made for motion and no written agreement existed between Agents. *Held* that Tribunal has inherent power, and indeed duty, to entertain and, in proper cases, to raise for itself preliminary points going to its jurisdiction. *Held* also that according to applicable American law lease of undertaking not valid and that English company possesses no interest on which claim can be founded. *Held* further that defects in British memorial not such as to furnish adequate ground for preliminary motion. Claim disallowed.

*Cross-references:* Am. J. Int. Law. vol. 19 (1925). pp. 206-214; Annual Digest, 1923-1924. pp. 180-183.

*Bibliography:* Nielsen, pp. 332-335.

This is a claim preferred by His Britannic Majesty's Government on behalf of the Rio Grande Irrigation and Land Company, Limited, and founded upon an alleged denial of real property rights.

As will presently appear, this opinion is not concerned with the merits of the claim itself inasmuch as, in the view of the Tribunal, the Government of the United States of America is entitled to succeed on the preliminary point, relating to the jurisdiction of the Tribunal to entertain the claim at all.

It is necessary, however, to state in some detail the facts out of which the claim arises.

In the year 1893, a corporation entitled the Rio Grande Dam and Irrigation Company (hereinafter called the "American company") was formed under the laws of the territory of New Mexico with a capital stock of \$5 million in shares of \$100 each, for the purpose, *inter alia*, of constructing a dam across the Rio Grande River and impounding its waters for irrigation purposes. The dam was to be constructed at Elephant Butte, a point in Sierra County, New Mexico, about 120 miles above the city of El Paso, and all the concessions, rights and privileges necessary to the effective equipment of the undertaking as an irrigation enterprise were legally acquired by the company aforesaid. The term of the company's existence was forty-seven years. By virtue of a Federal Act of March 3, 1891, in case of an undertaking of this character, an approval and confirmation by the Secretary of the Department of the Interior was necessary. That approval and confirmation was given on February 1, 1895 (memorial, p. 51). By section 20 of that Act it is provided as follows:

"*Provided*, that if any section of said canal, or ditch, shall not be completed within five years after the location of said section, the rights herein granted shall be forfeited as to any uncompleted section of said canal, ditch, or reservoir, to the extent that the same is not completed at the date of the forfeiture" (U.S. answer, app., p. 129).

In October, 1895, the Rio Grande Irrigation and Land Company, Limited (hereinafter called the "English company"), on whose behalf this claim is preferred, was incorporated in England, for the purpose of financing the American company in consideration of the transfer of the whole undertaking of the American company. Its capital was £ 500,000, consisting of £ 100,000 8 % cumulative preference shares of £ 1 each, and £ 400,000 ordinary shares of £ 1 each. There was also an authorized issue of 2,000 first mortgage debentures of £ 50 each bearing interest at 5 %. These debentures were secured on the undertaking and property of the company under a trust deed which was executed on August 28, 1896, and which conferred upon the National Safe Deposit Company, Limited, as trustee for the debenture-holders, a power of sale in the event, *inter alia*, of the company's going into liquidation, and empowered the trustee in such an event on request made, to appoint a receiver (section 10). Debentures were issued to the value of over £ 40,000, though the precise figure is uncertain. There was also an issue of preference shares to the value of £ 30,500.

The following were the arrangements made between the American and the English companies:

By an agreement dated March 27, 1896 (reply, p. 17), the American company agreed to lease to the English company:

"All the said concession of the American company and all the rights and privileges held or enjoyed by the American company therewith or thereunder as from the date hereof . . ." (reply, p. 17).

for the aforesaid term of 47 years, less three days. The American company covenanted to transfer to and vest in the English company: (a) "All the undertaking of the American company, now capable of being validly transferred to the English company; (b) "The benefit and obligation of certain contracts relating to the acquisition of land, water rights, water rents and water

supply which the American company had made with local landowners and municipalities."

The price to be paid, on completion, by the English company was 300,000 fully paid ordinary shares in the English company and £ 26,500 in cash.

By an agreement dated May 30, 1896, between the two companies, Nathan E. Boyd, an American citizen and the promoter of the whole enterprise, and R. Chetham Strode were appointed the American company's nominees to receive the 300,000 ordinary shares on its behalf (reply, p. 23); while the payment of £ 25,600 in cash was subsequently altered by an agreement of May 31, 1896, between the two companies, to £ 19,450 in debentures and £ 7,050 in cash (U.S. additional evidence, p. 1).

To revert to the agreement of March 27, 1896, in execution of a power created by paragraph 7 thereof, Dr. Nathan E. Boyd was nominated by the American company a director of the English company; and by paragraph 11 it was provided:

"11. The American company shall continue its existence and shall act as the agent of the English company and shall comply with all instructions of the English company or its directors from time to time and shall if requested so to do by the English company hold all or any of the premises hereby agreed to be sold in trust for the English company or as it may from time to time direct" (reply, p. 22).

The arrangements between the companies were completed by an indenture dated May 30, 1896, which witnesses that the American company, in consideration of a yearly rent of \$1 and certain covenants to be performed by the English company, "has leased, demised, and to farm, let, and full liberty given to enjoy and exercise" (U.S. answer, app., p. 655), to the English company the whole of its irrigation undertaking, as therein particularly described:

"To have and hold . . . from the first day of June, one thousand, eight hundred and ninety-six, for and during and until the full end and term of forty-seven years thence next ensuing and fully to be completed and ended" (U.S. answer, app., p. 657).

The English company also acquired the control of the whole of the capital stock of the American company.

There is ample evidence in the minute book of the directors of the English company that, from an early moment in the existence of that company, its directors had felt anxiety as to the validity of the lease from the American company, in view of the alien laws of the United States. In January, 1896, Mr. Newton Crane, a distinguished American counsel, practising at the English bar, was consulted on the point; and expressed the opinion that the English company:

... "may hold canals by leasehold within the territory of New Mexico and State of Texas, and take over absolutely the franchises and powers granted by the United States and the Territory of New Mexico and the State of Texas".

Mr. Hawkins, however, a local attorney in New Mexico, differed; and, this fact being brought to his notice Mr. Newton Crane, in an opinion dated November 18, 1896, while asserting the view that a lease was, both by American and English law, personal property and not an interest in real property, advised that it might be wise, in view of possible local hostility, to form another company in West Virginia, to which the stock of the American company should be transferred, the English company becoming the holder of all the stock in the West Virginia company; but that, in other respects, all arrangements should remain as they were. This advice was followed; and in April, 1897, a company entitled the Rio Grande Investment Company was incorporated

in West Virginia, to which the American company's stock was transferred as consideration for \$1 million worth of stock fully paid of the Rio Grande Investment Company, of which stock the English company became the holder (reply, p. 13; reply, p. 50; English company's minute book, meeting of Friday, April 30, 1897).

It has been discussed before us whether the undertaking as well as the stock of the American company was transferred to the Rio Grande Investment Company. There is evidence both ways, but in our view, the point is, for our present purpose, immaterial.

For some time, going back to a date anterior to the formation of the American company, there had been complaints made by the Mexican to the United States Government in respect of the depletion of the flow in the lower portion of the Rio Grande, owing, as it was alleged, to the interception of its waters for irrigation purposes in Colorado and New Mexico. Commissions of inquiry had been held, and as early as 1890, a suggestion was put forward by Colonel Anson Mills and other engineers that the United States should construct a dam near El Paso. The Elephant Butte enterprise brought this question to a point; it being alleged that the construction of the Elephant Butte dam would make a supply of water adequate for the needs of Mexico impossible.

The jurisdiction over navigable rivers in the United States is vested in the Secretary of War; and proceedings by the Attorney-General may be taken, if so advised, to prevent the diminution of the navigability of such rivers (see Act, September 19, 1890, c. 907; and Act, July 13, 1892, c. 158, printed at pages 125 and 129 of the U.S. answer, appendix).

The federal authorities, having satisfied themselves that the Rio Grande below El Paso was, for some considerable distance, navigable, in May, 1897, brought a suit in the District Court of New Mexico to obtain an injunction against the Rio Grande Dam and Irrigation Company with a view to preventing the construction of the dam at Elephant Butte, on the ground that it would obstruct and diminish the navigability of the Rio Grande. The record was amended by the addition of the English company as co-defendants. The suit was dismissed by the District Court; the dismissal was affirmed by the Supreme Court of New Mexico; but the Supreme Court of the United States, on appeal, reversed that judgment, and remitted the matter to the Court of New Mexico for inquiry as to whether the defendants' dam would diminish the navigability of the Rio Grande within the limits of present navigability. The inquiry was made, and the suit was again dismissed by both the courts of New Mexico; but, on appeal, was again remitted by the Supreme Court of the United States, for the purpose of the same inquiry. At this juncture, in April, 1903, leave was given by the District Court of New Mexico to the United States to file a supplemental complaint, praying that the rights of the American company relating to the Elephant Butte undertaking might be forfeited, on the ground that the work had not been completed within five years after the location of the section as required by section 20 of the Act of March 3, 1891, c. 561 (U.S. answer, app., pp. 74, 93, and 129). The supplemental complaint was served on the attorney of the American company but no appearance within the appointed time was entered thereto. A decree of forfeiture was granted by the District Court, and was affirmed both by the Supreme Court of New Mexico, and, in December, 1909, by the Supreme Court of the United States (U.S. answer, app., pp. 74-92).

The complaint of His Britannic Majesty's Government, as put forward in the reply, is that these proceedings were oppressively and indirectly launched and prosecuted with other than their avowed object; and that:

"The real purpose of the litigation appears to have been to defeat the Com-

pany's scheme and it is the initiation and relentless prosecution of the suit of which His Majesty's Government complain" (reply, p. 4).

More than nine years before the conclusion of this litigation namely, in April, 1900, the English company had gone into liquidation (reply, p. 26).

On May 3, 1900, Dr. Nathan E. Boyd was appointed receiver for the debenture holders (reply, p. 43); and on May 4, 1900, the liquidator of the company sold the equity of redemption in all the company's undertaking, assets and rights to the receiver (reply, p. 49), the debenture holders, thereupon, becoming the owners of everything belonging to the company.

The only remaining facts, relevant to the point of jurisdiction which we have now to decide are connected with the presentation of this case during this session before the Tribunal.

On Friday, November 9, 1923, the British Agent applied for leave to file a reply. This application was opposed by the United States Agent, broadly, on the ground, that, having regard to the history of the case, the rules of procedure, and the defective character of the memorial, so voluminous a document should not be admitted at so late a moment. After some discussion, having regard to the desire of both governments to have the case disposed of, it was agreed that the case should proceed, the reply being admitted, and both sides being at liberty to file additional evidence. Later, on the same day, the following conversation took place between the Tribunal and the Agents on both sides (transcript of record, 17th sitting, p. 23):

"The UMPIRE: . . . Mr. Nielsen, you want to present some observations about a preliminary motion, is not that so?"

"Mr. NIELSEN: I want to present a motion that this claim should be dismissed because of the manner in which it is presented, and because there is no showing of any British interest in it, I mentioned one individual whom we have always regarded as the real claimant.

"The UMPIRE: In the circumstances Mr. Nielsen will explain or deliver up that motion, and then Sir Cecil Hurst will answer.

"Mr. NIELSEN: I shall ask Mr. Dennis to argue that motion, if it pleases.

"The UMPIRE: Mr. Dennis will deliver that motion and then you will give your answer on the motion, Sir Cecil Hurst.

"Sir Cecil HURST: A reply will certainly be made on behalf of His Britannic Majesty's Government."

The motion to dismiss the claim was filed on that day by the United States Agent. Broadly, it raised two points: (1) the absence of British interest in the claim; (2) the breach of the Rules of Procedure in the presentation of the case.

On Monday, November 12, 1923, the British Agent wrote a letter to the United States Agent giving notice that he intended to argue that a preliminary motion of this character was not contemplated or provided by the rules or any of the instruments controlling the Tribunal. This point was in fact taken by the British Agent at the end of his argument made in reply to the motion, when, he further argued that, if such a motion was provided for anywhere, on the proper construction of rules 31, 37, and 38, application for leave to make it must be in writing, and that there had been no such application in writing; and further, that, while under the rules and the exchange of notes read together, an agreement in writing between the Agents, in such case, was necessary, here there was no such agreement, nor, indeed, any agreement at all.

To these arguments there is, in the opinion of the Tribunal, one conclusive answer. Whatever be the proper construction of the instruments controlling the Tribunal or of the rules of procedure, there is inherent in this and every legal

Tribunal a power, and indeed a duty, to entertain, and, in proper cases, to raise for themselves, preliminary points going to their jurisdiction to entertain the claim. Such a power is inseparable from and indispensable to the proper conduct of business. This principle has been laid down and approved as applicable to international arbitral tribunals (see Ralston's International Arbitral Law and Procedure, pp. 21 *et seq.*). In our opinion, this power can only be taken away by a provision framed for that express purpose. There is no such provision here. On the contrary, by article 73 of chapter III of The Hague Convention, 1907, which, by virtue of article 4 of the treaty creating this commission, is applicable to the proceedings of this commission, it is declared:

"The tribunal is authorized to declare its competence in interpreting the *compromis* as well as the other acts and documents which may be invoked, and in applying the principles of law."

The question, therefore, which we have to decide is this: whatever our opinion may be as to the forfeiture of the American company's rights by the courts of the United States, does the English company possess the interest necessary to support this claim?

Clearly, the debenture holders, in this respect, are in no better position than their debtors, the English company, through whom they claim.

To answer this question, it is necessary to consider carefully the provisions of the United States Alien Law, Act of March 3, 1887, c. 340 (U.S. answer, app., p. 122); it being United States law which is decisive of the validity of this leave. This point, it may be observed, is raised on the face of the record.

The following are the material sections of the Act aforesaid:

"1. That it shall be unlawful for any person or persons not citizens of the United States, or who have not lawfully declared their intention to become such citizens, or for any corporation not created by or under the laws of the United States, or of some State or Territory of the United States, to hereafter acquire, hold, or own real estate so hereafter acquired, or any interest therein, in any of the territories of the United States or in the District of Columbia, except such as may be acquired by inheritance or in good faith in the ordinary course of justice in the collection of debts heretofore created:

" . . . . .

"4. That all property acquired, held, or owned in violation of the provisions of this Act shall be forfeited to the United States, and it shall be the duty of the Attorney-General to enforce every such forfeiture by bill in equity or other proper process" (U.S. answer, app. pp. 122-123).

Two questions arise on these sections. The first is this: were the American company's rights, concessions, and privileges, real estate rights? This question is best answered by the description of them contained in: (1) The Agreement of March 27, 1896 (reply, p. 17); (2) The Indenture of May 30, 1896 (U.S. answer, app. p. 655); (3) The Trust Deed of August 28, 1896 (British additional evidence).

In our opinion, the answer to this question is in the affirmative. The description of these rights given in the documents referred to leaves no room for doubt on this point.

The second question is this: did the lease of these rights, concessions, and privileges, granting as it did to the English company, the entire undertaking for the whole life of the American company, constitute "an interest in real estate"? In the opinion of the Tribunal, the answer to this question also is in the affirmative. No decision to the contrary has been brought to our notice. Looking at the wording of the Act itself, the term "interest" is very wide, certainly wide enough to include a lease. It is no doubt true that a lease is personal

estate and goes to the executor; but that fact does not, in our opinion, prevent its being an interest in real estate—a view which seems to be supported by the description of a lease as a “*chattel real*”. Further, the words in section I, “hold or own”, appear to point in the same direction; as, had freeholds only been contemplated, the word “own” would have been sufficient; while the word “hold” is aptly referable to a lease. It should also be remembered that this claim is expressly put forward as “based on an alleged denial in whole or in part of real property rights” (reply, p. 3).

In an opinion, dated May 20, 1887, immediately after the passage of the Act under consideration, the Attorney-General of the United States expressed the view that “bona fide leases are not intended to come within the inhibition of the Act”, but the recent decision on November 19, 1923, of the Supreme Court of the United States in *Frick v. Webb* (281 Federal Reporter 407), seems to support a contrary view. This was a suit brought in the United States District Court by one Frick, who wished to sell some stock in a California land corporation to his co-plaintiff, Satow, a Japanese subject, to prohibit the Attorney-General of California from taking steps to prevent the sale being carried out, as being in contravention of section 2 of the Californian Alien Land Law of 1920 (Statutes of California, 1921, p. lxxxiii).

The material sections of that law are:

“*Section 1.* All aliens eligible to citizenship under the laws of the United States may acquire, possess, enjoy, transmit, and inherit, real property, or any interest therein, in this State, in the same manner and to the same extent as citizens of the United States except as otherwise provided by the laws of this State.

“*Section 2.* All aliens other than those mentioned in section one of this act may acquire, possess, enjoy, and transfer real property, or any interest therein, in this State, in the manner and to the extent and for the purpose prescribed by any treaty now existing between the Government of the United States and the nation or country of which such alien is a citizen or subject, and not otherwise” (279 Federal Reporter, p. 115).

The material portion of the headnote is as follows:

“Ownership by a Japanese subject, who is ineligible to citizenship, of stock in a farm corporation, which owned agricultural land, held ‘ownership of an interest in the land,’ within Alien Land Law, Cal. 1920, Sec. 2”.

In the course of the judgment these words occur:

“We think the ownership of stock in such a corporation would be an interest in real property”.

The plaintiff appealed to the Supreme Court of the United States which upheld the decision.

Without pushing this decision too far, it would seem, at least, to indicate that the Supreme Court of the United States is inclined to give a broad interpretation to the words “interest in real property” or “interest in real estate” where they occur in alien laws.

It was urged by the British Agent that, as the Alien Law of 1887 had never been invoked by the United States in the long litigation against the American and English companies, this point should not be taken by the Tribunal now. This, as has been said, is not the view we take of our power or duty in relation to a clear point of jurisdiction raised, as this is, on the face of the record. Further, the course followed in this respect by the United States may well be explained by the fact that the main object of that litigation was not to crush the English company, but to get rid of the Elephant Butte concession which had been granted to the American company.

It is possible, perhaps, to argue that the meaning of section 4 of the Alien Law of 1887 is that the title to such property is good until forfeited by proper process. It appears to the Tribunal that, if that meaning was intended, the words would have been "shall be subject to forfeiture", and not "shall be forfeited". However that may be, by section 1 the acquisition of real estate or any interest therein by the persons mentioned is made "unlawful". Such acquisition, therefore, cannot found any claim for compensation.

The result, therefore, is that the English company took no valid rights whatever under the lease from the American company, and possesses no interest on which a claim such as this can be founded.

A very large part of the arguments addressed to the Tribunal on both sides was directed to the transactions relating to the debentures issued by the English company and the nationality of the debenture holders. Having regard to the view which the Tribunal takes of the position of the English company under the alien law, discussion of these points is unnecessary.

Another ground urged before us by the Government of the United States was the breach of the rules of procedure which, it was alleged, His Britannic Majesty's Government had committed in the presentation of the claim. On this point, it is sufficient to say that, while recognizing that there were defects in the memorial in this case, the Tribunal does not think, in all the circumstances, that those defects were such as to furnish, in themselves, adequate ground for allowing a preliminary motion of this character.

In conclusion, we desire to say that, in our opinion, even had the lease from the American company been valid, a formidable point, arising out of the English company's relations with the Rio Grande Investment Company, might still have lain in the way of His Britannic Majesty's Government.

*Now, therefore:*

The award of the Tribunal is that the claim of His Britannic Majesty's Government be disallowed.

## UNION BRIDGE COMPANY (UNITED STATES) *v.* GREAT BRITAIN

*(January 8, 1924. Pages 376-381.)*

### AMENDMENT OF PLEADINGS.—INTERNATIONAL TORT.—NEUTRAL PROPERTY.—

LIABILITY FOR ACTS OF OFFICIALS, WAR CIRCUMSTANCES, INTENTION. Purchase in January-March, 1899, by Orange Free State from American company of materials for steel road bridge f.o.b. New York. Outbreak of war between Great Britain and Orange Free State on October 12, 1899. Arrival of materials in Port Elizabeth on October 25 and November 12, 1899. Refusal by agents of Orange Free State to pay. Annexation of Orange Free State by Great Britain on May 24, 1900. Transport of materials in August, 1901, from Port Elizabeth to Bloemfontein by order of Storekeeper of Cape Government Railways at Port Elizabeth and without notice to agents of company. Storage at Bloemfontein by Imperial Railway authorities. No request for return made by agents of company who since October, 1901, were aware of transport to Bloemfontein. No answer to letters written in 1907 by Central South African Railways to company concerning return of materials. Materials put up to auction and bought by Central South African Railways on July 22, 1908.

