

**DREW VS. SYLVESTER: REPORT  
AND JUDGEMENT.  
JOHN GOODNOW, CONSUL  
GENERAL, SHANGHAI REFEREE**

Published @ 2017 Trieste Publishing Pty Ltd

ISBN 9780649239078

Drew vs. Sylvester: Report and judgement. John Goodnow, consul general, shanghai referee by Various

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**VARIOUS**

**DREW VS. SYLVESTER: REPORT  
AND JUDGEMENT.  
JOHN GOODNOW, CONSUL  
GENERAL, SHANGHAI REFEREE**



*Case*

*Return to  
E B Drew  
Oc 8110.15F*

In the U. S. Consular Court,  
CANTON, CHINA.

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**D R E W**  
*vs.*  
**S Y L V E S T E R**  
Report and Judgment.

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**JOHN GOODNOW,**  
CONSUL GENERAL, SHANGHAI.

*Referee.*

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*1025*

# In the United States Consular Court.

SHANGHAI, CHINA, 29th April, 1899.

Before JOHN GOODNOW Esq., Consul-General, Acting as Referee.

DREW v. SYLVESTER.

The petition and answer in this case were as follows:—

The petition of the above named petitioner shows:—

1.—That he is a citizen of the United States, and Commissioner of the Imperial Maritime Customs at Canton, China.

1.—That the Defendant is an American Citizen,

3.—The defendant by his Bond bearing date the 25th day of August 1898, became bound to the petitioner in the sum of Fifteen thousand Kuping Taels of good and lawful sycee silver, to be paid by the defendant to the petitioner, subject to a condition thereunder written, whereby, after reciting that the defendant had that day applied for a Customs Permit to ship 500 Mauser Rifles, and 500,000 Mauser Cartridges, by the American steamer *Abbey* then lying at the port of Canton in China, and had undertaken that the rifles and cartridges aforesaid, should without delay, after shipment, be conveyed on board the steamer *Abbey*, direct to the port of Singapore, and to no other place, and that the defendant would produce before the petitioner at Canton within six weeks from the date of the now reciting Bond from the Consul of the United States at Singapore, official proof that the arms and cartridges aforesaid had been duly conveyed in the steamer aforesaid to Singapore. And after reciting that the petitioner had granted, and issued to the defendant, the permit to ship as aforesaid the condition of the said Bond was declared to be, that if the defendant should by himself or by his Agent produce and deliver to the petitioner within the period of six weeks from the date of the now reciting Bond, a Certificate signed, and sealed by the Consul of the United States at the port of Singapore, to the effect that the 500 rifles, and 500,000 cartridges aforesaid had duly arrived on board the steamer *Abbey* at the port of Singapore, then the said Bond should be void and otherwise should be, and remain in full force, and virtue.

4.—The said rifles and cartridges were shipped on board the steamer *Abbey*, but the defendant (either by himself or his agent) has never produced before, or delivered to the Petitioner any certificate signed or sealed by, or any proof from, the United States Consul at Singapore, or any proof whatever, that

the said rifles and cartridges, had arrived at the port of Singapore and in fact the said rifles and cartridges were never conveyed to Singapore, but were conveyed to the Island of Luzon, or to one of the Philippine Islands.

5.—The petitioner has demanded payment of the said sum of Fifteen Thousand Taels which has become due under the Bond to the petitioner from the defendant, but payment of the same has been withheld by the defendant.

Your petitioner therefore prays:—

That judgment may be given against the defendant accordingly, with interest and costs, and that he may have such other and further relief as to your Honorable Court may seem meet.

And your petitioner will ever pray.

Subscribed and sworn to at Canton on this 17th day of March, 1899, before me.

(Sgd.) E. B. DREW,  
*Commissioner of Customs,  
Canton.*

(Seal) (Sgd.) A. H. WHITE,  
*Deputy Consul-General  
in charge, at Canton,  
Acting Judicially.*

The answer of the defendant in the matter is:—

1.—He admits paragraphs 1 and 2 of the petition.

