

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

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

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 Kimberley 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.

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