United States claim before Tribunal originally based upon State succession, conquest, annexation, subsequently on wrongful interference by British officials.

*Held* that transport of materials, the company's title to which Great Britain does not deny, was international tort committed in respect of neutral property; that Great Britain liable since Storekeeper acted within scope of his duty; and that liability not affected either by Storekeeper's mistake as to neutral character and ownership of materials, or by pressure and confusion caused by war, or by lack of intention on the part of British Authorities to appropriate materials.

DAMAGES: PRINCIPLE OF INTERNATIONAL LAW, FAIR COMPENSATION, CONTRACT VALUE, FAILURE OF PLAINTIFF TO ACT.—INTEREST. According to principle of international law fair compensation due, not contract value of materials. Owner's failure to act to be taken into account. No interest allowed.

*Cross-references:* Am. J. Int. Law, vol. 19 (1925), pp. 215-219; Annual Digest, 1923-1924, pp. 170-171.

*Bibliography:* Nielsen, pp. 371-375.

In this case, the Government of the United States of America prefers a claim for damages, arising out of alleged wrongful interference with certain bridge material, which belonged to the Union Bridge Company, an American firm, by officials in South Africa, for whose action His Britannic Majesty's Government is said to be responsible. This is the form of the claim as now made; but, originally, as presented in the United States memorial (p. 6), it was put forward against His Britannic Majesty's Government, as successors in contractual liability, by virtue of conquest and annexation, to the Orange Free State.

Having regard to the contents of the answer, this ground was recognized by the United States to be unmaintainable, and was abandoned, on the occasion of the first argument at Washington, on June 12th and 13th 1913 (oral argument, p. 1).

The case now comes before us for further hearing under a direction given by the Tribunal on that occasion (supp. pap., p. 3), with the addition of some supplementary papers which were filed on February 17th, 1914, by His Britannic Majesty's Government, in response to a request made by the Tribunal for further documents (*ibid.*). This change of attitude, taken together with considerable *lacuna* in the correspondence and in the evidence on certain points of importance—explicable, perhaps by the outbreak of war in South Africa at a crucial date in the history of the case—has somewhat embarrassed the Tribunal. The evidence, however, has sufficed to enable us to arrive at a decision.

The material facts are these:

By a contract in writing, contained in two tenders and acceptances, dated in January, February, and March, 1899 (mem., app. exhibits 3-6), the Union Bridge Company agreed with the Orange Free State, acting through its general agents, Messrs. William Dunn & Co. of 43 Broad Street Avenue, London E.C., to supply and deliver for the sum of £ 2,200 and in accordance with a specification (mem., app., p. 10) the material for a wrought steel road bridge. The material was bought f.o.b. New York (see clause 16, "General conditions", app. mem., p. 19 and exhibit 4, p. 23, *ibid.*) and was delivered in two consignments, on board the steamers *Kurrachee* and *Clan Robertson* which sailed from New York for Algoa Bay, South Africa, on September 18th and September 27th, 1899, respectively. The consignments were addressed as follows: "In Dienst, Inspector-General of Public Works, Orange Free State Government, Bloemfontein, South Africa" (mem., app., pp. 40-43). A certificate of acceptance of the material and of the absence of unnecessary delay in the manufacture of the

finished material (ans., annex. 30) was given by Messrs. R. W. Hunt & Co. who were appointed (mem., app., exhibit 7) for that purpose under clauses 5 and 9 of the general conditions (mem., app., p. 17).

During the voyage from New York to Algoa Bay, viz., on October 12th. 1899, war broke out between Great Britain and the Orange Free State. The two steamers referred to arrived at Port Elizabeth on October 25th and November 12th. 1899 (mem., p. 33 and 38), respectively. The bridge material was unloaded at that port, and stored on depositing ground belonging to the Harbour Board. Meanwhile, in accordance with clause 22 of the general conditions of the contract (mem., app., p. 20), the bills of lading had been presented for payment in London on October 27th. 1899, to Messrs. William Dunn & Co., who refused payment (mem., p. 51).

On May 24th. 1900, the Orange Free State was, by proclamation, annexed to Great Britain (ans., p. 40, annex 31).

In June. 1900, a firm of agents, Messrs. Mackie, Dunn & Co., who described Messrs. William Dunn & Co., as "our London friends" (ans., annex 1) took steps to get into communication with the Inspector-General of Public Works at Bloemfontein, with a view to selling the bridge material to the British authorities (ans., annex 1-16). Throughout this correspondence the firm in question assert the property of the Union Bridge Co., in the bridge material, by whom they are instructed to sell and on whose behalf they hold the documents of title (ans., annex 7). On his side the Inspector of Public Works, acting on behalf of the Military Governor, accepts Messrs. Mackie, Dunn & Co.'s statement of the position and discusses the price to be paid for the material and the reductions to be made (ans., annex 6). Finally, on January 10th. 1901, an offer of £ 3,000 is made by the Inspector of Public Works, to remain open for acceptance till January 28th (ans., annex. 12). By a letter dated January 31st (ans., annex 14) acceptance of this offer is intimated by Messrs. Mackie, Dunn & Co., but is rejected on February 18th (ans., annex 15) by the British authorities as being out of time and because of the unsettled state of the country. To this letter Messrs. Mackie, Dunn & Co. reply on February 23rd (ans., annex 16) regretting the decision come to, and suggesting that the matter may be reopened and another offer made by the British authorities at a more opportune moment.

The question has been much discussed both at Washington (oral argument, pp. 14-16) and before us (transcript, pp. 18-23) as to how the property in this material could be in the Union Bridge Co. having regard to the fact that it was bought by the Orange Free State f.o.b. New York. We think it sufficient to say that the matter is not in issue before us. The learned agent of His Britannic Majesty's Government is not concerned to dispute the point (oral argument p. 62). His position would appear to be that the contract for purchase f.o.b. New York and the negotiations between the British authorities and Messrs. Mackie, Dunn & Co. on the footing that the title to this material was in the Union Bridge Co., are elements for the consideration of the Tribunal; but that, from the point of view of his Government, now that State Succession has been abandoned, the f.o.b. contract is *res inter alios acta*, while the negotiations for sale in South Africa make it very difficult, if not impossible, for him to deny that the title was, as at that time, in the Union Bridge company (transcript pp. 43-47). But further, it seems to us that having regard to the refusal of the Orange Free State to pay for the material, and to the subsequent disappearance of the Orange Free State in consequence of conquest and annexation, a claim in equity to the property in the material could have been maintained by the Union Bridge Company.

In our view, the real defences are that, assuming the property to be in the Union Bridge Co.:

(1) His Britannic Majesty's Government is not liable on any principle of law or equity;

(2) If there be liability, no damage has, in fact, been suffered by the Union Bridge Company.

The material continued to lie at Port Elizabeth till August 1901, when, without inspection and without notice to Messrs. Mackie, Dunn & Co (supp. pap., p. 10) it was forwarded by the order of Mr. W. H. Harrison, the Storekeeper of the Cape Government Railways at Port Elizabeth, by rail to the charge of the District Storekeeper, Bloemfontein—a distance of 400 miles (ans., annex 17). There are several contradictory accounts of this removal. In our view the result of the evidence is that Mr. Harrison purported to act upon instructions given to him, shortly after the outbreak of war, when he was storekeeper at East London, to forward all bridge material intended for the Orange Free State railways, to the Imperial Military Railways, Bloemfontein (ans., annex 17). In so forwarding this material, therefore, he made two mistakes, inasmuch as it (1) was neutral property; and (2) was intended for a road, and not a railway bridge (*ibid.*). The Cape Government Railways were distinct from and independent of the Imperial Railways (supp. pap., p. 21); but the British Agent disclaims any intention to deny responsibility for the action of the Cape Government Railways (transcript, pp. 79-80). The Imperial Railway authorities were much annoyed by the arrival of this material at Bloemfontein and refused at first to receive it (supp. pap. pp. 5-18); but it was eventually unloaded and stored at Bloemfontein by the railway authorities (ans., annex 26, p. 40) where it lay till September 1909.

Messrs. Mackie, Dunn & Co. were aware early in October, 1901, that the material had been unloaded at Bloemfontein and would remain there for the present (supp. pap. "B", p. 31); yet during the eight years that it lay there, the Imperial Railway authorities at Bloemfontein received from that firm neither protest nor demand that it should be returned to Port Elizabeth or sent to any other destination. Finally, in 1907, two letters dated, respectively, February 18th and June 24th (supp. ans., annexes 32 and 33) were written by the General Manager of the Central South African Railways to the Union Bridge Company offering to return them the material on certain terms as to payment of charges and indemnity, and intimating that, in default of instructions, the railways would sell it by public auction to defray the expenses already incurred by them in the matter. These letters were unanswered. Accordingly, the material was put up to auction, under the by-laws of the railways on July 22nd, 1908, at Bloemfontein (supp. ans., Annex 35) and bought in for £ 545 (*ibid.*, annex 37). A year later, on August 4th, 1909, the material was sold to the Crown Mines Ltd. for £ 1,500 (supp. ans., annex 40 and 41). The Union Bridge Company have received nothing by way of payment for the material.

On these facts, the question arises: is there any liability on His Britannic Majesty's Government?

In our opinion, the answer to this question is in the affirmative.

The consignment of the material to Bloemfontein was a wrongful interference with neutral property. It was certainly within the scope of Mr. Harrison's duty as Railway Storekeeper to forward material by rail, and he did so under instructions which fix liability on His Britannic Majesty's Government.

That liability is not affected either by the fact that he did so under a mistake as to the character and ownership of the material or that it was a time of pressure and confusion caused by war, or by the fact, which, on the evidence, must be admitted, that there was no intention on the part of the British authorities to appropriate the material in question. The knowledge of Messrs. Mackie, Dunn & Co., in October, 1901, that the material was at Bloemfontein, coupled with

their failure for eight years to make any protest or demand for its return is relevant, in our view, only to the question of quantum of compensation, and does not qualify the intrinsic wrongfulness of Mr. Harrison's action. In this aspect of the case, that action constitutes an international tort, committed in respect of neutral property, and falls to be decided not by reference to nice distinctions between trover, trespass and action on the case, but by reference to that broad and well-recognized principle of international law which gives what, in all the circumstances, is fair compensation for the wrong suffered by the neutral owner. This, and not the contract value of the material is, in our opinion, the true measure of damages.

There is evidence that in October, 1907, the material had deteriorated by reason of rust, corrosion, and bending (ans., annex 19); but this deterioration would have resulted, perhaps to an even greater degree, had the material lain near the sea at Port Elizabeth; and it is a reasonable inference that it was because of their inability to find a purchaser that Messrs. Mackie, Dunn & Co. let the material lie in store for so many years. In other words, in our view, the consignment to Bloemfontein did not cause the deterioration. Taking, therefore, £ 1,500 as the value of the material in 1909, and deducting therefrom the sums of £ 249 and £ 17 10s. for charges at Port Elizabeth (supp. pap., pp. 31 and 16) and £ 123 for marine freight due to the *Clan Robertson* (supp. pap., p. 33), which the Union Bridge Co. would have to pay in any case, and making some allowance for storage at Bloemfontein, we think that justice will be met by an award of £ 750 without interest.

*Now, therefore:*

The Tribunal decides that His Britannic Majesty's Government shall pay to the Government of the United States of America the sum of £ 750 sterling.

#### SEVERAL CANADIAN HAY IMPORTERS (GREAT BRITAIN) *v.* UNITED STATES

*(Canadian Claims for Refund of Duties. March 19, 1925. Pages 364-370.)*

EXHAUSTION OF LOCAL REMEDIES.—MUNICIPAL LAW: KNOWLEDGE OF ALIENS OF PRESUMPTION.—IMPLIED WAIVER OF DEFENCE. Collection between 1868 and 1882 of too high customs duties on importations of baled hay from Canada into United States. Failure of claimants to avail themselves of legal remedies secured by United States legislation. No reimbursement of claimants made. *Held* that legal remedies were adequate and that importers are presumed to know customs laws of countries with which they are dealing; plea that claimants at time of collections were unaware, until too late, that duties paid were in excess of those imposed by law therefore rejected. *Held* also that submission of claims to Tribunal by United States constituted no implied waiver of defence under municipal law. Claims disallowed.

*Cross-references:* Am. J. Int. Law, vol. 19 (1925), pp. 795-800; Annual Digest, 1925-1926, p. 230.

*Bibliography:* Nielsen, pp. 347-363.

This proceeding involves five claims which have been argued, submitted, and considered together for duties paid to the Government of the United States

on importations of baled hay from Canada. It is contended that the duties so paid were in excess of those imposed by law.

Concerning the facts there is no dispute.

Between 1868 and 1882 duties were levied, collected, and paid pursuant to the provisions of section 2516 of the Revised Statutes of the United States. The material portion of this statute reads as follows:

"There shall be levied, collected and paid on the importation of all raw or unmanufactured articles, not herein enumerated or provided for, a duty of 10 *per centum ad valorem*; and on all articles manufactured in whole or in part, not herein enumerated or provided for, a duty of 20 *per centum ad valorem*."

The duty of making classifications under the customs laws was vested in the collectors of customs, supervised by the Treasury Department. That department classified baled hay as an article manufactured in whole or in part, and, therefore, during the period mentioned, the duty of 20 *per centum ad valorem* was levied and collected upon all baled hay imported into the United States.

There were also in force at this time the following laws relating to protest, appeal, and resort to the courts by importers for the recovery of any duties alleged to be erroneously or illegally exacted.

Section 2931 of the Revised Statutes of the United States:

"On the entry of any vessel, or of any merchandise, the decision of the collector of customs at the port of importation and entry, as to the rate and amount of duties to be paid on the tonnage of such vessel or on such merchandise, and the dutiable costs and charges thereon, shall be final and conclusive against all persons interested therein, unless the owner, master, commander, or consignee of such vessel, in the case of duties levied on tonnage, or the owner, importer, consignee, or agent of the merchandise, in the case of duties levied on merchandise, or the costs and charges thereon, shall, within ten days after the ascertainment and liquidation of the duties by the proper officers of the customs, as well in cases of merchandise entered in bond as for consumption, give notice in writing to the collector on each entry, if dissatisfied with his decision, setting forth therein, distinctly and specifically, the grounds of his objection thereto, and shall within thirty days after the date of such ascertainment and liquidation, appeal therefrom to the Secretary of the Treasury. The decision of the Secretary on such appeal shall be final and conclusive; and such vessel, or merchandise, or costs and charges, shall be liable to duty accordingly, unless suit shall be brought within ninety days after the decision of the Secretary of the Treasury on such appeal for any duties which shall have been paid before the date of such decision on such vessel, or on such merchandise, or costs or charges, or within ninety days after the payment of duties paid after the decision of the Secretary. No suit shall be maintained in any court for the recovery of any duties alleged to have been erroneously or illegally exacted, until the decision of the Secretary of the Treasury shall have been first had on such appeal, unless the decision of the Secretary shall be delayed more than ninety days from the date of such appeal in case of an entry at any port east of the Rocky Mountains, or more than five months in case of an entry west of those mountains."

Section 3011 of the Revised Statutes of the United States:

"Any person who shall have made payment under protest and in order to obtain possession of merchandise imported for him, to any collector, or person acting as collector, of any money as duties, when such amount of duties was not, or was not wholly, authorized by law, may maintain an action in the nature of an action at law, which shall be triable by jury, to ascertain the validity of such demand and payment of duties, and to recover back any excess so paid. But no recovery shall be allowed in such action unless a protest and appeal

shall have been taken as prescribed in section twenty-nine hundred and thirty-one."

These provisions are similar to those found in the customs laws of various countries, including Canada (pages 57 to 63 of the answer.)

The several claimants were Canadian shippers of baled hay consigned to agents or brokers in the United States who paid and billed back upon their respective consignors duties at the rate of 20 *per centum, ad valorem*.

In 1882 a firm of commission merchants in New York, availing itself of the provisions of sections 2931 and 3011 of the Revised Statutes above quoted, proceeded by protest, appeal and suit to recover the difference between 10 *per centum* and 20 *per centum, ad valorem*, paid on certain shipments of baled hay. This proceeding culminated in a decision of the Circuit Court of the United States for the Northern District of New York to the effect that under section 2516 of the Revised Statutes of the United States, baled hay was dutiable only at the rate of 10 *per centum ad valorem* (Frazee, *et al. vs.* Moffitt, collector; 18 Federal 584). Consequently, the plaintiff in that proceeding recovered judgment for the additional 10 *per centum* which it had paid. There was no appeal from this decision and the Treasury Department on March 23, 1882, issued to collectors of customs a circular reading in part as follows:

"The Attorney-General has advised acquiescence in such ruling (Frazee, *et al. vs.* Moffitt, collector). I yield to this opinion and officers of the customs will govern their actions accordingly."

Thenceforth baled hay ceased to be classified as a manufactured article under section 2516 of the Revised Statutes of the United States, and duties began to be levied and collected at the rate of 10 *per centum* instead of 20 *per centum, ad valorem*.

At no time did the claimants here involved avail themselves of the right of protest to the collector, appeal to the Treasury Department and resort to the courts secured by section 2931 and 3011 of the Revised Statutes of the United States. It is asserted, however, that at the time the collections were made they had no actual knowledge of the provisions of the customs laws of the United States and were not aware, until too late for protest and appeal under the statutes, that the duties paid were in excess of those imposed by law. In 1883 the claimants presented a memorial to the Governor-General of Canada requesting that their claims be brought to the attention of the United States, and certain diplomatic correspondence ensued. The position taken by the Government of the United States was in effect that in the circumstances the claimants must have recourse to Congressional action for any refund to which they might appear to be entitled. A bill was later introduced in Congress and the matter was in due course referred to the Committee on Claims of the United States Senate, which in turn referred the bill to the Court of Claims for findings of fact under the terms of the Act of March 3, 1887. The Court of Claims in February, 1909, reported back to the Senate Committee findings of fact in the case of one claimant, Blain, evidently taken as typical.

In the course of the argument a letter from the Secretary of the Treasury dated March 20, 1906, to the Senate Committee on Claims was produced. Inasmuch as this letter does not appear in the formal record, it is here quoted:

1126-D

## "TREASURY DEPARTMENT

## "OFFICE OF THE SECRETARY

"Washington, March 20, 1906

"The Chairman  
"Committee on Claims  
"United States Senate

"Sir:

"I have the honor to acknowledge the receipt of your letter of the 14th instant requesting information relative to the merits of S. 4402, granting to the Court of Claims jurisdiction to hear and determine, notwithstanding failure to file protests, etc., the claims of Hosmer, Crampton & Hammond and others for duties in excess of those imposed by law upon hay imported into the United States during the years 1866 to 1882, inclusive.

"All of the claims covered by said bill have not been identified on the records of the Department but many have been and all so far as identified are entirely similar and are covered by the following statement of facts.

"Under the tariff acts of 1861, 1862, and 1870, codified in the Revised Statutes of 1874 and 1878, hay was not specifically provided for and by a ruling of this Department dated April 8, 1868, the same was held to be dutiable at the rate of 20 % *ad valorem* as a non-enumerated manufactured article under the Act of March 2, 1861 (see section 2516, Revised Statutes).

"Duties were assessed in accordance with such ruling upon all imported hay until March 23, 1882, when the United States Circuit Court having held in the case of *Frazer v. Moffitt*, 18 Federal Reporter 584, that such hay was subject to a duty of 10 % only, as a non-enumerated unmanufactured article under section 2516 R.S., the Department acquiesced in said decision and duties at the rate of 10 % only were collected upon imported hay until the passage of the Act of 1883, by which hay was made subject to a specific duty at \$2.00 per ton.

"Under the provisions of section 14 of the Act of June 30, 1864 (sec. 2931, Revised Statutes), the decision of the Collector was made final and conclusive against all persons interested therein unless a protest was filed against such decision within ten days thereafter, and an appeal taken to the Secretary of the Treasury.

"As none of the claimants filed the protests necessary to a review of the collector's decision and a refund of the duties erroneously assessed, they did not pursue their legal remedy and must be considered as having concurred in the collector's decision and in any errors occurring therein.