2.—He admits that he executed the document referred to in paragraph 3, and craves leave to refer to the document itself for the precise terms and conditions thereof, but he denies that the said document has or ever had any binding effect on him, or that he is or ever was under any legal obligation whatsoever by reason thereof. The said document was *void ab initio*.

3.—He denies each and all of the allegations alleged in paragraphs 4 and 5.

The defendant therefore prays that the petition be dismissed the petitioner decreed to pay the costs, and that he may have such other or further relief as to the Court may seem meet.

And defendant will ever pray.

W. F. SYLVESTER,  
by S. J. LEVEY, Attorney in fact.

Subscribed and sworn to at Shanghai this 7th day of April, 1899.

by S. J. LEVEY,

JOHN GOODNOW,  
*Consul-General U.S.A. Shanghai.*

Mr. H. P. Wilkinson appeared for the petitioner and Mr. Platt for the defendant. Mr. Alfred Cunningham was appointed official stenographer with the consent of both parties.

His Honor: In this case I may mention what the course of procedure has been. It is a case that came first before the U.S. Consul at Canton, the petition dated there 17th March, 1899, is there, the answer is there, but I hold in my hand an agreement from Mr. Drew executed before Mr. White submitting the matter to myself as referee, and an identical agreement signed by Mr. Sylvester, signed before me. The commission I bear rests on these. His Honor then read his commission.

Mr. Wilkinson then proceeded to read the petition.

His Honor: The first two paragraphs may be omitted.

Mr. Wilkinson: Then I will read from par. 3, (Read).

Mr. Wilkinson also read the answer.

His Honor: Before you go on there is the Bond. Do you admit the Bond and the signature, Mr. Platt?

Mr. Platt: Yes.

The Bond was then put in and marked petitioner's Exhibit A.

Mr. Wilkinson: May it please your Honor, the case in these pleadings is practically this. That the plaintiff as Commissioner of Customs had in his favour as such Commissioner and for the benefit of this successors in office, a bond executed by the defendant. The defendant admits the execution of the bond, refers to the original but says he is not now and could never have been bound by it. Further, he denies the allegation in the petition which alleges that the terms of the bond were not carried out by a certificate of the U.S. Consul at Singapore of the arrival of arms in that vessel and further denies a demand made for payment. I understand on behalf of Mr. Sylvester that the answer apart from formality amounts to this, that the bond itself for some reason is void. The only reason that I can think of that such a bond would be void would be that the defendant had the right to do without any condition whatever. That would be one defence, and the only other defence I can think of is this, that although perhaps he may not have an inherent right to do a certain thing, namely to ship these arms, nevertheless the terms of this bond were so severe or practically were obtained under such duress as to render their performance void and illegal. I think perhaps it would be best for me to show the position in which the parties were at the moment when this bond was executed and to deal with the relations of the United States and China which governed the export and shipment of arms from Canton, or any of the other treaty ports of China. My case for the plaintiff is this, first, that the defendant having no inherent or treaty right to

export these arms at all, save by the consent, leave, license and grace of the Chinese Government, and that the plaintiff gave that license on that condition as he had a right to do and that condition was this bond. Further, as to the second possible defence, that in giving this lease he gave it with oppressive terms, I am instructed that the bond was given freely and willingly by the defendant as a means whereby he would be enabled to ship these arms. This was borne out by the fact that it was done through the U.S. Consulate at Canton, and that there was no duress at the moment would be further borne out by the fact that the Consul signed it, and further by the evidence of Mr. Drew who would show that the wording of the bond had been altered at the instance of the defendant and the Consul at Canton, Therefore there could be no actual or possible duress. The trade between the United States and China, depends upon Treaty, and the various conventions, arrangements and additional articles which have since been added to it. That treaty is the Treaty of Tientsin between China and the United States and the Treaty was made on the basis of an older Treaty which it is necessary I think for me to refer to. The earliest Treaty was the Treaty of Wanghia, signed in 1844. I have in my hands a book entitled "Treaties between the United States of American and China, Japan, Lewchew and Siam, Acts of Congress and the Attorney-General's opinion, with the decrees and regulations issued for the guidance of U.S. Consular Courts in China published by authority, Hong-kong 1862." On the first page there is the following official copy of a notification by S. Wells Williams, Secretary of Legation:—

