REPORTS OF INTERNATIONAL ARBITRAL AWARDS

RECUEIL DES SENTENCES ARBITRALES

Owners of the Argonaut and the Colonel Jonas H. French (United States) v. Great Britain

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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.

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

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

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 1 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.

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

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

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.