"The amount of duties involved in the aggregate or in each individual case covered by the bill can not be ascertained unless the ports of entry be stated and then only at a very large expense. The aggregate of the excessive duties collected on imported hay between the dates mentioned has, however, been variously estimated at from \$250,000 to \$2,000,000.

"In my opinion, the passage of the bill referred to would establish a very bad precedent, as I know of no reason why these importers should be repaid the excessive duties collected from them that would not equally apply to all persons who have paid excessive duties and have not pursued their legal remedy, and to allow all such claims would be equivalent to a repeal of the provisions of law requiring the filing of protests by importers and would subject the Government to an avalanche of claims subsequent to every adverse decision of the courts in customs cases.

"For your further information I enclose herewith letters dated the 1st and 10th ultimo from the Department to the Chairman of the Committee on Claims of the House of Representatives relative to similar claims.

"Respectfully,

"L. M. SHAW

"Secretary.

"(2 inclosures)"

Although the subject was under consideration by Congress for several years no Congressional action was taken; and eventually the claims were included in the schedule for decision by the Tribunal.

It is clear from the foregoing statement of facts that the customs laws of the United States afforded adequate legal remedies to all importers in the situation of these claimants who might be dissatisfied with the duties exacted and contend that they were either unlawful or excessive. These remedies we find were not only reasonable and fair, but more or less common to the customs laws of all civilized countries. We do not conceive that in the orderly administration and enforcement of such laws any other course of action is open to governments as a practical matter. Some definite procedure for the control of appeals for refunds must be laid down and observed. It is of course conceivable that a statutory procedure might be so unreasonable as effectually to deny the right of protest and appeal, but we do not find any such condition here; and even if a case of unreasonable and arbitrary statutory procedure were presented, provided it applied equally to the nationals of the government concerned and to foreigners, we should entertain grave doubt as to whether it could be said to operate as a denial of justice so as to lay the foundation for an international claim.

Section 2931 of the Revised Statutes of the United States has been construed by the Supreme Court of the United States. We quote from the opinion in *Arnsion* and another *v. Murphy*, collector, 115 U.S. 579, decided on December 7, 1885:

"The statute makes the decision of the collector final and conclusive as to the rate and amount of duties, unless there is a specific protest made to the collector within ten days after the liquidation, and an appeal taken to the Secretary of the Treasury within thirty days after the liquidation. The decision of the Secretary on the appeal is made final and conclusive, unless a suit is brought within ninety days after such decision, in the case of duties paid before the decision, or within ninety days after the payment of duties paid after the decision; and no suit can be brought before a decision on the appeal, unless the decision is delayed for the time specified in the statute.

"We are of opinion that it is incumbent upon the importer to show, in order to recover, that he has fully complied with the statutory conditions which attach to the statutory action provided for. He must show not only due protest and appeal, but also a decision on the appeal, and the bringing of a suit within the time limited by the statute after the decision, or else that there has been no decision, and the prescribed time after the appeal has elapsed. The decision on the appeal is, necessarily, a matter of record in the Treasury Department, and, as is shown in the present case, it is communicated to the collector by a letter to him, the letter itself being the decision. The letter is a matter of record in the custom house. Inquiry there or at the Treasury Department would always elicit information on the subject: and the importer, knowing when his appeal was taken, can always protect himself by bringing his suit after the expiration of the time named after the appeal, although he has not heard of a decision, being thus certain that he will have brought it within the time prescribed after a possible decision.

"The conditions imposed by the statute cannot, any of them, be regarded as matters a failure to comply with which must be pleaded by the defendant as a statute of limitation. The right of action does not exist independently of the statute, but is conferred by it. There is no right of action on showing merely the payment of the money as duties, and that the payment was more than the law allowed, leaving any statute of limitation to be set up in defence, as in an ordinary suit. But the statute sets out with declaring that the decision of the collector shall be final and conclusive against all persons interested, unless certain things are done. The mere exaction of the duties is, necessarily, the decision of the collector, and, on this being shown in any suit, it stands as conclusive till the plaintiff shows the proper steps to avoid it. These steps include not only protest and appeal, but the bringing of a suit within the time prescribed. They are all successively grouped together in one section, not only in section 14 of the act of 1864, but in section 2931 of the Revised Statutes; and the 'suit' spoken of in those sections is the 'action' given in Revised Statutes, section 3011."

We adopt this reasoning as applicable to these claims.

The plea that the claimants were ignorant of their rights under the law, and consequently entitled to refunds of duties, regardless of the law, through the award of an international tribunal cannot be sustained. Importers, whatever their nationality, must be presumed to know and are bound by the customs laws of the countries with which they are dealing. These claimants in fact dealt through commission brokers and agents in the United States by whom the duties were actually paid.

The submission of the claims to this Tribunal by the Government of the United States constituted no implied waiver and did not operate to take them out from under the ordinary statutory provisions.

*Now, therefore :*

The award of the Tribunal is that the claims of His Britannic Majesty's Government be disallowed.

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OWNER OF THE *R. T. ROY* (UNITED STATES) *v.* GREAT BRITAIN  
(*March 19, 1925. Pages 408-410.*)

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SEIZURE OF FISHING VESSEL IN LAKE HURON, ESCAPE.—EVIDENCE: PLACE OF SEIZURE. DAMAGE. FAILURE TO CO-OPERATE IN COLLECTING EVIDENCE.—EXHAUSTION OF LOCAL REMEDIES, EQUITY. Seizure of American fishing vessel *R. T. Roy* on June 25, 1908, by Canadian inspector of Fisheries in Lake Huron. Escape of vessel after preliminary examination by inspector of officers and crew at South Bay Mouth on June 27, 1908. Claim presented for damages on account of seizure, detention, loss of catch, destruction of nets. *Held* that, wherever boundary through Lake Huron was then located, evidence not sufficient to determine whether seizure effected on American or on Canadian side of it, and that evidence of damages inconclusive and unsatisfactory. Vessel's escape and its failure, therefore, to submit to orderly legal procedure emphasized. *Held* equitable to disallow claim for failure to exhaust local remedies.

*Cross-reference:* Am. J. Int. Law, vol. 19 (1925), pp. 800-803.

*Bibliography:* Nielsen, pp. 406-407.

On June 25, 1908, the *R. T. Roy*, a steam fishing vessel of American ownership and registry, was seized in Lake Huron by a Canadian inspector of Fisheries. The reason alleged for the seizure was that the vessel was at the time fishing in Canadian waters. The inspector took her forthwith, together with the officers and crew, to South Bay Mouth, a Canadian port. There, it appears, a preliminary examination of the officers and crew was conducted by the inspector, and their testimony was reduced to writing. After a lapse of two or three days the inspector set out in another vessel with the *Roy* in tow, the officers and crew still on board, for Sault Ste. Marie, another Canadian port, where the usual legal inquiry looking to the ultimate condemnation or release of the vessel was intended to take place. On the way, the *Roy* ran on a reef in Canadian waters, and, efforts to float her again proving ineffectual, the inspector went on to Sault Ste. Marie in the other boat for the purpose of securing assistance. While he was gone the captain and crew of the *Roy* succeeded in getting her off the reef, and they thereupon took her back to her home American port, Alpena, Michigan, where on the first day of July, 1908, further depositions of the officers and crew covering the circumstances of the seizure were taken before a notary public. These latter depositions are included in the record. The testimony taken at South Bay Mouth, saving that of the captain, has not been produced. The evidence indicates that the papers embodying the South Bay Mouth testimony were left on the *Roy* by the inspector when he left her to go to Sault Ste. Marie, and that they were subsequently carried to Alpena and there disappeared. Some years later, however, the testimony of the captain was produced by one of the attorneys for the claimant at Alpena, on request of the State Department.

At the moment of seizure there was a discussion between the inspector and the captain with regard to the precise location of the *Roy*. The chart carried by the *Roy* was produced, and, while the evidence is not quite clear on the point, it seems probable that the cross found on the chart was placed there by the captain in the course of this discussion, and that this cross represented both the captain's and the inspector's estimate of the place of seizure. It is contended by the Government of the United States that the seizure took place within American waters, and it is contended by His Majesty's Government that the point was in Canadian waters.

Damages are claimed for the seizure and detention of the vessel, for loss of the catch of fish, and for destruction of nets.

The sole issue—one of pure fact—which is sharply raised in the pleadings and has been exhaustively argued by distinguished counsel, is whether, having due regard for the international boundary through Lake Huron as it was then located, the seizure of the *Roy* was effected on the American or on the Canadian side of that boundary.

In the view which we take of this controversy, we do not find it necessary for us to follow the argument in its involutions with respect to the exact location of the boundary through Lake Huron as laid down by the Treaty of Ghent of 1783 and by the decision of the Special Commissioners in 1822, pursuant to the second Treaty of Ghent, executed in 1814. Nor are we inclined to engage upon any detailed analysis of the evidence beyond pointing out its vague and uncertain character. We have been forced to conclude that in the state of the record it is impossible, without indulging unwarranted conjecture, to determine the main question of fact involved. Leaving out of account the complicated problem of the boundary itself, which is of course not physically indicated through Lake Huron, we are faced by an irreconcilable conflict of untested and untestable statements. The location of the point of seizure is at best a mere guess. The captain of the *Roy* is quoted as saying that he "could only make an

estimate or guess as to her location when seized". To check the location by reference to the speed of the *Roy* on her trip to the fishing ground is impracticable because varying estimates of speed were made. The so-called "deep hole", where the nets were set, might have been ascertained with reasonable accuracy, but no evidence on this subject has been adduced. The unexplained disappearance of the best contemporary evidence, namely, the statements taken at South Bay Mouth two days after the seizure for the express purpose of ascertaining the facts, is also a disturbing factor. The evidence of damages is inconclusive and unsatisfactory.

The Tribunal is constrained to emphasize the failure of the claimant to submit to the orderly legal procedure provided for the determination of the issue at the time. The seizure here complained of was the initial step in a procedure which, if it had been permitted to pursue its normal course, would have led to a judicial inquiry in which the very issue here presented would have been considered with full opportunity to elicit all the facts by examination of records and cross-examination of material witnesses. This procedure was interrupted, and its logical completion rendered impossible, by the affirmative act of the claimant's representative in withdrawing the vessel from the only jurisdiction where the matter could be duly and promptly dealt with. The circumstances do not justify us in finding that the Canadian authorities had abandoned the seizure when such withdrawal took place.

Moreover, proceedings might have been taken in the Canadian courts at any time against the Fisheries inspector personally or against the Canadian Government by way of petition of right.

The terms of submission provide that this Tribunal "shall take into account as one of the equities of a claim to such extent as it shall consider just in allowing or disallowing a claim, in whole or in part, any failure on the part of the claimant to obtain satisfaction through legal remedies which are open to him or placed at his disposal".

In the exercise of the discretion thereby conferred, the Tribunal is of the opinion that the claim must be disallowed.

*Now, therefore :*

The award of the Tribunal is that the claim of the Government of the United States be disallowed.

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#### ADOLPH G. STUDER (UNITED STATES) *v.* GREAT BRITAIN

*(March 19, 1925. Pages 548-553.)*

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ANNEXATION. SUCCESSION OF STATES: PRIVATE RIGHTS ACQUIRED PREVIOUS TO—.—INTERNATIONAL RESPONSIBILITY FOR DEPENDENT STATE.—EXHAUSTION OF LOCAL REMEDIES.—EVIDENCE: PROOF OF MUNICIPAL LAW.—EXTRAJUDICIAL ACTION. Grant of land made on February 3, 1877, by Sultan of Muar to Mr. Adolph G. Studer, United States citizen. Annexation of Muar in 1878 by Sultan of Johore who, according to Mr. Studer, deprived him of benefit of grant. Assumption by Great Britain of international responsibility for Government of Johore in 1885. Failure of Mr. Studer to submit case to local Courts as agreed to by Sultan. Lack of evidence concerning facts and municipal law obtaining in Muar at time of grant. *Held* that reason why claim not carried before Courts of Johore not sufficiently explained. Claim

disallowed with recommendation that Sultan's offer that claim be submitted to Johore Courts be renewed.

*Cross-reference:* Am. J. Int. Law, vol. 19 (1925), pp. 790-794.

*Bibliography:* Nielsen, p. 547.

This claim as put forward in the memorial is "for the repeated invasion and ultimate destruction of cessionary and property rights" in the State of Muar, in the Malay Peninsula. The particular events giving rise to it took place in the years 1875, 1876 and 1877. The original claimant, Adolph G. Studer, was at that time the Consul of the United States at Singapore. He conceived the idea of securing a cession of land somewhere in the peninsula and establishing a plantation. After a preliminary inquiry he decided that the State of Muar was a desirable location for his project and accordingly approached the ruling Sultan of that State, Ali Iskander Sah, with a view to obtaining a grant. Following certain conversations with one Keun, an employee of a bank at Singapore, who apparently represented the Sultan, Studer sent Keun to see the latter at Malacca, and the result was a so-called preliminary concession dated December 24, 1875 (appendix to the memorial, pp. 201-204). This instrument, drawn up by Studer himself in the technical language usual in conveyances made under the Anglo-Saxon system of land tenure, purported to convey to Studer under certain conditions the fee simple title to a tract of land six geographical miles square, to be selected by Studer on any portion of Muar not already disposed of by the Sultan. One of the conditions required Studer to make the selection within three years from the date of the instrument. About one year later Studer himself went to Malacca and, after an interview with the Sultan, proceeded to Muar where he undertook to make the selection. At the same time he also located grants for several other individuals who appeared to have become interested, through him or otherwise, in the possibilities for developing plantations in that territory.

On February 3, 1877, the preliminary grant was superseded by a final one which defined Studer's concession by metes and bounds (appendix to the memorial, pp. 204-206). This second instrument appreciably enlarged the area of the grant so that it included approximately 80 square miles. The final grant comprised substantially 50,000 acres.

Sultan Ali died in July, 1877.

The contention of the United States is that although Studer subsequently complied with all of the conditions of the grant, he was deprived of the benefit thereof, and his concession was effectually destroyed, through the wrongful acts and omissions of the subsequent ruler of Muar, the Sultan of Johore, to whose dominions the State of Muar was annexed in 1878.

The British Government appears in this proceeding by virtue of its assumption of responsibility internationally for the Government of Johore under the provisions of a treaty made in 1885.

In January, 1894, Studer brought his claim to the attention of the British Acting Governor of the Straits Settlement by means of a letter outlining at length the history of the concession and of his efforts to secure recognition for it and to operate under it (appendix to the memorial, p. 175). In October, 1894, Studer filed with the State Department at Washington a comprehensive statement of his claim, which occupies, together with the exhibits, nearly 200 pages of the record (appendix to the memorial, pp. 85-276 1/2). In October, 1896, the State Department took the matter up with the British Government and a long diplomatic correspondence ensued, concluding with a communication dated April 28, 1906, from Sir Edward Grey, then at the head of the Foreign Office, to the Honorable Whitelaw Reid, then American Ambassador

(appendix to the memorial, p. 582). This communication referred to a previous suggestion that the claim be submitted to the local courts in Johore for adjudication, and, after transmitting a memorandum from the Sultan of Johore and his advisory board, Sir Edward Grey said:

"It is therein again pointed out that no valid reason has yet been adduced for the claimant's refusal to submit his claim in a regular manner before the proper court in Johore; and, as was stated in the note to Mr. Choate of the 8th of November, 1903, His Majesty's Government feel that until that step has been taken the Johore Government cannot be pressed to recognize the claim in any way.

"It appears from the earlier 'statement of facts and argument for the claimant' drawn up in 1899, that some difficulty was thought to exist in adopting this course, on the ground that 'the immunity of the Sovereign Power from suits at law within its territorial limits, unless by its own consent and in the manner in which it ordains', was a familiar principle at law.

"With a view of meeting this objection His Majesty's Government have thought it desirable to obtain a distinct assurance from the Sultan of Johore on the subject; and His Highness has now formally expressed willingness to waive all technical objections, and to agree to the case being tried by the Principal Judicial Officer in Johore in the presence of a British officer. In the circumstances Your Excellency will no doubt agree that the legal remedies which are open to the claimant in the Sultan's courts must be exhausted before any question of treating the matter through the diplomatic channel or referring it to arbitration can be considered" (appendix to the memorial, pp. 582-583).

It does not appear that any advantage was taken of this offer. Counsel for the United States in the course of the oral argument stated that so far as he was advised the reason for the failure was that the existing treaty with the schedule in which this claim was ultimately included was then already under discussion between the two Governments (transcript of oral argument, p. 695), and Counsel for His Majesty's Government gave it as his understanding that the offer still stands (transcript of oral argument, pp. 447-448).

In the view which, with great reluctance, we feel obliged to take of this case, we do not consider it either necessary or proper for us to enter upon a detailed examination of the evidence presented. The Tribunal finds itself not only embarrassed by the singular lack of reliable evidence and testimony on both sides, but virtually precluded from arriving at any confident conclusion upon the merits of this most interesting and complicated controversy. There is hardly a statement of fact in this record which is not disputed; and the number of facts which may be said to be definitely ascertained or admitted is almost negligible. Every issue has been strenuously fought. It may be useful to enumerate some of these issues:

The power of Sultan Ali to make any concession is denied.

The evidence governing the status and authority of the Sultan in such matters is meagre and unsatisfactory.

Assuming that he had the power, it is contended that the Sultan did not in fact exercise it in this instance; that there is no adequate showing that the Sultan knew what he was doing when he signed the deeds or that he intended to do more than issue a mere licence or permit. In this connexion it is admitted that the record is silent upon the rather important question whether the Sultan could read or understand the English language in which the deeds were framed.

The relative positions of the Sultan and of the so-called Tumongong of Muar and the necessity for ratification by the latter are not so clearly defined as one would like to have them. In this connexion it is contended that the Tumongong did in reality ratify the concession; but the document relied

upon for this purpose is at least open to varying interpretations, and the further evidence on the point seems shadowy and imperfect.

The construction to be placed upon the grant itself has been debated at great length. On the one hand, we are asked to hold that the deed must be construed at its face value, in accordance with the principles of western systems of land tenure, as a conveyance of title in fee simple; on the other, it is argued that the instrument must be interpreted in the light of the Malay customary law, and that so construed it has the effect of a mere permit to enter and cultivate, such permit being personal to the grantor and lapsing with his death. The Tribunal has not before it any authoritative statement of the Malay customary law applicable to the State of Muar in 1876 and 1877. The situation in this respect offers serious complications. We are dealing with a transition period; and while it is plain that the native customary law, whatever it may have been, ultimately gave way to the white man's law, the point of time at which it can fairly be said that the process had advanced far enough to embrace the possibility of a grant of this form and character is, in our opinion, hardly susceptible of determination on the record before us. The evidence of actual practice at the period under consideration is fragmentary and inconclusive.

A large part of the oral argument has been devoted by both counsel to a discussion of events subsequent to the grant, bearing particularly upon Studer's efforts to comply with the conditions and to develop his project in the face of alleged interference by the local authorities. Some 12 acts of commission and omission have entered into this discussion. We apprehend that in any conscientious examination of the question whether a denial of justice within the meaning of international law took place, the conclusion would have to be based not upon the definite establishment of any one or more of these so-called "trespasses" as such, but upon the cumulative effect of these transactions viewing them as illustrative of a general prevailing condition and of the attitude maintained by the local authorities. These are all disputed questions of fact, and without taking them up *seriatim* and in detail we are constrained to hold that in the present state of the evidence we can not form a reliable conclusion as to whether there was or was not a denial of justice.

The Tribunal sees no reason to doubt Studer's absolute sincerity and perfect good faith from beginning to end; it has been deeply impressed by this circumstance, which is indeed conceded by counsel for His Majesty's Government. Nevertheless, where a case rests so largely upon *ex parte* statements prepared many years after the event by the party in interest, for the express purpose of presenting his claim in the best possible light, allowances must be made for infirmities of memory as well as for a claimant's natural sense of grievance amounting sometimes to almost an obsession. Studer's letter to the Acting Governor of the Straits Settlement and his communication to the Department of State were both written nearly 20 years after the transactions took place. Neither of these statements possesses the solemnity of a sworn declaration. They are merely the attempts of an individual who truly believed that he had been wronged, and perhaps had been unjustly treated, to recall and set down acts and circumstances of long ago. In effect, the Government of the United States asks the Tribunal to accept these statements without substantial corroboration and to found its judgment upon them. Without regarding many, if not most, of the essential facts as duly established in this way, it is difficult to see how any judgment could be rendered; and even so, much would be left to inference and conjecture.

