

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

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

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 writing 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.
