

# **REPORTS OF INTERNATIONAL ARBITRAL AWARDS**

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## **RECUEIL DES SENTENCES ARBITRALES**

**Henry James Bethune (Great Britain) v. United States (Lord Nelson case)**

1 May 1914

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### 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.

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

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

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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.

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

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

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