On the whole record the Tribunal is convinced that the Government of the United States was justified in espousing this claim. It is, moreover, our unanimous feeling that the claim deserved, and still deserves, careful consider-

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.

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

### v. GREAT BRITAIN

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

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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

the port of Ferryland in Newfoundland in June 1889, the local customs authorities refused to recognize the licence. After trying at two other ports, at each of which the authorities refused to recognize the licence, and after information that the vessel would be seized if attempt was made to act under it, the master gave up fishing and sailed for his home port with a partial cargo.

In the answer it is set up: (a) that the master should have paid for a Newfoundland licence under protest and reclaimed the money; (b) that it is not shown that the master even if denied his right to procure bait in Newfoundland, could not have procured it elsewhere; (c) that the abandonment of the fishery was not a natural or probable result of the refusal of the Newfoundland authorities to recognize the licence; (d) that the licence was not valid in Newfoundland; and (e) that the damages claimed are "remote, speculative, contingent, and incapable of assessment".

As to the first contention, we find that the master communicated at once by telegraph with the State Department at Washington. Obviously that Government could not acquiesce in the proposition that the terms of the *modus vivendi* should be set aside by requiring two licences where but one annual licence was provided for. We think the master was not bound to proceed in any other way than by asserting his rights under the licence and the *modus vivendi* and referring the matter to his own Government.

Upon the second and third contentions, there seems to us sufficient evidence that denial of the right to procure bait in Newfoundland compelled abandonment of the fishing voyage.

With respect to the fourth contention, quite apart from any question of the binding force of the *modus vivendi* and its provision for "annual licences" to be recognized both in Canada and in Newfoundland, the action of the Council of Newfoundland on October 15, 1888, above referred to, seems to us to be decisive.

As to damages, the questions raised are the same as those considered in the cases of the Horace B. Parker (claim No. 76) and the Thomas F. Bayard (claim No. 77) and call for no further comment.

We award the sum of \$8,625, claimed by the United States for enforced giving up of the voyage. The claim, originally put forward for a possible second and third voyage, which were not attempted, were very properly abandoned by the United States.

#### F. H. REDWARD AND OTHERS (GREAT BRITAIN) v. UNITED STATES

(*Hawaiian Claims. November 10, 1925. Pages 160-161.*)

CONQUEST, ANNEXATION, SUCCESSION OF STATES: LIABILITY FOR DELICT. Monarchist rebellion in Hawaii on January 6, 1895. Arrest and imprisonment of British subjects under martial law proclaimed on January 7, 1895, by President of Republic. Choice offered by Government to stand trial by military commission or leave the country. Several chose to leave, others released after investigation. Rejection on December 17, 1897, of claims presented by Great Britain. Annexation of Hawaii by United States on July 7, 1898. Claims brought before Tribunal for wrongful imprisonment etc. *Held* that no general principle of succession to liability for delict exists to which succession through conquest would be exception (reference made to Robert E. Brown award, see p. 120 *supra*).

*Cross-references:* Am. J. Int. Law, vol. 20 (1926), pp. 381-382; Annual Digest, 1925-1926. p. 80.

*Bibliography:* Nielsen, pp. 85-159.

These are claims for wrongful imprisonment, detention in prison, enforced leaving of the country, and other indignities, claimed to have been inflicted upon British subjects by the authorities of the Hawaiian Republic prior to annexation by the United States.

We think the cases are governed by the decision of this tribunal in the case of Robert E. Brown, American and British claims arbitration, claim No. 30.

It is contended on behalf of Great Britain that the Brown case is to be distinguished because in that case the South African Republic had come to an end through conquest, while in these cases there was a voluntary cession by the Hawaiian Republic as shown (so it is said) by the recitals of the Joint Resolution of Annexation. We are unable to accept the distinction contended for. In the first place, it assumes a general principle of succession to liability for delict, to which the case of succession of one state to another through conquest would be an exception. We think there is no such principle. It was denied in the Brown case and has never been contended for to any such extent. The general statements of writers, with respect to succession to obligations, have reference to changes of form of government, where the identity of the legal unit remains, to liability to observe treaties of the extinct state, to contractual liabilities, or at most to quasi-contractual liabilities. Even here, there is much controversy. The analogy of universal succession in private law, which is much relied on by those who argue for a large measure of succession to liability for obligations of the extinct state, even if admitted (and the aptness of the analogy is disputed), would make against succession to liability for delicts. Nor do we see any valid reason for distinguishing termination of a legal unit of international law through conquest from termination by any other mode of merging in, or swallowing up by, some other legal unit. In either case the legal unit which did the wrong no longer exists, and legal liability for the wrong has been extinguished with it.

We decide that these claims must be rejected.

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## SEVERAL BRITISH SUBJECTS (GREAT BRITAIN) *v.* UNITED STATES

*(Iloilo Claims. November 19, 1925. Pages 403-405.)*

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CESSION OF SOVEREIGNTY. ANNEXATION. SUCCESSION OF STATES.—PROTECTION OF ALIENS AGAINST INSURGENTS.—NECESSARY WAR LOSSES, CONDUCT OF MILITARY OPERATIONS. Cession by Spain to United States of sovereignty over Philippines: treaty signed on December 10, 1898, exchange of ratifications on April 11, 1899. Provision that on exchange of ratifications Spain should evacuate islands. Desire of Spanish commander at Iloilo, Island of Panay, to evacuate earlier. Request on December 14, 1898, by Iloilo business men among whom six of present claimants, to United States commander at Manila to occupy place. Evacuation of Iloilo by Spanish commander on December 24, 1898, immediately followed by occupation by Filipino insurgents. Arrival of United States expeditionary force in Iloilo harbour on December 28, 1898. Declaration of war by so-called Filipino Republic against United States on February 4, 1899. Landing of United States forces

in Iloilo on February 11, 1899, occupation of town burned by insurgents. Loss of claimants' property by, or in consequence of, fire. *Held* that no culpable disregard of interests of claimants shown: (1) United States intervention was matter of discretion; (2) delay in landing forces largely due to request by businessmen themselves; and (3) no wanton or intentional destruction of property by United States vessels or troops, Tribunal not competent to criticize conduct of military operations. Claims disallowed.

*Cross-reference:* Am. J. Int. Law, vol. 20 (1926), pp. 382-384.

*Bibliography:* Nielsen, pp. 382-402.

These are claims for destruction of property of British subjects on the occasion of the occupation of Iloilo by the forces of the United States during the Philippine Insurrection.

On August 12, 1898, a "Protocol of Agreement" had been entered into between the United States and Spain whereby it was provided that the United States should "occupy and hold the city, bay, and harbour of Manila, pending the conclusion of a treaty which shall determine the control, disposition, and government of the Philippines". On December 10, 1898, a treaty was signed whereby, in article III, Spain ceded the Philippines to the United States. Article v of the treaty provided that on exchange of ratifications Spain should evacuate the islands. Exchange of ratifications did not take place until April 11 following. In the meantime, the Spanish commander at Iloilo, on the island of Panay, the second place of importance in the archipelago, being pressed by Filipino insurgents, desired to evacuate, and seems to have communicated this desire to General Otis, the American commander at Manila. The latter stated that he was without authority to act on the suggestion. On December 14, however, the businessmen of Iloilo having requested General Otis to occupy the place in order to preserve peace and property, the general cabled to Washington asking permission to do so. No answer was sent till December 21. In consequence an expeditionary force could not be dispatched until December 26 and it did not reach Iloilo until December 28. Although General Otis had endeavoured to get word of the expedition to the Spanish commander, he had not succeeded. The place had been evacuated on December 24, and was promptly occupied by a force of Filipino insurgents. General Miller, who commanded the expeditionary force, acting on a petition from the businessmen of Iloilo, which he communicated to General Otis, and on instructions from Manila, and ultimately from Washington, remained in the harbour without landing his force or attempting to take possession until February 11. On that date, pursuant to orders dated February 8, which reached him on February 10, he landed, drove out the insurgents, and occupied the town. From the beginning the insurgents had threatened to burn the town if forcibly driven out, and on February 11 they succeeded in carrying out this threat. The property of the claimants was destroyed by, or lost in consequence of, this fire.

It is contended by Great Britain that there was culpable neglect on the part of the authorities of the United States in three respects: (1) in the delay of a week in answering General Otis's request, so that the Spanish commander had evacuated Iloilo and the insurgents had taken control before the expedition under General Miller arrived; (2) in delaying the occupation of Iloilo after General Miller's arrival, so that the insurgents were able to make and carry out preparations for burning the town; (3) in the manner of landing and occupation when finally made.

As to the first contention, we are of opinion that there was no duty upon the United States under the terms of the Protocol, or of the then unratified

treaty, or otherwise, to assume control at Iloilo. *De jure* there was no sovereignty over the islands until the treaty was ratified. Nor was any *de facto* control over Iloilo assumed until the taking up of hostilities against the United States on the part of the so-called Filipino Republic required it on February 11, 1899. The sending of General Miller's force, at the request of the business men of the place, was an intervention to preserve peace and property. As between the United States and the claimants or their government, it was a matter of discretion whether or not to do this, and no fault can be imputed because of delay in undertaking such an intervention.

As to the second contention, it appears that the delay was, at least, largely due to request of the business men who had originally sought intervention (among them six of the present claimants) who feared the town would be burned and their property destroyed if General Miller attempted to land and to take forcible possession. Even if it is assumed that there was any duty toward the claimants to act promptly, under all the circumstances we can not say that the delay was culpable.

As to the third contention, it appears that the Filipino insurgents, who burned Iloilo, were acting under orders from and professed allegiance to the so-called Filipino Republic, which, on February 4 preceding, had declared war against the United States and had attacked the American forces at Manila, thus bringing on a conflict which lasted over three years. There was no wanton or intentional destruction of property by the vessels or troops of the United States. Indeed, there is evidence that the troops exerted themselves vigorously to put out the fires and to stop looting. The most that is claimed is that, if the operations of landing and taking the town had been carried out in a different way, the burning by the insurgents might have been prevented. But the circumstances were difficult and the general situation was trying. The operations were in charge of experienced officers and we do not feel competent to criticize their judgment as to the conduct of military operations. Considering all the circumstances, we do not think that any culpable disregard of the interests of the claimants has been shown.

We decide that these claims must be rejected.

#### D. EARNSHAW AND OTHERS (GREAT BRITAIN) *v.* UNITED STATES

(*Zafiro case. November 30, 1925. Pages 579-585.*)

LOOTING, DESTRUCTION OF PRIVATE PROPERTY IN TIME OF WAR. Looting and destruction of private property on May 4, 1898, at Cavite, Philippines, by crew of *Zafiro*, an American merchant vessel acting in Manila Bay as supply ship and part of United States naval forces.

RESPONSIBILITY FOR ACTIONS OF MERCHANT VESSEL IN NAVAL FORCES.—SEA WARFARE: CONVERTED MERCHANTMAN.—PUBLIC VESSEL.—RESPONSIBILITY FOR ACTS ASHORE OF SAILORS. *Held* that United States responsible for actions of *Zafiro* by nature of service and purpose for which employed, irrespective of her not being a "converted merchantman" under Convention VII, Hague Conference 1907. *Held* also highly culpable to let this particular crew go ashore without effective control in circumstances prevailing at the time.

EXTENT OF LIABILITY.—EVIDENCE: BURDEN OF PROOF. United States *held* liable for the whole, though not all of the damage was done by crew of

*Zafiro*: crew participated to substantial extent (no burden on Great Britain to prove exact items of damage chargeable to crew), and part chargeable to unknown wrongdoers cannot be identified.

INTEREST. In view of considerable, though unascertainable, part of damage not chargeable to crew *held* that no interest should be allowed.

*Cross-references*: Am. J. Int. Law, vol. 20 (1926), pp. 385-390; Annual Digest, 1925-1926, pp. 221-222.

*Bibliography*: Annual Digest, 1925-1926, p. 222.

These are claims for property looted or destroyed by the crew of the *Zafiro*, on May 4, 1898, while the ship was moored alongside the wharf of the Manila Slipway Company at Cavite, engaged in coaling. The claimants were employees of the company and lived on the premises in houses belonging to the company. During the naval battle of May 1, 1898, in Manila Bay, as the wharf and premises were in the line of fire and shells were exploding about the houses, the claimants and their families went away for safety, leaving the premises in charge of Filipino watchmen and Chinese employees of the company. On May 4 the *Zafiro* was ordered to go to the Spanish coal pile at Cavite to coal, and in order to do so moored alongside the company's wharf. The evidence as to what followed is in conflict and there is much dispute as to the facts. We do not doubt that the affidavits of the watchmen and of the Chinese employees are at least somewhat exaggerated. But it is clear enough that the Chinese crew of the *Zafiro* took a substantial part in the looting of the houses of the claimants and destruction of their property, which was undoubtedly complete and thorough. Hence it becomes necessary to consider whether and how far the United States is liable for the actions of the crew.

It appears that the *Nanshan* and *Zafiro*, two British merchant vessels, were bought by Admiral Dewey at Hong Kong, under authority of the Secretary of the Navy, in April, 1898. They were not commissioned, but were registered as American vessels, and the original crews (British officers and Chinese sailors) were shipped in the American merchant service. The reason for so doing is set forth in Admiral Dewey's autobiography as follows: "We registered them as American merchant steamers, and by clearing them for Guam, then almost a mythical country, we had a free hand in sending them to English, Japanese or Chinese ports to get any supplies we might need." In other words, it was not intended that they should trade and they did not trade. They were used as supply ships and colliers; and the purpose of registering them as merchant steamers was to enable them to resort to neutral ports to obtain supplies and coal, not for general purposes of the United States, but for the specific purposes of Admiral Dewey's naval operations. An ensign and four men were placed on each and Admiral Dewey and Admiral Crowninshield each speak of the naval officers as being "in command". Admiral Crowninshield says: "The naval officer exercised control over all the movements of the ship and gave all orders concerning her. The merchant captain was merely his executive officer, being familiar with the crew and with the ship." Ensign Pearson, now Commander Pearson, who was on the *Zafiro*, says: "My instructions were not to interfere particularly with the details of the ship's routine, but to receive the Admiral's orders for the ship and see them carried out, and to assist as much as possible and consistent with the general duty of the ship." He adds: "At the time of her purchase she was manned by British merchant officers and a crew of Chinese. With the exception of the captain and chief engineer, these officers and crew were retained on the vessel. A. M. Whitton, who had been first mate, was made captain, and W. D. Prideaux, formerly second mate, was made first mate . . . The handling and management of the Chinese crew

was left to the ship's officers, who had been with the crew in the merchant service and better understood their ways and peculiarities."

On behalf of the United States, it is contended that the *Zafiro*, registered as a merchant ship, must be so regarded and can not be held to be a public ship for whose conduct the United States may be held liable. In support of that contention reference is made to a long line of cases as to the immunities of public ships, e.g., the *Exchange*, 7 Cranch, 116; the *Charkuch*, L. R. 4 Adm. & Eccl. 59; the *Parlement Belge*, 5 P. Div. 197; the *Guj Djemal*, 264 U.S. 90; the *Pesaro*, 277 Fed. Rep. 473; the *Attualità*, 238 Fed. Rep. 909. In addition counsel for the United States rely upon the seventh convention of the Second Hague Conference of 1907, and on the decisions of the United States Court of Claims in *Stovell v. United States*, 36 Ct. Cl. 392, and the Manila prize cases, 188 U.S. 254, in which, it is argued, the status of the *Nanshan* and the *Zafiro* was established.

We have no difficulty in distinguishing those cases from the one before us. The *Exchange* case had to do with the immunity of warships in foreign ports. So also the other cases first cited have to do with claims to immunity from process while in foreign ports. That is quite a different question from the one before us, which is not one of what immunity the *Zafiro* might have claimed in Hong Kong, but of what responsibility attaches to the United States for her action, in Manila Bay, where and while she was acting as a supply ship for Admiral Dewey's squadron, in the naval operations he was then and there conducting, and was under his orders through a naval officer put on board to carry them out. No such situation is presented in the cases cited. In the *Guj Djemal*, 264 U.S. 90, and *ex parte* Hussein Lufti Bey, 256 U.S. 616, the Turkish Government owned, possessed, and operated the vessel, but it was engaged in "ordinary commerce under charter to a private trader". It was held that the vessel could be libeled for services and supplies. In the *Pesaro*, 277 Fed. Rep. 473, the ship was owned by the Kingdom of Italy, was in possession of the Italian Government and was manned by a master, officers, and crew employed by a department of the Government. But it "was engaged in commercial trade, carrying passengers and goods for hire, and in such trade was not functioning in a naval or military capacity, or under the immediate direction of the department of the Italian Government having to do with military or naval affairs" (473-4). Even if the case before us were necessarily governed by the question whether immunity could have been claimed for the *Zafiro* in a foreign port, these decisions would not be in point. Even more is this true of the *Attualità*, 238 Fed. Rep. 909, where the crucial point, as the court decided, was to be found in the circumstance that the Italian Government was not in possession of the ship which it owned.

In the admirable opinion of Judge Mack in the *Pesaro*, 277 Fed. Rep. 473, 481, it is said: "If, as I believe, sound principles of admiralty jurisprudence require that a ship be treated as an entity separate and distinct from her owner, the immunity of a public ship should depend primarily, not upon her ownership, but upon the nature of the service in which she is engaged and the purpose for which she is employed." We agree. But if we carry this out and say that the liability of the State for her actions must depend upon the nature of the service in which she is engaged and the purpose for which she is employed, it is obvious that the case before us differs radically from all those which have been cited and on which the United States relies.

It may be conceded that the *Zafiro* does not meet all the requirements of "a converted merchantman" under convention VII of the Second Hague Conference of 1907. But the purpose of that convention was to distinguish

converted merchantmen from privateers and to give them a proper status as ships of war; not to cover such a case as that presented here.

As to the Manila prize cases, 188 U.S. 254, and *Stovell v. United States*, 36 Ct. Cl. 392, we think, when looked at critically, they go to sustain liability of the United States. One of the findings of the Court of Claims, affirmed by the Supreme Court of the United States, was: "The naval officer exercised control over the vessel and gave all orders concerning her. The merchant captain was merely his executive officer, being familiar with the crew" (188 U.S. 280). Another finding was: "the duty of the naval captain on said ship was to take general charge of the vessel, execute all orders from the flagship, controlling the movements of the *Nanshan* . . . but not to interfere with the internal management and discipline of the ship and such things as loading and unloading cargo" (id. 281). The question involved in those cases was whether the merchant officers of the *Nanshan* and *Zafiro* were entitled to prize money for ships taken in the battle of Manila. The District Court held that "the *Nanshan* and the *Zafiro*, not participating in any of said captures and not being armed vessels of the United States within signal distance of the vessel or vessels making the capture, under such circumstances and in such conditions as to be able to render effective aid if required, are not entitled to share in any of the prize money". (id. 282-3). The Court of Claims "held on the facts that the *Nanshan* was not at the battle of Manila in such a condition as to enable her to render effective aid if required; that she was performing the functions of a collier, to be protected instead of to act aggressively" (id. 282). These findings were approved and adopted. They are far from showing that the *Zafiro* at the time in question was a mere merchant ship for whose actions the United States would not be responsible.

From all the evidence we are of opinion that the *Zafiro* was a supply ship, acting in Manila Bay as a part of Admiral Dewey's force, and under his command through the naval officer on board for that purpose and the merchant officers in charge of the crew.

We have next to inquire whether at the time of the looting in question the Chinese crew were under discipline and officered so as to make the United States responsible, and to consider how far the United States would be chargeable for want of supervision by those who had or should have had the crew in charge under the circumstances.

It is well settled that we must distinguish between soldiers or sailors under the command of officers, on the one hand, and, on the other hand, bodies of straggling and marauding soldiers not under the command of an officer, or marauding sailors not under command or control of officers. *Hayden's case*, 3 Moore, International Arbitrations, 2985; *case of Terry and Angus*, Id. 2993; *Mexican Claims*, Id. 2996-7. These cases draw a very clear line between what is done by order or in the presence of an officer and what is done without the order or presence of an officer. But it is not necessary that an officer be on the very spot. In *Donougho's case*, 3 Moore, International Arbitrations, 3012, a Mexican magistrate called out a posse to enforce an order; but no responsible person was put in charge and the posse became a mob so that damage to foreigners resulted. The Mexican Government was held liable. In *Rosario & Carmen Mining Company's claim*, id. 3015, growing out of the same occurrences, Sir Edward Thornton relied in part on the culpable want of discretion shown by the magistrate who called out the posse in not putting it in charge of a proper person or being present himself "to restrain the violence of such an excited body of men". In *Jeanneaud's Case*, 3 Moore, International Arbitrations, 3001, a cotton gin belonging to neutrals was burned by volunteer soldiers who were in a state of excitement after a battle. The officers did not

use the ordinary means of military discipline to prevent it, and their government was held liable. In the Mexican claims, 3 Moore, International Arbitrations, 2996-7, a government was held liable where the officers failed to restrain such actions after having had notice thereof (see also Porter's case, *Id.* 2998). And in the case of Dunbar & Belknap, *id.* 2998, there was held to be liability where officers left the property of foreigners without protection when it was in obvious danger from their soldiers.

In the case before us, we think the officers were not actually present at the houses when the looting was done. After members of the crew brought some of the property upon the vessel, and one of the officers found where it came from, he went to the houses and took away some articles in order to preserve them for the owners. This is evidently what the Chinese witnesses have in mind when they charge the officers with looting; for one of the officers tells us that when he found the Chinese so interpreted his good offices, he desisted for the sake of good order. After the matter was drawn to the attention of the naval officers, the vessel was searched and the articles found on board were returned to the claimants. But the damage had been done. Moreover, Captain Whitton's statement that he "stopped anything he saw coming on board" gives the impression that he did not stop with sufficient promptitude the taking of things on land before they could come on board, after he found that plundering was going on. Without regard to this point, however, we feel that there was no effective control of the Chinese crew at the time when the real damage took place. When the *Zafiro* was tied up alongside the company's wharf, where the houses were, the naval officer and the merchant captain went off to look at the Spanish batteries, leaving the crew in charge of the first mate. The latter gave half of the crew leave to go ashore. Captain Whitton says significantly: "You know what Chinese are, especially these times." To let this crew go ashore where these houses were, with no one in charge of them, at a time when plunder and pillage were certain—and plunder and pillage by the Filipinos had been observed by all the officers—seems to us to have been highly culpable.

It was said in argument that a government is not responsible for what its sailors do when on shore leave. But we cannot agree that letting this Chinese crew go ashore uncontrolled at the time and place in question was like allowing shore leave to sailors in a policed port where social order is maintained by the ordinary agencies of government. Here the Spaniards had evacuated Cavite, and no one was in control except as the Navy controlled its own men. The nature of the crew, the absence of a régime of civil or military control ashore, and the situation of the neutral property, were circumstances calling for diligence on the part of those in charge of the Chinese crew to see to it that they were under control when they went ashore in a body. In Jeanneaud's case, 3 Moore, International Arbitrations, 3001, the unusual circumstances were dwelt upon. Here also what might have been proper enough under other circumstances became culpable under those which actually obtained. Had the officers been ashore with the crew, liability would be clear enough. But to let the crew go ashore uncontrolled, and thus to let them get out of the control that obtained when they were on the ship, seems to us in substance the same thing.

We think it clear that not all of the damage was done by the Chinese crew of the *Zafiro*. The evidence indicates that an unascertainable part was done by Filipino insurgents, and makes it likely that some part was done by the Chinese employees of the company. But we do not consider that the burden is on Great Britain to prove exactly what items of damage are chargeable to the *Zafiro*. As the Chinese crew of the *Zafiro* are shown to have participated to a

substantial extent and the part chargeable to unknown wrongdoers can not be identified, we are constrained to hold the United States liable for the whole.

In view, however, of our finding that a considerable, though unascertainable, part of the damage is not chargeable to the Chinese crew of the *Zafiro*, we hold that interest on the claims should not be allowed.

We award as follows: to D. Earnshaw, \$4,392 (Mexican); to A. Young, \$1,306.50 (Mexican); to G. Gilchrist, \$458 (Mexican).

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LUZON SUGAR REFINING COMPANY, LIMITED (GREAT BRITAIN)  
v. UNITED STATES

(November 30, 1925. Page 586.)

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NECESSARY WAR LOSSES, CONDUCT OF MILITARY OPERATIONS.—EVIDENCE: REPORT OF MILITARY COMMANDER. United States *held* not responsible for damage done by United States forces to plant of claimant in 1899 during Philippine insurrection; damage incident of military operations as shown by report of commanding United States general.

*Cross-references:* Am. J. Int. Law, vol. 20 (1926), p. 391; Annual Digest, 1925-1926, pp. 225-226.

*Bibliography:* Nielsen, p. 586; Annual Digest, 1925-1926, p. 226.

This is a claim for injury to the plant of the claimant during the Philippine insurrection. It appears that the insurgents entrenched about fifty yards on each side of the pumping station of the claimant and that during the operation of driving them out the plant was damaged by shells. It is clear from the report of General Otis that the damage was an incident of the military operations whereby the insurgents were driven from their capital. The foreign residents, whose property unhappily chanced to stand in the field of those operations, have no ground of complaint against the United States which had no choice but to conduct them where the enemy was to be found. No complaint is made that the troops were out of hand or did anything beyond what the operations necessarily involved.

Hence this claim must be rejected and we so decide.

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J. PARSONS (GREAT BRITAIN) v. UNITED STATES

(November 30, 1925. Page 587.)

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DESTRUCTION OF PRIVATE PROPERTY IN TIME OF WAR.—POLICE MEASURE. United States *held* not responsible for destruction of stock of (poisonous) liquors directed by United States military authorities in 1899 during Philippine insurrection: matter of police.

*Cross-reference:* Am. J. Int. Law, vol. 20 (1926), p. 385.

*Bibliography:* Nielsen, p. 587.

This is a claim for the value of a stock of liquors destroyed by order of the Provost Marshal General, under authority of the Military Governor General, at Manila, during the Philippine insurrection. We are satisfied that the destruc-

tion was a matter of police entirely within the powers of the military government and quite justified by the circumstances. Hence, we hold that this claim must be rejected, and it is so decided.

## SUCCESSORS OF WILLIAM WEBSTER (UNITED STATES)

### *v.* GREAT BRITAIN

(December 12, 1925. Pages 540-546.)

**CESSION OF SOVEREIGNTY, ANNEXATION, SUCCESSION OF STATES: PRIVATE RIGHTS ACQUIRED PREVIOUS TO—** Purchase in 1836-1839 by Webster, United States citizen, of certain lands in New Zealand from native chiefs and tribes. Proclamation by Great Britain on January 14 and 29, 1840, of non-recognition of titles to land not derived from or confirmed by Queen. Cession of sovereignty on February 6, 1840, by native chiefs and tribes to Great Britain. Act of June 9, 1841, going less far than proclamations and establishing Commission to examine titles derived from aborigines and recommend Crown grants in lieu thereof to maximum of 2,560 acres per claimant, unless more authorized by Governor and Council. Submission by Webster of his claims to Commission "willing to take his chance with all others". Crown grants made for about 42,000 acres. Claim for compensation presented before Tribunal on the ground that not all native titles were given effect.

**JURISDICTION, PRELIMINARY MOTION.** Preliminary objection to jurisdiction overruled since: (1) Tribunal unable to decide upon jurisdiction before full hearing of Cayuga Indians claim (see p. 173 *infra*), and (2) since according to rules of procedure award shall be delivered as soon as possible and Tribunal satisfied that claim must be rejected on its merits.

**INTERPRETATION OF (PRIMITIVE AND DEVELOPED) MUNICIPAL LAW.—EQUITY.** *Held* that under customary native law Webster acquired no more than titles of uncertain scope and content, not extending to full property (*dominium*). Differences listed with Burt's claim (see p. 93 *supra*). *Held* also that Act of June 9, 1841, instead of destroying Webster's imperfect native titles, gave him option of claiming them and insisting they be allowed, for what they were worth, on the basis of international law, or of exchanging them for better title derived from Crown to such lands as should be awarded him, and that he agreed to the latter. *Held* further not equitable that Webster, who was awarded more than sixteen times maximum, should receive full title to whole of large claimed areas.

**AWARENESS OF RISK.** *Held* that Webster must have known that native titles not marketable unless confirmed, established, or transformed, so that losses due to delay or uncertainty in confirming, etc. (proclamations of January 14 and 29, 1840), were risk of his speculation. Claim disallowed.

*Cross-references:* Am. J. Int. Law, vol. 20 (1926), pp. 391-397; Annual Digest, 1925-1926, pp. 83-84.

*Bibliography:* Nielsen, pp. 537-539; Annual Digest, 1925-1926, p. 84.

As described in the memorial, "this claim is for damages resulting from the denial of title to and loss of possession of certain lands in . . . New Zealand" as a consequence of what are claimed to have been "unwarranted and unjustifiable acts of the British authorities after the annexation by the British Crown".

It appears that William Webster, a citizen of the United States, who was engaged in trading with the native population of New Zealand, purchased from native chiefs and native tribes, between 1836 and 1839, large tracts of land, the extent of which is not clearly established. As shown by the claims lodged before the New Zealand Commission, they amounted to some 184,000 acres. As claimed in his applications to the American Government, they amounted to about 500,000 acres, of which he asserted he had "proved title to about 240,000 acres". The purchases were paid for chiefly in goods and merchandise, and he claims to have invested in this way about \$78,000. The New Zealand Land Commission found an outlay of a little less than \$40,000.

Webster was not the only person engaged in buying land from the natives at this time. Indeed, it appears that different land speculators, other than Webster, claimed to have bought in this way some 654,000 acres more than the whole area of the two principal islands. Hence, to avoid conflict and to prevent spoliation of the natives, it became necessary for some government to step in. This was done by the British Government when, in 1839, it commissioned Captain William Hobson, R.N., as Lieutenant Governor of New Zealand, and directed him to proclaim that Great Britain would "not acknowledge as valid any title to land, which either has been or shall hereafter be acquired in that country", unless derived from and confirmed by the crown. In pursuance thereof, on January 29, 1840, Captain Hobson made a proclamation in which, reciting that it was not intended to "dispossess the owners of any lands acquired on equitable conditions, and not in extent or otherwise prejudicial to the present or prospective interests of the community", he announced that the crown did not deem it "expedient to recognize any titles to land in New Zealand which are not derived from or confirmed by Her Majesty". A like proclamation had been made on January 14, 1840, by Sir George Gipps, Governor of New South Wales, to whose jurisdiction New Zealand had been added.

On February 6, 1840, Great Britain entered into a treaty with the native chiefs and tribes of New Zealand, called the Treaty of Waitangi, whereby sovereignty was ceded to the British Crown. The land laws of New South Wales were then extended to New Zealand, by an Act of August 4, 1840, and commissioners were appointed to examine and report on claims to land titles. On June 9, 1841, this Act was repealed, and an Act was passed by the Colony of New Zealand providing for a second commission to examine the titles derived from the aborigines and recommend grants in lieu thereof. This Act established a maximum of 2,560 acres for any one claimant, unless more was authorized expressly by the Governor and Council. After some correspondence with the American Consul at Sydney, New South Wales, and with the New Zealand authorities, Webster, on October 3, 1841, wrote to the Colonial Secretary: "I wish my claims to be laid before the Commissioners and am willing to take my chance with all others." Accordingly he submitted his claims to the Land Commission and ultimately he and his assignees were allowed about 42,000 acres, the difference being due partly to surveys and definite fixing of boundaries, partly to interpretation of native grants, partly to determination of the amount of the consideration paid by Webster in different conveyances, and partly to the insistence of the Home Government that the Colonial Government should not go too far in approving and allowing grants in excess of the maximum. The contention is that the several native grants should have been given effect as conveying to Webster a full and complete title by British law to their entire extent, and that his successors are entitled to compensation for the difference between the amount of land called for in the native grants and granted to him by the Crown.

A preliminary question was raised to the effect that this claim is barred by

article V of the convention between Great Britain and the United States, executed on February 8, 1853, and ratified on July 26, 1853. This question was argued to us in connection with the argument of a like question in the Cayuga Indians claim. We found upon that argument that some of the points involved were also involved in the Cayuga Indians claim, and felt unable to pass upon them with assurance until a more complete understanding of the latter could be had from a full hearing thereon. Hence we were constrained to overrule the preliminary objection, reserving power to decide the present case upon the point involved in the objection, should it ultimately appear proper to do so. At the hearing on the merits, counsel for Great Britain has once more urged this point upon us.

Rule 39 of the rules of procedure governing our proceedings reads: "The award of the Tribunal in respect to each claim shall be delivered at a public session of the Tribunal as soon after the hearing of such claim has been concluded as may be possible." We do not feel justified in passing on the question as to the effect of article V or the Convention of 1853 until after full argument of the Cayuga Indians claim. Nor, in view of rule 39, do we feel justified in delaying a decision of the present case until after that argument is concluded, since we are satisfied that, in any event, the claim now before us must be rejected on its merits.

Native land tenure in New Zealand prior to the annexation was the subject of an elaborate report to the Colonial Government in 1843. It is a subject upon which much has been written by local historians, in public documents, and by anthropologists and ethnologists. The native law was customary and in a low stage of development. The land was possessed and occupied by the tribe and separate cultivation seems to have given no more than what might be called a usufructuary interest. Alienation, in the sense in which it was understood by the white purchasers, was something quite new to the natives. There is some evidence that many of the tribes and chiefs supposed that they were giving purchasers no more than a sort of usufruct. As the sales to speculators were made mostly within five years before annexation and the bulk of Webster's purchases were within the year before Captain Hobson's proclamation, it is obvious that no specific customary law as to the manner or effect of these wholesale alienations of communal property could have grown up. In order to purchase land so held, so as even to obtain such title as was known to native law, was far from easy. It involved the collective interests of a large group, not always easy to ascertain, and called for representation of interests by persons whose authority was not always clear. Hence, before annexation purchases of land from the natives were the chief source of quarrels and disturbances. The first care of the Government after annexation was to put an end to this cause of conflict by establishing a definite régime of private property under British law instead of the indefinite régime of customary, collective tribal rights of occupation or possession and of uncertain titles by purchase from chiefs and tribes.

Conveyances from the native chiefs could give Webster no higher or different title than that which existed by native customary law. As has been said, it is, at least, very doubtful how far the customary communal or collective title to land involved more than a claim to occupation by the tribe. Nor is it clearly shown that the natives understood any such thing as *dominium* over land, as it is understood in developed law, or understood the sort of title, with its implications, which Webster asserts was conveyed to him.

It is argued that the title of the British Crown is derived from the same source as Webster's title. We cannot agree. All those who had any claim to represent the aboriginal natives, as politically organized, entered into a treaty

ceding sovereignty to Great Britain. The treaty ceded sovereignty in article I. In article II, possession was guaranteed to the chiefs and tribes in all which they possessed individually or collectively. This is a clear declaration of the nature of native property as it existed at the time of the cession. It is far from recognizing the sort of proprietary system which Webster's claim presupposes. In addition an exclusive right of pre-emption of lands was given to the Crown. This was a matter of sovereignty. It was a legal regulation of alienation, not a conveyance of property.

It is said that in this respect the present case is governed by the decision of this Tribunal in one of the Fiji land claims, namely, the claim of Rodney Burt, American-British claims arbitration, No. 44. But we think that case differs from the present case in three important respects. In the first place, in the Burt case there was a long period of transition from native customary law to the white man's law, as a result of which conflicting theories as to power to convey and the effect of conveyance grew up. The British Government deliberately committed itself to one of these theories, and that theory was the basis of Burt's claim. Secondly, Burt, who had what, under the decision of the Land Commissioners in his case, was a full and complete native title, was deprived of all rights although he had been in actual (not constructive) possession prior to the cession. He was not allowed even what the native grant, at the very least, must have given him, nor was he allowed any equivalent therefor. Thirdly, the provisions of the cession as to titles were very different from those in the present case. In the Burt case, in addition to the cession of sovereignty, there was a declaration that "the absolute proprietorship of all lands, not shown to be now alienated, so as to have become bona fide the property of Europeans, or other foreigners", subject to certain exceptions, should be the property of the Crown. In other words, the cession assumes a pre-existing régime of "absolute proprietorship" in land and of alienations whereby European purchasers had acquired such property rights. In the present case the cession recognizes nothing more than a régime of possession by chiefs and tribes.

It is argued further that Webster's title has the same basis as the title of the British Crown because the native grants to him were taken as extinguishing the native title and the surplus over the grants made to Webster by the Colonial Government was held to revert to the Crown. But we interpret differently the proceedings by which these grants were made and cannot accept this contention.

Our conclusion is that Webster acquired no more than a native customary title, the content and scope of which was very uncertain and can not be said to have extended to a full property or *dominium* as known to matured law.

We do not think that these customary titles were "destroyed" by the local legislation, as contended by the United States. The Act of August 4, 1840, setting up the first commission, provides that native titles not "allowed" by the Crown after investigation shall be void. It then provides for grants and prescribes a maximum grant to any claimant. The Act of June 9, 1841, setting up the second commission, provides that all lands validly sold by the aboriginal natives shall be vested in the Crown. But this is evidently for the purpose of adopting the common-law view that all lands are held of the Crown, and thus laying the foundation for a modern property régime in place of the native customary tenure. For the Act then provides how any person who had acquired title prior to annexation may obtain a grant in lieu of his purchase fixing a scale for judging what he had paid and a maximum grant for any grantee. True, it was not till 1865 that an allowance of customary titles as such was provided for. But we think Webster was given an option of claiming his customary title and insisting it be allowed, for what it was worth, on the basis of international law, or of exchanging it for a Crown grant in fee simple

under the terms of the statute of 1841. Obviously there was great advantage in the latter in that the title under the latter was marketable, while, after annexation, the customary title was not. Webster agreed to submit his claims to the Land Commission and "take his chances along with the rest". We think this means that he agreed to exchange his customary title for a title derived from the Crown to such lands as should be awarded him. In fact the maximum was not applied in his case. He was awarded more than 16 times that maximum. This feature of the case distinguishes it at once from the Burt case. After this exchange and these grants, which seem to have been the result of very careful investigation and of a disposition on the part of the commissioners and of the Governor to do Webster justice and to be governed by equity rather than by the strict terms of the statute, we do not think Webster had any just claim for further grants in fee simple. He had exchanged his customary title to the surplus for a better title to what was granted him. It does not seem to us equitable that for his customary title he should receive a full title by British law to the whole of the large areas which he claims. Even less would it have been equitable to award him full title by British law to the fullest possible extent of the indefinite boundaries which his conveyances from the native chiefs called for. He could not have been in actual possession of all of these tracts, nor were the limits of such possession as he had by any means clear. In these respects also the Burt case is very different.

As to one claim which Webster submitted to the Land Commission, it appeared that all the chiefs who should have joined were not parties to his conveyance. On this ground the Commission rejected his title. It is contended that he should have been allowed an undivided interest corresponding to that of those who joined. But, as we understand it, these customary titles were collective. The chiefs were in no sense tenants in common. Such title as there was, was in the collectivity. If the collectivity, or its representatives, acted there was an alienation. If not, less than the collectivity had nothing to convey. Such seems to have been the view of the Commission, and we see no reason to think that their view of native tenures was erroneous.

It is said that the "threat" in the instructions of the British Government to Captain Hobson in 1839—and in the proclamation of Sir George Gipps, prior to annexation, that the Crown would not acknowledge as valid titles not derived from or confirmed by a grant from the Crown—destroyed the value of Webster's property. But the statutes after annexation did not go as far as these proclamations. The proclamations deprived him of nothing. If it is claimed that they injured the marketability of his property (which he had acquired as a speculation, not in order to settle thereon), the answer is that he must have known that, in order to be marketable, the title would ultimately need some kind of confirmation or establishment or some kind of transformation into the sort of title known to developed law. The titles obtained from native chiefs under customary law were not like those under consideration in *United States v. Percheman*, 7 Peters 51, 86-87. Those were titles to land in Florida under Spanish law. They were full and complete, giving a *dominium*, as well understood from Roman times in continental Europe and in lands settled therefrom. In the present case, losses due to delay or uncertainty in confirming or establishing the titles, or to deductions in exchange for a full and marketable title under British law, were a risk of Webster's speculation.

We are, therefore, of opinion that this claim should be rejected, and we so decide.

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CUNNINGHAM AND THOMPSON COMPANY AND OTHERS (GREAT BRITAIN) *v.* UNITED STATES*(Fishing Claims, Group I.)*

## COMMERCIAL ACTIVITIES OF FOREIGN FISHING VESSELS IN TERRITORIAL WATERS.

—INTERPRETATION OF TREATY: *RES JUDICATA*.—LIGHT DUES, CUSTOMS DUTIES, SHIPS' EQUIPMENT.—POSTPONEMENT OF AWARD: AGREEMENT BETWEEN AGENTS. Exaction by Newfoundland between 1897 and 1910 of light dues, customs duties, etc., from American fishing vessels engaged, according to Great Britain, in commercial activities in Newfoundland territorial waters. *Held* that purchase of herring by American fishing vessels from independent fishermen in Newfoundland territorial waters is not exercise of fishing privilege belonging to United States under Anglo-American Treaty of October 20, 1818, and that disposing of fishing outfit and gear by such vessels in said waters to Newfoundland fishermen as part of their compensation is not one of customary means and methods reasonably necessary to exercise of that privilege. *Held* also that question of hiring men by American fishing vessels in Newfoundland waters answered by Permanent Court of Arbitration in North Atlantic Coast Fisheries Arbitration and that, on the basis of this arbitration, American vessels were engaged in trading. Determination of recoverable amounts postponed in view of possible agreement between agents. Exemption of ships' equipment. Award made pursuant to agreement between agents.

*Cross-reference:* Am. J. Int. Law, vol. 20 (1926), pp. 397-399.

*Bibliography:* Nielsen, pp. 554-564.

*(Decision, November 6, 1925. Pages 565-566.)*

These are claims for refund of light dues, customs duties, and other charges levied upon vessels engaged, as claimed by the United States, in herring fishing at Bay of Islands and other places upon what, for convenience, may be called the Treaty Coast of Newfoundland. The answer of Great Britain sets up that the vessels in question were exercising commercial privileges by (a) purchasing herring; (b) hiring men in Newfoundland waters; and (c) "selling goods in Newfoundland to employees".

As to the first contention, there is a mass of conflicting evidence on the one hand as to the course pursued by particular American vessels which are claimants, and on the other hand as to the practice of American vessels generally in the herring fishery on the Treaty Coast. Partly the contention involves questions of fact and of the legal interpretation of the facts when found. In part it involves the questions of law raised by the second contention. There can be no doubt that purchase of herring from independent fishermen in Newfoundland waters could not be regarded as an exercise of the fishing privilege belonging to the United States, under the Treaty of 1818. But, for reasons which will appear presently, we do not deem it necessary, with respect to each vessel in question, to determine as a fact whether it was fishing or was buying herring on each occasion for which claim is made.

We think the questions raised by the second contention are disposed of in the answers to the first and second questions in the award of the Permanent Court of Arbitration at The Hague in the North Atlantic Coast Fisheries arbitration.

It remains to consider the third contention.

Under the answer of the Permanent Court of Arbitration at The Hague to the seventh question in the North Atlantic Coast Fisheries arbitration, an American vessel could not exercise fishing privileges and commercial privileges on the same voyage. As to any voyage there must be wholly and purely fishing activities or the vessel must be regarded as trading. Concession of the fishing privilege in the Treaty of 1818 carried with it tacitly (or by implication) the privilege of doing such things as are reasonably necessary to its exercise in view of the nature of the fishery to be carried on. It is contended, on behalf of the United States, that the privilege extends to all customary means and methods of carrying on the fishery. But in our opinion this is true only provided and to the extent that the customary means and methods are reasonably necessary to the exercise of the fishing privilege. We consider that the disposing of fishing outfit and gear to Newfoundland fishermen in Newfoundland waters as a part of their compensation, such outfit and gear remaining their property after use in the employment and entering into the general stock of the country, was not a reasonably necessary mode of or incident of exercising the fishing privilege and must be held to have been trading.

So far as appears, it was quite enough to have given out outfit and gear for the purpose of fishing while in the employ of the vessel, charging it might be for outfit and gear lost or destroyed. A payment or part payment in outfit and gear, so as to come into competition with the trade of Newfoundland in such articles, was not necessary nor was it reasonable. There is nothing to show that an arrangement whereby the outfit and gear, so far as unconsumed, should remain the property of the vessel, was not perfectly feasible and reasonable. There is evidence that Newfoundland fishermen, who employed servants and fished independently, provided nets in this way.

As all the American vessels pursuing the herring fishery on the Treaty Coast regularly disposed of gear and outfit to Newfoundland fisherman so as to leave such articles (if unconsumed) in Newfoundland as the property of those fishermen, we must hold that all of the claimant vessels, at all the times in question, were to that extent engaged in trading and hence were not exclusively exercising fishing privileges.

It is assumed that the agents of the respective parties will be able to agree upon the amounts recoverable in view of the foregoing findings. If not, the Tribunal will proceed to determine them.

*(Order, November 9, 1925. Page 567.)*

With respect to barrels and salt, which went back upon the ships on which they came, were not landed, and were used solely to transport the fish obtained, we are of opinion that they were part of the ships' equipment and were not subject to duty.

*(Award, December, 22 1925. Page 567.)*

The agent for the United States and the associate agent for Great Britain having reached an agreement concerning the amounts to be paid to the United States in the fishing claims in Group I, conformably to the decision of the Tribunal with respect to these claims rendered on November 6, 1925, and the order made with respect to them on November 9, 1925, the Tribunal awards the following sums in these claims pursuant to this agreement:

<i>Number of claim</i>	<i>Name of claimant</i>	<i>Amount \$</i>
45	Cunningham & Thompson Company . . . . .	1,093.70
46	Representatives of Fred L. Davis, deceased . . . . .	452.38
47	Representative of William Parsons, deceased . . . . .	390.95
48	Gorton-Pew Fisheries Company . . . . .	1,089.50
49	Representative of William H. Jordan, deceased . . . . .	37.50
50	Orlando Merchant . . . . .	831.00
51	Representative of Jerome McDonald, deceased . . . . .	304.24
52	John Pew & Son . . . . .	106.62
53	Gorton-Pew Fisheries Company, successor to D. B. Smith & Company . . . . .	882.85
54	Sylvanus Smith & Company, Inc. . . . .	228.23
55	Representative of John Chisholm, deceased . . . . .	249.08
56	Carl C. Young . . . . .	406.70
57	Hugh Parkhurst & Company . . . . .	121.41
58	Almon D. Malloch . . . . .	139.47
59	Thomas M. Nicholson . . . . .	364.44
63	Lemuel E. Spinney . . . . .	151.10
64	William H. Thomas . . . . .	130.56
65	Frank H. Hall . . . . .	56.38
66	M. Walen & Son, Inc. . . . .	313.85
67	Atlantic Maritime Co. . . . .	267.90
68	Waldo I. Wonson . . . . .	341.22
70	Henry Atwood . . . . .	21.00
71	Fred Thompson . . . . .	19.92
TOTAL		\$ 8,000.00

CAYUGA INDIANS (GREAT BRITAIN) *v.* UNITED STATES*(January 22, 1926. Pages 307-331.)*

## TREATY (CONTRACT) WITH INDIAN TRIBE.—SUBJECTS OF INTERNATIONAL LAW.

—LEGAL STATUS, PROTECTING POWER, NATIONALITY, MIGRATION OF INDIAN TRIBE.—RIGHT OF PROTECTING POWER TO SUE. Removal in 1784 of considerable portion of Cayuga Nation, a tribe of the Six Nations, from Buffalo Creek, New York, to Grand River, Canada. Conclusion in 1789, 1790, and 1795 of treaties between New York State and Cayuga Nation: cession of lands to New York State against annuity of \$1,800 forever to the Nation to be paid at Canandaigua, Ontario County, Canada. Payment of annuity to Cayugas living in Canada until 1810, and from then on to Cayugas living in United States. War of 1812 (War of Independence), in which Cayugas in United States and those in Canada took part on side of United States and of Great Britain, respectively. Conclusion in 1814 of Treaty of Ghent between United States and Great Britain obliging United States to restore to Indians with whom it had been at war "all the possessions, rights, and privileges which they may have enjoyed or been entitled to" in 1811 before war (article IX). Presentation of claim before Tribunal for: (1) whole amount of annuity from 1810 to the present; or (2), alternatively, for proportion of

annuity for past and future to be ascertained by reference to numbers of Cayugas in United States and in Canada for the time being. *Held* that Indian tribe is not a legal unit of international law and is a legal unit only in so far as law of sovereign nation within whose territory it occupies land recognizes it; that, at Revolution, New York State, not the United States, succeeded to British Crown as protecting power of Cayuga Nation; that, hence, Cayuga Nation with which New York State contracted, so far as it was a legal unit, was a legal unit of New York law and at the date at which claim arose had not British nationality; and that, therefore, Great Britain can not maintain claim for whole annuity. *Held* also that, though migration does not affect national character of Indian tribe, Canadian Cayugas are British nationals and Great Britain, therefore, is entitled to maintain claim for them.

**ABANDONMENT OF RIGHTS.** *Held* that Canadian Cayugas did not by their emigration surrender all claim or interest in annuity and property: by Treaty of 1789, after removal to Canada, the United States guaranteed their lands to Six Nations, and principal signers of Treaty of 1795 and of annuity receipts from 1795 to 1810 were Canadian Cayugas.

**INTERPRETATION OF TREATY: SUBSTANCE AND FORM, APPARENT MEANING, RULE OF EFFECTIVENESS.—GROUNDS OF DECISION: PRINCIPLES OF INTERNATIONAL LAW, EQUITY, JUSTICE, FAIR DEALING.** *Held* that claim is within purview of Treaty of Ghent: article IX of this Treaty, construed on elementary principle of justice requiring to look at substance, not form, has in view Indians who, like Canadian Cayugas, substantially participate in division of money; and that, according to general and universally recognized principles of justice and fair dealing, and especially since article 7 of Special Agreement of 18 August 1910 (see p. 10 *supra*) provides that decision shall be made "in accordance with . . . the principles of international law and of equity", anomalous and hard situation of Cayugas, to whom was a covenant with tribe and posterity what was a covenant with legal unit that might and came to be but fraction of whole, gave rise, when tribe divided, to claim of Canadian Cayugas to proportionate share of annuity, and that such share ought to have been paid to them from 1810 to present time (ample discussion of grounds of decision as stipulated in different treaties); and that the same follows from article IX, Treaty of Ghent, which is not only a "nominal" provision, not intended to have any definite application: apparent meaning, interpretation so as to give relevant clause a meaning rather than so as to deprive it of meaning.

**MOMENT AT WHICH CLAIM ARISES.—STATE CONTRACTS AND FEDERAL LIABILITY.—DENIAL OF JUSTICE.** *Held* that claim not barred by article V, Claims Convention 1853 ("every claim upon either Government arising out of any transaction of a date prior to the exchange of the ratifications of the present convention"): (1) earliest date at which claim against United States can be said to have accrued is 1860 when, New York State having definitely refused to recognize claims of Canadian Cayugas based upon Treaty of 1795 (a contract of New York State, giving no rise to Federal liability in case of non-fulfilment), the matter was brought to attention of United States authorities, and they failed to carry out article IX, Treaty of Ghent; (2) in 1853 there had not, as yet, been denial of justice by United States.

**PERSONS UNDER DISABILITY: GENERAL PRINCIPLES OF JUSTICE CONCERNING PRESCRIPTION, STATUTES OF LIMITATION, LACHES.—LACHES OF PROTECTING POWER, GOOD FAITH, EQUITY.—INTEREST.** *Held* that, on the general principles of justice concerning prescription, statutes of limitation, and laches in relation

to persons under disability, dependent Indians are not to lose just claims through laches of protecting sovereign unless there has been so complete and bona fide change of position in consequence of that laches as to require such result in equity; and that, in equity, payments made by New York State from 1811 to 1849, when claim of Canadian Cayugas presented to New York legislature, should stand as made, and interest on share of Canadian Cayugas in past installments from 1849 should be denied.

**JURISDICTION: MONEY AWARD, DECLARATORY JUDGMENT.—DAMAGES: ACCURATE DETERMINATION, MAXIM THAT EQUALITY IS EQUITY.** *Held* that 'Tribunal has jurisdiction to render money award only, no declaratory judgment concerning rights for the future; and that money award should, therefore, contain two elements: (1) share in payments from 1849; (2) capital sum yielding income equal to half of annuity for future (in the absence of accurate data concerning relative numbers of Cayugas in United States and Canada, Tribunal applies maxim that equality is equity). Award made for \$100,000.

*Cross-references:* Am. J. Int. Law, vol. 20 (1926), pp. 574-594; Annual Digest, 1925-1926, pp. 203, 206, 237-238, 246.

*Bibliography:* Nielsen, pp. 203-306, Annual Digest, 1925-1926, pp. 203-204, 206-207, 238, 246.

This is a claim of Great Britain, on behalf of the Cayuga Indians in Canada, against the United States by virtue of certain treaties between the State of New York and the Cayuga Nation in 1789, 1790, and 1795, and the Treaty of 1814 between the United States and Great Britain known as the Treaty of Ghent.

At the time of the American Revolution, the Cayugas, a tribe of the Six Nations or Iroquois, occupied that part of Central New York lying about Cayuga Lake. During the Revolution, the Cayugas took the side of Great Britain, and as a result their territory was invaded and laid waste by Continental troops. Thereupon the greater part of the tribe removed to Buffalo Creek and after 1784 a considerable portion removed thence to the Grand River in Canada. By 1790 the majority of the tribe were probably in Canada. In 1789 the State of New York entered into a treaty with the Cayugas who remained at Cayuga Lake, recognized as the Cayuga Nation, whereby the latter ceded the lands formerly occupied by the tribe to New York and the latter covenanted to pay an annuity of \$500 to the nation. In this treaty a reservation at Cayuga Lake was provided for. As there was much dissatisfaction with this treaty on the part of the Indians, who asserted that they were not properly represented, it was confirmed by a subsequent treaty in 1790 and finally by one in 1795, executed by the principal chiefs and warriors both from Buffalo Creek and from the Grand River. By the terms of the latter treaty, in which, as we hold, the covenants of the prior treaties were merged, the State covenanted, among other things, with the "Cayuga Nation" to pay to the said "Cayuga Nation" eighteen hundred dollars a year forever thereafter, at Canandaigua, in Ontario County, the money to be paid to "the Agent of Indian Affairs under the United States for the time being, residing within this State" and, if there was no such agent, then to a person to be appointed by the Governor. Such agent or person appointed by the Governor was to pay the money to the "Cayuga Nation", taking the receipt of the nation and also a receipt on the counterpart of the treaty, left in the possession of the Indians, according to a prescribed form. By this treaty the reservation provided for in the Treaty of 1789 was sold to the State.

There are receipts upon the counterpart of the Treaty of 1795 down to and including 1809, and these receipts and the receipt for 1810, retained by New

York, show that the only persons who can be identified among those to whom the money was paid, and the only persons who can be shown to have held prominent positions in the tribe, were then living in Canada. In 1811 an entire change appears. From that time a new set of names, of quite different character, appear on the receipts retained by New York. From that time there are no receipts upon the counterpart. Since that time, it is conceded, no part of the moneys paid under the treaty has come in any way to the Cayugas in Canada, but the whole has been paid to Cayugas in the United States, and since 1829 in accordance with treaties in which the Canadian Cayugas had no part or in accordance with legislation of New York. The claim is: (1) that the Cayugas in Canada, who assert that they have kept up their tribal organization and undoubtedly have included in their number the principal personages of the tribe according to its original organization, are the "Cayuga Nation", covenantees in the Treaty of 1795, and that as such they, or Great Britain on their behalf, should receive the whole amount of the annuity from 1810 to the present. In this connexion it is argued that the covenant could only be discharged by payment to those in possession of the counterpart of the treaty and indorsement of a receipt thereon, as in the treaty prescribed; (2) in the alternative, that the Canadian Cayugas, as a part of the posterity of the original nation, and numerically the greater part, have a proportion of the annuity for the future and a proportion of the payments since 1810, to be ascertained by reference to the relative numbers in the United States and in Canada for the time being.

As the occasion of the change that took place in and after 1811 was the division of the tribe at the time of the War of 1812, those in the United States and those in Canada taking the part of the United States and of Great Britain, respectively, Great Britain invokes article IX of the Treaty of Ghent, by which the United States agreed to restore to the Indians with whom that Government had been at war "all the possessions, rights, and privileges which they may have enjoyed or been entitled to" in 1811 before the war.

Great Britain can not maintain a claim as for the Cayuga Nation for the whole annuity since 1810 and for the future. In order to maintain such a claim, it would be necessary to establish the British nationality of the obligee at the date at which the claim arose. The settled doctrine on this point is well stated by Little, Commissioner, in *Abbiatti's case*, 3 Moore, International Arbitrations, 2347-8. See also *Mexican claims*, 2 id. 1353; *Dimond's case*, 3 id. 2386-8. The obligee was the "Cayuga Nation", an Indian tribe. Such a tribe is not a legal unit of international law. The American Indians have never been so regarded, 1 Hyde, International Law, para. 10. From the time of the discovery of America the Indian tribes have been treated as under the exclusive protection of the power which by discovery or conquest or cession held the land which they occupied. Wheaton, International Law, 838; 3 Kent, Commentaries, 386; *Breaux v. Jones*, 4 La. Ann. 141. They have been said to be "domestic, dependent nations" (Marshall, C. J., in *Cherokee Nation v. Georgia*, 5 Pet. 1, 17), or "States in a certain domestic sense and for certain municipal purposes" (Clifford, J., in *Holden v. Joy*, 17 Wall. 211, 142). The power which had sovereignty over the land has always been held the sole judge of its relations with the tribes within its domain. The rights in this respect acquired by discovery have been held exclusive. "No other power could interpose between them" (Marshall, C. J., in *Johnson v. McIntosh*, 8 Wheat. 543, 578). So far as an Indian tribe exists as a legal unit, it is by virtue of the domestic law of the sovereign nation within whose territory the tribe occupies the land, and so far only as that law recognizes it. Before the Revolution all the lands of the Six Nations in New York had been put under the Crown as "appendant to the

Colony of New York", and that colony had dealt with those tribes exclusively as under its protection (Baldwin, J., in *Cherokee Nation v. Georgia*, 5 Pet. 1, 34-35). New York, not the United States, succeeded to the British Crown in this respect at the Revolution. Hence the "Cayuga Nation", with which the State of New York contracted in 1789, 1790 and 1795, so far as it was a legal unit, was a legal unit of New York law.

If the matter rested here, we should have to say that the Legislature of New York was competent to decide, as it did in the treaties of 1829 and 1831, what constituted the "Nation", for the purposes of the prior treaties made by the State with an entity in a domestic sense of its own law and existing only for its own municipal purposes.

It does not follow, however, that Great Britain may not maintain a claim on behalf of the Cayuga Indians in Canada. These Indians are British Nationals. They have been settled in Canada, under the protection of Great Britain and, subsequently, of the Dominion of Canada, since the end of the eighteenth or early years of the nineteenth century. There was no definite political constitution of the Cayuga Nation, and it is impossible to say with legal precision just what would constitute a migration of the nation as a legal and political entity. But as an entity of New York law, it could not migrate. "Nationality is the status of a person in relation to the tie binding such person to a particular sovereign nation." Parker, Umpire, in Administrative Decision No. 5, Mixed Claims Commission, United States and Germany. October 31, 1924, 25 Am. Journ. Int. Law, 612, 625. The Cayuga Nation, as it existed as a legal unit by New York law, could not change its national character, without any concurrence by New York, and become, while preserving its identity as the covenantee in the treaty, a legal unit of and by British law. The legal character and status of the New York entity with which New York contracted was a matter of New York law. Moreover, the situation of the Cayuga Nation is very different from that of an ordinary corporation, which has no small margin of self-determination. Such a legal unit cannot change its national character by its own act. See North and South American Construction Company's case, 3 Moore, International Arbitrations, 2318, 2319. Even less is such a thing possible in the case of an Indian tribe, whose dependent condition is as well settled as its legal position is anomalous. Such tribes are "in a state of pupillage" (Marshall, C. J., in *Cherokee Nation v. Georgia*, 5 Pet. 1, 17). They have always been "subject to such restraints and qualified control in their national capacity as was considered by the whites to be indispensable to their own safety and requisite to the due discharge of the duty of protection" (3 Kent, Commentaries, 386). In the case of Indians on the public domain of the United States, they are "the wards of the Nation. They are communities dependent on the United States" (Miller, J., in *United States v. Kagama*, 118 U.S. 375, 383-4). With respect to Indians, the Government "is *in loco parentis*" (Nisbet, J., in *Howell v. Fountain*, 3 Ga. 176).

When the Cayugas divided, some going to Canada and some remaining in New York, and when that cleavage became permanent in consequence of the War of 1812, Great Britain might, if it seemed desirable, treat the Canadian Cayugas as a unit of British law or might deal with them individually as British nationals. Those Indians were permanently established on British soil and under British jurisdiction. They were and are dependent upon Great Britain or later upon Canada, as the New York Cayugas were dependent on and wards of New York. If, therefore, the Canadian Cayugas have a just claim, according to "the principles of international law and of equity", Great Britain is entitled to maintain it.

That, as a matter of justice the Canadian Cayugas have such a claim, has

been the opinion of every one who has carefully and impartially investigated their case. In 1849, the Commissioners of the Land Office, to whom the Legislature of New York had referred a memorial of "the chiefs and warriors of the Cayuga Indians residing in Canada West", reported in their favor and urged a "just distribution" of the annuity. This commission was composed of the then Lieutenant Governor, Secretary of State, Comptroller, Treasurer, and State Engineer and Surveyor of New York (N.Y. Assembly, Doc. 1849, vol. 3, No. 165). Afterwards the claim was considered in detail by the General Term of the Supreme Court of New York in *People v. Board of Commissioners of the Land Office*, 44 Hun. 588. That tribunal pointed out that we "ought not to permit words such as 'sovereign states', 'treaties', and the like to conceal the real facts". The substance of the matter was that New York agreed to pay the then Cayuga Indians and their posterity, and on the division of the tribe the annuity ought to have been apportioned as, indeed, was done when the New York Cayugas afterward divided. It is true the judgment in this case was reversed by the Court of Appeals. But the reversal was upon jurisdictional grounds in no way affecting the views of the Supreme Court upon the merits of the claim. Nor can we examine the evidence and come to any other conclusion than that as a matter of right and justice such an apportionment should have been and ought to be made.

In the report of the Committee of the New York Senate, in 1890, that committee was governed by two propositions of law, one that the Canadian Cayugas by their emigration "surrendered all claim or interest in the annuity funds and property of said Cayuga Nation of Indians", the other, that the claim was not within the purview of the Treaty of Ghent (N.Y. Senate Doc. No. 73, 1890). But the first cannot be maintained in view of the circumstances that the United States guaranteed their lands to the Six Nations in 1789 after the removal to the Grand River in 1784, and that the principal signers of the Treaty of 1795 and most of those who receipted for the annuities on behalf of the Nation from 1795 to 1810 were Cayugas who had so emigrated. As to the second, we do not so construe the Treaty of Ghent. The committee relies on the form of payment to the nation as an entity. The word "enjoy" in the treaty, as we think, refers to the substantial participation in the division of the money. If New York did not follow the treaty as to production of and receipt on the counterpart, the State was bound to see that those who ought to have the money were those who got it. Both in this report and in the opinion of Judge O'Brien, then Attorney-General of New York, in 1884 (memorial, vol. III, p. 777), the circumstance that the Canadian Cayugas had taken part with Great Britain in the War of 1812 is evidently regarded as a ground of excluding them from any share in the annuity. So also the letter of Commissioner Bissell (memorial, vol. III, p. 793) gives this reason. But it is obviously untenable, and it was expressly stated on behalf of the United States at the hearing that no such defense is urged. It is evident that both the committee and the Attorney-General go upon the form of the covenant and the legal authority of New York to determine what shall be recognized as the Cayuga Nation. They do not deny the merit of the claim. This is palpably true of the decision of the New York Court of Appeals in *Cayuga Nation v. State*, 99 N.Y. 235.

It cannot be doubted that until the Cayugas permanently divided, all the sachems and warriors, wherever they lived, whether at Cayuga Lake, Buffalo Creek, or the Grand River in Canada, were regarded as entitled to and did share in the money paid on the annuity. Indeed, it is reasonably certain that the larger number and the more important of those who signed the Treaty of 1795 were then, or were soon thereafter, permanently established in Canada. It is clear that the greater number and more important of those who signed the

annuity receipts from the date of the treaty until 1810 were Canadian Cayugas. We find the person through whom, by the terms of the treaty, the money was to be paid, writing to the Governor of New York in 1797 that the Canadian Cayugas had not received their fair proportion in a previous payment and proposing to make the sum up to them at the next payment. Everything indicates that down to the division the money was regarded as payable to and was paid to and divided among the Cayugas as a people. The claim of the Canadian Cayugas, who are in fact the greater part of that people, is founded in the elementary principle of justice that requires us to look at the substance and not stick in the bark of the legal form.

But there are special circumstances making the equitable claim of the Canadian Cayugas especially strong.

In the first place, the Cayuga Nation has no international status. As has been said, it existed as a legal unit only by New York law. It was a *de facto* unit, but *de jure* was only what Great Britain chose to recognize as to the Cayugas who moved to Canada and what New York recognized as to the Cayugas in New York or in their relations with New York. As to the annuities, therefore, the Cayugas were a unit of New York law, so far as New York law chose to make them one. When the tribe divided, this anomalous and hard situation gave rise to obvious claims according to universally recognized principles of justice.

In the second place, we must bear in mind the dependent legal position of the individual Cayugas. Legally, they could do nothing except under the guardianship of some sovereign. They could not determine what should be the nation, nor even whether there should be a nation legally. New York continued to deal with the New York Cayugas as a "nation". Great Britain dealt with the Canadian Cayugas as individuals. The very language of the treaty was in this sense imposed on them. What to them was a covenant with the people of the tribe and its posterity had to be put into legal terms of a covenant with a legal unit that might and did come to be but a fraction of the whole. American courts have agreed from the beginning in pronouncing the position of the Indians an anomalous one (Miller, J., in *United States v. Kagama*, 118 U.S. 375, 381). When a situation legally so anomalous is presented, recourse must be had to generally recognized principles of justice and fair dealing in order to determine the rights of the individuals involved. The same considerations of equity that have repeatedly been invoked by the courts where strict regard to the legal personality of a corporation would lead to inequitable results or to results contrary to legal policy, may be invoked here. In such cases courts have not hesitated to look behind the legal person and consider the human individuals who were the real beneficiaries. Those considerations are even more cogent where we are dealing with Indians in a state of pupillage toward the sovereign with whom they were treating.

There is the more warrant for so doing under the terms of the treaty by virtue of which we are sitting. It provides that decision shall be made in accordance with principles of international law and of equity. Méryghac considers that an arbitral tribunal is justified in reaching a decision on universally recognized principles of justice where the terms of submission are silent as to the grounds of decision and even where the grounds of decision are expressed to be the "principles of international law". He considers, however, that the appropriate formula is that "international law is to be applied with equity" (*Traité théorique et pratique de l'arbitrage international*, para. 303). It is significant that the present treaty uses the phrase "principles of international law and equity". When used in a general arbitration treaty, this can only mean to provide for the possibility of anomalous cases such as the present.

An examination of the provisions of arbitration treaties shows a recognition that something more than the strict law must be used in the grounds of decision of arbitral tribunals in certain cases; that there are cases in which—like the courts of the land—these tribunals must find the grounds of decision, must find the right and the law, in general considerations of justice, equity and right dealing, guided by legal analogies and by the spirit and received principles of international law. Such an examination shows also that much discrimination has been used in including or not including “equity” among the grounds of decision provided for. In general, it is used regularly in general claims arbitration treaties. As a general proposition, it is not used where special questions are referred for arbitration.

Three arbitration treaties between Great Britain and the United States contain provision for decision in accordance with “equity” or “justice”: the Claims Convention of 1853, article I (1 Malloy, *Treaties*, 664), using the words “according to justice and equity”; the Claims Convention of 1896, article II (1 Malloy, 766), calling for “a just decision”; and the Agreement for Pecuniary Claims Arbitration, 1910, article VII (3 Malloy, 2619), prescribing decision “in accordance with treaty rights, and with the principles of international law and of equity”. These are general claims arbitrations. They should be contrasted with the arbitration agreements between Great Britain and the United States in which there is no provision for equity as one of the grounds of decision. Articles IV, V and VI of the Treaty of Ghent provide for arbitration as to the islands on the Maine boundary, as to the north-eastern boundary, and as to the river and lake boundary. The arbitrators are to decide “according to such evidence as shall be laid before them”. Here the questions were of fact only. Hence in an arbitration of specific questions, all provision as to equity is omitted. So also in the Regulations for the Mixed Courts of Justice under the Treaty of April 7, 1862 (1 Malloy, 681), article I, the arbitrators are to “act in all their decisions in pursuance of the stipulations of the aforesaid treaty”. This was a special tribunal under a treaty for abolition of the slave trade. The contrast with the provisions of the treaties for general claims arbitrations is noteworthy. So also in the Fur Seal Arbitration Convention of 1892 (1 Malloy, 746), articles II, VI; the Alaskan Boundary Convention, 1903 (1 Malloy, 787), articles I, III, IV; and the Agreement for the North Atlantic Coast Fisheries Arbitration (1 Malloy, 835), article I. In each of these, certain specific questions were submitted. These agreements are either silent as to the grounds of decision or provide simply for a fair and impartial consideration.

In some of the arbitration agreements between Great Britain and the United States it has happened that clauses of both types have been included in one treaty. Thus, in the Jay Treaty of 1794, article V has to do with arbitration of the Maine boundary. In that matter the arbitrators are to decide “according to such evidence as shall . . . be laid before them”. But article VII, providing for arbitration of claims, requires a decision “according to the merits of the several cases, and to justice, equity, and the law of nations”. (1 Moore, *International Arbitrations*, 5,321.) Again in the Treaty of Washington, 1871, art. XXXIV and following, providing for arbitration of the San Juan water boundary, call for decision “in accordance with the true interpretation of the Treaty of June 15, 1846”. 1 Moore, *International Arbitrations*, 227. Also in the same treaty, article VI, submitting the Alabama claims, provides three carefully formulated rules, agreed on expressly by the parties, and requires decision by those rules and “such principles of international law, not inconsistent therewith, as the arbitrators shall determine to have been applicable to the case”. So also in article II, as to claims governed by rules agreed upon, the arbitrators are to examine and decide “impartially and carefully”. On the

other hand, in article XXIII, providing for the arbitration of fishing claims, the decision is to be "according to justice and equity" (1 Malloy, 710, 714). Here the careful discrimination, according to the subject matter dealt with in the several articles of the same treaty, speaks for itself.

Arbitration treaties of and with Latin American countries before 1910 (the date of the treaty here in question) tell the same story. Of these, some provide for decision according to international law, equity (or justice) and treaty provisions. Such are (with slightly varying language): Arbitration Convention between the United States and Mexico, 1839, 1 Malloy, 1101, art. IV (arbitration of claims); Ecuador-United States, 1862, 13 St. L. 631; Peru-United States, 1863, 13 St. L. 639, art. III; United States-Venezuela, 1866, 13 St. L. 713, art. I; Mexico-United States, 1868, 1 Malloy, 1128, art. I; Guatemala-Mexico, 1888, 71 Br. & For. State Pap. 255, art. IV; United States-Venezuela, 1892, 28 St. L. 1183, art. III; Chile-United States, 1892, 27 St. L. 965, art. IV; Guatemala-Honduras, 1895, 77 Br. & For. State Pap. 530, art. VI; Mexico-Venezuela, 1903, Manning, *Arbitration Treaties among the American States*, 343, art. I (arbitration of all pending claims); Brazil-Peru, 1904, U.S. Foreign Relations, 1904, p. 111, art. III (General claims arbitration); Argentina-Brazil, 1905, 3 Am. Journ. Int. Law, Suppl. p. 1, art. X (General arbitration); Brazil-Peru, 1909, Manning, 450, art. IX (General arbitration). It will be noted that these words are used where no specific claims are in question, but there is a general arbitration of claims of all kinds. In other cases the treaty speaks only of justice and equity. Such are: Costa Rica-Nicaragua, 1854, Manning, 31, art. III; New Granada-United States, 1857, 1 Malloy, 319, art. I; Chile-United States, 1858, 12 St. L. 1083; Paraguay-United States, 1857, Manning, 145, art. II; Costa Rica-United States, 1860, 12 St. L. 1135, art. II; Peru-United States, 1868, 16 St. L. 751, art. I; Chile-Peru, 1868, Manning, 78; United States-Venezuela, 1886, Manning, 150, art. VI; Mexico-United States, 1902, 32 St. L. 1916; Brazil-United States, 1902, U.S. Treaty Series, No. 413, art. I. Here it is significant that eight of the ten are arbitrations between the United States and Latin American States, in which, because of the difference in legal systems and technique of decision, it was expedient to give some latitude to the Tribunal. In this connexion the treaty between the United States and Venezuela in 1903 (U.S. Treaty Series, No. 420) is especially significant. It requires decision "upon a basis of absolute equity, without regard to objections of a technical character or of the provisions of local legislation" (as to what this meant, see Ralston, *International Arbitral Law and Procedure*, 69-71). In other cases, the language shows that the arbitrator was to be no more than an *amiable compositeur*: Honduras-Salvador, 1880, Manning, 1115, art. V ("just and expedient"); Honduras-Nicaragua, 1894, Manning, 211, art. II (5); Honduras-Salvador, 1895, Manning, 216, art. II; Chile-United States, 1909, U.S. Treaty Series, No. 535 1/2 ("as an *amiable compositeur*").

In the treaties cited, to which the United States has been a party, it will be noted how discriminatingly the language is chosen. How can it be said that the phrase "principles of equity" is of no significance when the different phrases are shown to have been so carefully chosen to fit different occasions?

This conclusion is borne out even more when we examine the arbitration treaties of and with the Latin American States in which no reference is made to equity. In some of these no reference is made to grounds of decision: Mexico-United States, 1897, 30 St. L. 1593 (a limited arbitration of specific issues of law and fact raised by prior diplomatic correspondence); Peru-United States, 1898, U.S. Treaty Series, No. 286 (limited arbitrations of the amount of indemnity only—all other questions excluded); Haiti-United States, 1899, Manning, 282 (special agreement to submit one claim of a citizen of the United

States to one of the Justices of the Supreme Court of the United States); Guatemala-United States, 1900, Manning, 288, art. I (refers "questions of law and fact" as to one specific claim); Nicaragua-United States, 1900, 2 Malloy, 1290 (reference to specific claims, as to the amount of indemnity only—question of liability expressly excluded); Salvador-United States, 1901, U.S. Treaty Series, No. 400 (specific claims, the issues having already been defined by diplomatic correspondence); Dominican Republic-United States, 1902, Manning, 320 (special arbitration of one claim on defined points); Dominican Republic—United States, U.S. Treaty Series, No. 417 (special arbitration as to terms of payment of agreed indemnity). In each of these cases the United States was a party, and the nature of the arbitration shows why it is that reference to general grounds of decision was omitted.

In another type of case provision is made for decision according to international law or "public law" and treaties. Such a case is: Colombia-United States, 1874, 1 Foreign Rel. U.S. 427, art. II (but here these general grounds were supplemented by special stipulations). In another type, the grounds of decision are expressly restricted to "the rules of international law existing at the time of the transactions complained of": Haiti-United States, 1884, 23 St. L. 785, art. IV (reference of two special claims of citizens of the United States to one of the Justices of the Supreme Court of the United States; naturally it was sought to restrict the scope of his choice of grounds of decision). In another group of treaties, the decision is to be "according to the principles of international law". Such are: Brazil-Chile, 1899, Manning, 259, art. V; Argentina-Uruguay, 1899, 94 Br. & For. State Pap. 525, art. X; Argentina-Paraguay, 1899, 92 Id. 485, art. X; Argentina-Bolivia, 1902, Manning 316, art. X; Argentina-Chile, 1902, Manning, 328, art. VIII; Costa Rica-Guatemala-Honduras-Nicaragua-Salvador, 1907, 100 Br. & For. States Pap. 836, art. XXI (treaty establishing the Central American Court of Justice as a Permanent Court of Arbitration). But these treaties (except the last) add that the terms of submission may otherwise provide, thus taking care of the possibility of anomalous situations. One treaty, Bolivia-Peru, 1901, 3 Am. J. Int. Law, Suppl. 378, art. VIII, requires "strict obedience to the principles of international law". In another type of this species of treaty there is minute specification of the exact grounds of decision. Such are Bolivia-Peru, 1902, Manning, 334; Costa Rica-Panama, 1910, 6 Am. J. Int. Law, Suppl., p. 1. Each is a boundary arbitration.

In these treaties of and with Latin American States, as in the case of treaties between Great Britain and the United States, it happens sometimes that different provisions as to the grounds of decision are made in different articles of the same treaty. Thus: Colombia-Ecuador, 1884, Manning, 140 (art. I, "impartiality and justice", art. II, "in accordance with the principles of international law and the legal principles established by analogous modern tribunals of high authority"); Ecuador-United States, 1893, 28 St. L. 1205 (art. II (*b*) "under the law of nations", art. IV, such damages "as may be just and equitable"—an arbitration of one specified claim); United States-Venezuela, 1908, U.S. Treaty Series, No. 522 1/2 (art. I "under the principles of international law", art. II whether "manifest injustice" was done, art. III "on its merits in justice and equity", art. V "in accordance with justice and equity"). This different language for different situations speaks for itself. It should be said also that the language of treaties with Continental Powers, both prior and subsequent to 1910, to which the United States is a party, entirely sustains the conclusions to which the examination of the treaties with Great Britain and with Latin-American States must lead (see United States-Norway, 1921, 3 Malloy, 2749, art. I; Allied Powers-Germany, 1920, 3 Malloy, 3469, art.

299 (b); Allied Powers-Hungary, 1921, 3 Malloy, 3644, art. 234 (b); United States-Great Britain-Portugal, 1891, 2 Malloy, 1460, art. 1; United States-Germany-Great Britain, 1899, 2 Malloy, 1589, art. I.)

Under the first and second Hague Conventions for the Pacific Settlement of International Disputes (32 St. L. 1779, art. XLVIII; 36 St. L. 2199, art. LXXIII) there is to be a special *compromis* in each arbitration which is to provide as to the basis of decision. But wide powers of determining the basis of decision are insured by art. 48. Also art. 38 of the Statute of the Permanent Court of International Justice (1920) provides specially that the Court may decide *ex aequo et bono*, if the parties agree thereto. As Anzilotti points out, however, that much-criticized provision is meant for cases such as we have seen above, which call, not for principles of equity, but for a degree of compromise (Anzilotti, *Corso di diritto internazionale*, 64 (1923)). Such a power is not necessarily non-judicial, as Magyary asserts (*Die internationale Schiedsgerichtsbarkeit im Völkerbunde*, 151-2 (1922)). But it is a different thing from what we invoke in the present case, namely, general and universally admitted principles of justice and right dealing, as against the harsh operation of strict doctrines of legal personality in an anomalous situation for which such doctrines were not devised and the harsh operation of the legal terminology of a covenant which the covenantees had no part in framing and no capacity to understand. It is enough to cite the opinions of Mèrignhac (*Traité théorique et pratique de l'arbitrage international*, paras. 294-305); Bulmerincq (*Die Staatsstreitigkeiten und ihre Entscheidung ohne Krieg*, para. 11; Holtzendorff, *Handbuch des Völkerrechts*, VI, 42); and Lammasch (*Die Lehre von der Schiedsgerichtsbarkeit in ihrem ganzen Umfange*, II, 179-181, 185).

It remains to consider the United States-Norway Arbitration Award, 1922. (17 Am. J. Int. Law, 362, ff.) By article I of the agreement under which that award was made, the decision was to be "in accordance with the principles of law and equity". The meaning of this phrase is discussed on pages 383-385. Construing article LXXIII of The Hague Convention for the Settlement of International Disputes (1907) and article XXXVII of the Convention of 1908, the Tribunal considers, rightly, as we conceive, that the word *droit*, as used in those articles has a broader meaning than that of "law" in English, in its restricted sense of an aggregate of rules of law. It quotes Lammasch to the effect that the arbitrator should "decide in accordance with equity, *ex aequo et bono*, when positive rules of law are lacking". It then says of the words "law and equity" in the agreement under which it was sitting: "The majority of international lawyers seem to agree that these words are to be understood to mean general principles of justice as distinguished from any particular system of jurisprudence or the municipal law of any State" (p. 384). Not only is this the weight of opinion, but it is amply borne out by the language of arbitration treaties as adapted to the different sorts of arbitration and the types of questions which they present. The letter of Secretary Hughes to the Norwegian Minister, of date February 26, 1923 (17 Am. J. Int. Law, 287-289), in which he protests as to certain features of the awards, challenges the rule of international law found by the Tribunal and applied to the case. But it does not contest or refer to the Tribunal's construction of the words "law and equity", as used in the agreement; nor do we think that construction is open to question. Our conclusion on this branch of the cause is that, according to general and universally recognized principles of justice and the analogy of the way in which English and American courts, on proper occasions, look behind what in such cases they call "the corporate fiction" in the interests of justice or of the policy of the law (*Daimler Company, Ltd., v. Continental Tyre and Rubber Company, Ltd.* [1916] 2 A.C. 307, 315-316, 338 ff; 1 Cook (Corporations, 8 ed., para. 2)),

on the division of the Cayuga Nation the Cayuga Indians permanently settled in Canada became entitled to their proportionate share of the annuity and that such share ought to have been paid to them from 1810 to the present time.

But it is not necessary to rest the case upon this proposition. It may be rested upon the strict legal basis of article IX of the Treaty of Ghent, and in our judgment is to be decided by the application of that covenant to the equitable claim of the Canadian Cayugas to their share in the annuity.

Article IX of the Treaty of Ghent, so far as material, reads as follows: "The United States of America engage to put an end, immediately after the ratification of the present treaty, to hostilities with all the tribes or nations of Indians with whom they may be at war at the time of such ratification; and forthwith to restore to such tribes or nations, respectively, all the possessions, rights, and privileges which they may have enjoyed or been entitled to in one thousand eight hundred and eleven, previous to such hostilities." The former portion of this covenant clearly refers to the Indian tribes on the public domain of the United States known then as the Western Indians, and was so construed by the United States, which proceeded to make special treaties of peace with those tribes. On its face the remainder of the covenant seems to apply squarely to the Canadian Cayugas, who had been actually in the receipt and enjoyment of their share of the annuity from the Treaty of 1795 down to the eve of the war of 1812. In the answer of the United States there is an elaborate and ingenious argument, based upon the history of the negotiations leading to article IX, on the basis of which we are asked to hold that the article was only a "nominal" provision, not intended to have any definite application. We can not agree to such an interpretation. Nothing is better settled, as a canon of interpretation in all systems of law, than that a clause must be so interpreted as to give it a meaning rather than so as to deprive it of meaning. We are not asked to choose between possible meanings. We are asked to reject the apparent meaning and to hold that the provision has no meaning. This we cannot do. We think the covenant in article IX of the Treaty of Ghent must be construed as a promise to restore the Cayugas in Canada who claimed to be a tribe or nation and had been in the war as such, to the position in which they were prior to the division of the nation at the outbreak of the war. It was a promise to restore the situation in which they received their share of the money covenanted to be paid to the original undivided nation. There are but two alternatives, each quite inadmissible under every day rules of interpretation. One is that the promise has no meaning but was, as it was urged in argument, a provision inserted to save the face of the negotiators. The other is that the tribe or nation must be taken to be the entity of New York law, not the Canadian Cayugas as British nationals. As to this interpretation, the remark of Chief Justice Fuller, in *Burthe v. Dennis*, 133 U.S. 514, 520-21 is pertinent. He says: "It would be a remarkable thing, and we think without precedent in the history of diplomacy for the Government of the United States to make a treaty with another country to indemnify its own citizens for injuries received from its own officers". It would be no less strange and unprecedented for the United States to covenant with another power to restore the rights of its own nationals under its exclusive protection. In order to give this portion of the article any meaning, we must take it to promise that the Indians who had gone to Canada and had sided with Great Britain on the splitting up of the original nation, were to be put in the *status quo* as of 1811, even if legally the New York Cayuga organization was now the nation for the strict legal purposes of the covenant in the Treaty of 1795.

In 1843, in a letter to the then Governor of New York, written on behalf of the New York Cayugas with reference to the division of the annuity between

the Cayugas remaining in New York and those who had gone to the West, Peter Wilson, an educated Cayuga, and one of the Sachems of the New York nation, said: "The emigrating party of the New York Cayugas have invited the Canadian Indians to come over and accompany them to the western country, and we are apprehensive they will represent these as composing a part of their party having claims to the moneys of the Cayuga Nation arising from the annuities of the State of New York, which claim we do not recognize". Further on he adds: "We wish your excellency distinctly to understand that the Cayugas residing in a foreign country, to wit, Canada, have no just or legal claim to any part of the annuities arising from this State". Here, in its original form, the objection of the New York Cayugas to participation by the Canadian Cayugas rests on the proposition, obviously inadmissible, if for no other reason, in view of art. IX of the Treaty of Ghent, that the Canadian Cayugas reside in a foreign country. Six years later (1849), when the Canadian Cayugas were pressing their claim to a share before the Legislature of New York, the objection was rested on the ground of an agreement at the time of the division of the nation, whereby, to use Wilson's own words "It was mutually agreed that thereafter they should no longer participate in the annuities or emoluments flowing from the governments they were to oppose; but each division should take the whole from the government to which it is allied . . . that all property and interest on the British side should belong to the British Indians, while the property and interests on the American side must be the sole property of the American Iroquois". This is a plausible theory and, urged dramatically and with much detail of circumstance in Wilson's speech in 1849, it has undoubtedly played a controlling part in the subsequent denials of the claims of the Canadian Cayugas. But without adverting to the mystery that surrounds the speech itself, for it is not established that it was ever delivered, and conceding certain circumstances that appear to confirm it, we are of opinion that it has no foundation beyond the admitted division of the nation on the eve of the War of 1812, and the fact that during and after that war the Canadian Cayugas did not participate in the division of the payments. In reality the circumstances do not go beyond this. If there had been more, Wilson certainly would have said so in 1843. His letter of that date is too prolix to justify an assumption that he left out anything he knew that had a bearing on his case. Certainly he would not have left out the one conclusive argument in his armoury. Moreover, it ought to have been possible to establish a point of such importance by something more than the assertion in Wilson's speech. The only other evidence is a statement in a report of the Committee on Indian Affairs to the Senate of New York, in 1849, that the Council in which "that agreement was made, if any", had been graphically described to the committee by an Onondaga chief. It is clear enough from the whole report that the committee, at the least, was skeptical as to the alleged agreement. Certainly the whole conduct of the Canadian Cayugas from the conclusion of the War of 1812 was inconsistent with it. We are satisfied that they held the counterpart of the Treaty of 1795 from a time soon after its execution to the present, when they produce it before us. There is clear evidence that after 1815 their chiefs made repeated visits to New York, claiming a share and vouching their possession of the counterpart upon which, by the terms of the treaty, receipts for payment were to be indorsed. Almost immediately upon the close of the war they urged upon the British Colonial Office that they were no longer receiving their share of the annuity, as they had received it before the war. In 1819 they discussed their claim in a council and considered retaining counsel to present it. In 1849 they presented it by petition to the Legislature of New York, and continued to press it at intervals from that time. No one but Wilson testifies (if his speech may be called testimony)

to the agreement of partition. His speech, in many of its details, is palpably erroneous. The circumstances and the conduct of the parties are at variance with it. It cannot be that, if this solid and conclusive ground for excluding the Canadian Cayugas had existed, the ground of excluding them from a share in the annuity would have been doubtful in 1849.

We have next to consider whether the claim of Great Britain, on behalf of the Canadian Cayugas, that the latter should share in the payments of the annuity covenanted to be paid to the original Cayuga Nation, is barred by article V of the Claims Convention of 1853. That article reads:

"The High Contracting Parties engage to consider the result of the proceedings of this commission as a full, perfect, and final settlement of every claim upon either Government arising out of any transaction of a date prior to the exchange of the ratifications of the present convention; and further engage that every such claim, whether or not the same may have been presented to the notice of, made, presented, or laid before the said commission, shall from and after the conclusion of the proceedings of the said commission, be considered and treated as finally settled, barred, and thenceforth inadmissible."

On behalf of Great Britain it is contended that article V must be construed in connexion with article I and II. The United States, on the other hand, contends that article V is complete and unambiguous and hence calls for no interpretation, but must be applied according to its plain terms.

It will be noted that in order to be barred the claim must have: (1) "arisen"; and (2) arisen out of "transactions" prior to the ratification of the convention. No doubt the Treaty of 1795, the division of the Cayuga Nation, and the Treaty of Ghent are "transactions" prior to 1853. But if no claim against the United States had "arisen" in 1853, there was no claim to be barred by the terms of article V, which does not purport to apply and certainly ought not to be construed as applying to claims to arise in the future, even if in part out of past transactions. If, as the United States insists, we must apply the language of article V as it stands, the word "arise" is quite as important as the word "transactions", and we must look to the transactions that are decisive for the "arising" of the claim, as one cognizable before an international tribunal, in order to determine whether the claim before us is barred.

What, then, are the grounds on which liability of the United States must be based, and what is the date of the "transactions" from which a claim "arises" in which that liability may be asserted?

First, we must ask whether the United States would be liable directly and immediately on the basis of the Treaty of 1795. It has been urged upon us that the United States would be liable upon that treaty on three grounds: (1) that the treaty is legally a Federal, not a New York, treaty, made in the presence of a Federal Indian agent; (2) that the treaty has to do with a matter of exclusively Federal cognizance, under the Constitution of the United States, and so must be presumed to have been executed under competent Federal authority, since the alternative would be that the treaty would be void; (3) that in any event the interest of the United States in the treaty, as one dealing with a matter of Federal cognizance under the Constitution of the United States, is such as to make the United States directly and immediately liable upon the treaty, even if it is the contract of the State of New York.

We are unable to assent to any of these propositions. Neither in form nor in substance was the Treaty of 1795 a Federal treaty; it was a contract of New York with respect to a matter as to which New York was fully competent to contract. In form it is exclusively a New York contract. The negotiators derived their authority from the State Legislature and purported to represent the State only. The United States does not appear anywhere in the negotia-

tions nor in the treaty. The United States Indian agent, who was present, at the request of the Indians because they had confidence in him, appears as a witness in his personal, not his official, capacity. Nor was the subject matter one of Federal cognizance. The title of the Cayuga Indians, one of occupation only, had been extinguished by the Treaty of 1789, which ceded the Lands of the Cayugas to New York, providing for a reservation which, we think, must be taken to have been held of New York by the Nation. It is argued that the language of the treaty is rather that of a common law reservation, so that the reserved land was reserved out of the grant. As to this, we are satisfied with the observations of Gray, J., in *Jones v. Meehan*, 175 U.S. 1, 11: "The Indians . . . are a weak and dependent people who have no written language and are wholly unfamiliar with all the forms of legale xpression, and whose only knowledge of the terms in which the treaty is framed is that imparted to them by the interpreter . . . ; the treaty must therefore be construed not according to the technical meaning of the words to learned lawyers, but in the sense in which they would naturally be understood by the Indians". We think the treaty meant to set up an Indian reservation, not to reserve the land from the operation of the cession. Such a construction is indicated by Marshall C. J., in *Cherokee Nation v. Georgia*, 5 Pet. 1, 17.

That treaty (1789) was made at a time when New York had authority to make it, as successor to the Colony of New York and to the British Crown. Long before the Revolution, the country of the Six Nations had been treated as "appendent to the government of New York" (*Baldwin, J. in Cherokee Nation v. Georgia*, 5 Pet. 1, 35). It was for the Legislature of New York to say who could bind the Cayuga Nation as a New York entity. The subsequent treaties of 1790 and 1795 purported simply to confirm the original treaty and were made because of dissatisfaction of the Indians, not because of any legal invalidity. The cases cited to us with respect to Indians on the public domain of the United States or on lands relinquished by some or other of the original thirteen States are not in point. The distinction is made clear in Dana's note to Wheaton, *Elements of International Law*, para. 38 (8 ed. 60). He says: "It is important to notice the underlying fact that the title to all lands occupied by the Indian tribes *beyond the limits of the thirteen original States*, is in the United States. The Republic acquired it by the treaties of peace with Great Britain, by cessions from France and Spain, and by *relinquishments from the several States*" (see also *Seneca Nation v. Appleby*, 127 App. Div. 770). The title of New York here was independent of and anterior to the Federal Constitution. At the time of the Treaty of 1795, the Cayuga Indians held the reservation of New York and the dealings of New York with the Cayuga Nation as a New York entity and with respect to lands held of New York were a matter for that State only (see *Marshall, C. J., in Cherokee Nation v. Georgia*, 5 Pet. 1, 16-18; *Nelson, J. in Fellows v. Blacksmith*, 19 How. 366, 369; 3 Kent, *Commentaries*, 380-386; *Beecher v. Wetherbee*, 95 U.S. 517, 525 and State decisions there cited; *Seneca Nation v. Christie*, 126 N.Y. 122; *Jemison v. Bell Telephone Co.*, 186 N.Y. 493, 498).

We must hold that the Treaty of 1795 was a contract of the State of New York and that it was not a contract on a matter of Federal concern or in which the Federal Government had an interest. Indeed, the fact that it has stood unchallenged as a New York contract for over a century and that New York has gone on for the whole of that time dealing with the provisions of the treaty and with the legal position of the Cayuga Nation as matters of New York law, speaks for itself. This Tribunal cannot know more as to what is a Federal treaty and what a New York treaty than the United States and the State of New York.

If the Treaty of 1795 is a contract of the State of New York, the United States would not be liable merely on the basis of a failure of New York to perform a

covenant to pay money. This proposition is established by repeated decisions of international tribunals: Thornton, Umpire, in Nolan's case, 4 Moore, International Arbitrations, 3484; Thompson's case, *ibid.*; Bainbridge, commissioner, in La Guaira Electric Light and Power Company's case; Ralston, Venezuela Arbitrations of 1903, 178, 181-2; Thomson-Houston Electric Company's case, *id.* 168-9; Schweitzer v. United States, 21 Ct. Cl. 303; Florida Bond Cases, 4 Moore, International Arbitrations, 3594, 3608-12. In the case last cited there is a full discussion by Bates, Umpire. See also Ralston, International Arbitral Law and Procedure, paras, 457-467, pp. 217-221; Borchard, Diplomatic Protection of Citizens Abroad, 200. Two *dicta*, cited to the contrary on the argument, are readily distinguishable. What is said in the Montijo, 2 Moore, International Arbitrations, 1421, 1439, had no reference to a contract of a State of a Federal union creating a debt of that State. There was a violation of a Federal treaty. And the letter of Secretary Fish, 6 Moore, Digest of International Law, 815-816, had reference to injuries to persons and property by the State authorities, not to Federal liability for debts incurred by the contract of a State.

In the cases in which a Federal government has been held upon the contract of a State, there has been: (1) an immediate connexion of the Federal government with the contract as a participant therein; or (2) an assumption thereof or of liability therefor; or (3) a connexion therewith as beneficiary, whether in the inception or as beneficiary of the performance, in whole or in part; or (4) some direct Federal interest therein. The United States is in no such relation to and had no such connexion with or interest in the contract of New York with the Cayuga Nation.

Liability of the United States must, therefore, be grounded upon article IX of the Treaty of Ghent, in which the United States covenanted that the Indians should be restored to the position in which they were before the War of 1812, and hence that they should share in the annuity, as they did before the war. That liability, in our opinion, did not accrue until, New York having definitely refused to recognize the claims of the Canadian Cayuga, the matter was brought to the attention of the authorities of the United States, and that Government did nothing to carry out the treaty provision. That situation and the Treaty of Ghent are the transactions out of which the claim arises. The earliest date at which the claim can be said to have accrued, as a claim against the United States under international law, is 1860.

In municipal law, failure of a promisor to perform gives rise to a cause of action than and there, without more. But it is otherwise when one State steps in to assert a claim against another State because the latter is in default with respect to some performance promised to a national of the former. "In the estimation of statesmen and jurists, international law is probably not regarded as denouncing the failure of a State to keep such a promise, until there has been a refusal either to adjudicate wholly the claim arising from the breach or, following an adjudication, to heed the adverse decision of a domestic court. Upon the happening of either of those events, the denial of justice is regarded as first apparent. Then there is seen a failure to respect a duty of jurisdiction which is distinct from the breach of the contract and subsequent to it in point of time." 1 Hyde, International Law, para 303, pp. 546-7. See to the same effect decisions cited in Ralston, International Arbitral Law and Procedure, para. 37, pp. 27-29; 6 Moore, Digest of International Law, para. 916, pp. 285-9; 1 Westlake, International Law 331-334.

Even in 1860, the Government of the United States referred the Indians to New York. Certainly in 1853, when it was by no means clear that something might not yet be done by the Legislature of New York, an international tribunal would have said that, while there might have been a breach of the covenant,

there had not as yet been a denial of justice by the United States. For these reasons we hold that the claim is not barred by article V of the Convention of 1853.

It is urged on behalf of the United States that the claim should be held to be barred by laches. There is no doubt that there has been laches on the part of Great Britain. The claim of the Canadian Cayugas to share in the annuity payments was brought to the attention of the British Colonial Office immediately after the War of 1812, and within a few years thereafter was repeatedly urged upon the Deputy Superintendent General of Indian Affairs in Canada. Yet it was not until 1899 that the British Minister at Washington presented the claim to the State Department of the United States. Also it must be conceded that the case is not as if New York had withheld the money entirely. That State had paid the whole amount of the annuity each year, in reliance upon its authority to decide who constituted the "Cayuga Nation". There is much to be said for an equity in favor of New York as to payments before the claim of the Canadian Cayugas was presented to the legislature of that State, in 1849. But no laches can be imputed to the Canadian Cayugas, who in every way open to them have pressed their claim to share in the annuities continuously and persistently since 1816. In view of their dependent position, their claim ought not to be defeated by the delay of the British Government in urging the matter on their behalf. Nor can New York be said to have been prejudiced by the delay after 1849, at which time the facts of the case had been brought to the notice of the legislature and a public commission had recommended that justice be done. On the general principles of justice on which it is held in the civil law that prescription does not run against those who are unable to act, on which in English-speaking countries persons under disability are excepted from the operation of statutes of limitation, and on which English and American Courts of Equity refuse to impute laches to persons under disability, we must hold that dependent Indians, not free to act except through the appointed agencies of a sovereign which has a complete and exclusive protectorate over them, are not to lose their just claims through the laches of that sovereign, unless at least there has been so complete and bona fide change of position in consequence of that laches as to require such a result in equity. In the present case by no possibility can there be said to have been a change of position without notice after 1849. Under all the circumstances, we think it will be enough to deny interest on the share of the Canadian Cayugas in past installments of the annuity and to let the payments from 1811 to 1849 stand as made.

By the third prayer of the Memorial, Great Britain seeks a declaration that the Canadian Cayugas are entitled to the annuity for the future. Great Britain, for reasons already stated, is not entitled to such a declaration. Nor have we jurisdiction to make a declaration that the Canadian Cayugas are entitled to share in the annuity for the future. Our powers are limited to a money award, and we must consider how we may frame a money award so as to give effect by that means to the substantive rights of the parties and reach a just result. Accordingly we think the award should contain two elements: (1) an amount equal to a just share in the payments of the annuity from 1849; (2) a capital sum which at 5 % interest will yield half of the amount of the annuity for the future. If by means of an award the United States is held to pay these sums, we think that Government will have been required to perform the covenant in article IX of the Treaty of Ghent so far as specific performance may be achieved through a money award. The Canadian Cayugas are in a legal condition of pupillage. A sum in the hands of their *quasi* guardian sufficient to pay their share of the annuities for the future will fully protect them and give them what they are entitled to under the Treaty of Ghent.

In explanation of the way in which we have arrived at the amount of the award, we may say that as to the second element we have taken a sum sufficient to yield an income equal to half of the annuity because the evidence is too uncertain and controversial and the relative numbers fluctuate too much to permit of an exact proportion. Hence, in the absence of any clear mathematical basis of distribution, we proceed upon the maximum that equality is equity. In view of all the evidence we are satisfied that it is not New York nor the United States that will suffer by reason of any margin of error. As to the first element, as it is palpable that in any possible reckoning the Canadian Cayugas have always been numerically much more than half the tribe, we feel that we should be quite justified in awarding sixty per cent of the payments after 1849. But out of abundant caution and in view of the fact that New York actually paid out the whole amount each year under claim of right, we fix the whole amount, including both the elements above set forth, at one hundred thousand dollars.

We award one hundred thousand dollars.