March 1st 1862. "By Direction of H.E. Hon Anson Burlingame, Envoy Extraordinary and Minister Plenipotentiary of the United States of America to China, the treaties of Wanghia and Tientsin with the the Acts of Congress of the 1848 and 1860 extending the laws of the United States over their citizens in China and elsewhere in Asia, the various decrees regulations and notifications based thereon issued by the Commissioners to China, together with the opinion of Mr. Attorney-General Cushing, are, in order to render the same accessible to American citizens and to such others as may be parties to suits in the Consular Courts of the United States in China, hereby published for their information and guidance the same having been carefully collated with the copies in the archives of the Legation. In addition to the above, and having reference to section first of the Act of June 22, 1860, the treaties between the United States and Japan,

Lewchew, and Siam have been included in the collection."

By order,

S. WELLS WILLIAMS,  
*Secretary of Legation.*

That which I have read is the official copy issued by the direction of United States and their representatives in China, for the purpose of convenience. I now beg to hand the Court for reference another copy of the Treaties which I will also refer to.

Copy of Treaty handed to his Honor and marked Exhibit B.

Mr. Platt: I admit the Treaties.

Mr. Wilkinson: Now Article 5. I shall just preface this by remarking that of course it was well known that in former years trade between the United States and all foreign countries and China was at first prohibited by the laws of China and the present state of trade was the result of the efforts of Western Powers to open up trade with China. By the Treaty of Wanghia any trade expressly excepted thereby was illegal and could not be carried on by citizens of any Western power except by special and individual license. Article 5 of that Treaty says:—

At each of said five ports, citizens of the United States, lawfully engaged in commerce shall be permitted to import from their own or any other ports into China, and sell there and purchase therein and export to their own or any other ports all manner of merchandise of which the importation or exportation is not prohibited by this Treaty, paying the duties which are prescribed by the tariff herein before established and no other charges whatsoever.

Now we have got to see whether the Treaty itself says anything about the sort of trade prohibited. Now going back to Article 3, of the same Treaty, we see a statement with regard to ports allowed to be frequented, and it says:—

The citizens of the United States are permitted to frequent the five ports of Kwangchau, Amoy, Foochow Ningpo and Shanghai and to reside with their families and to proceed at pleasure with their vessels and merchandise to or from any foreign port and from any of the five said ports to any other of them. But said vessels shall not unlawfully enter the other ports of China, nor carry on a clandestine and fraudulent trade along the coasts thereof. And any vessel belonging to a citizen of the United States which violates this provision shall with her cargo be subject to confiscation to the Chinese Government.

I read that as showing the general definition given as to clandestine and fraudulent Trade, and the original rights as therein stated of the Chinese Government, are the rights of confiscation. Article 33 of the same Treaty says:—

Citizens of the United States, who shall attempt to trade clandestinely with such of the ports of China as are not open to foreign commerce or who shall trade in opium or any other contraband article of merchandise, shall be subject to be dealt with by the Chinese Government without being entitled to any countenance or protection from that of the United States; and the United States will take measures to prevent their flag from being abused by the subject of other nations as a cover for the violation of the laws of the empire.

That again I quote to show that there was such a thing at that time as clandestine trade, so that at that date this export of arms from Canton would have rendered the vessel liable to arrest without any reference to the United States. It is interesting in referring to the Treaty to note that the position of the Customs as the representatives of the Chinese Government in matters of tariff and arrangement with the local consuls was mentioned and referred to. In Article 6 of the Treaty we have a reference for the first time to the Commissioner of Customs:—

Whenever any merchant vessel belonging to the United States shall enter either of the said five ports for trade, her papers shall be lodged with the Consul, or person charged with affairs, who will report the same to the Commissioner of Customs; and tonnage duty shall be paid on said vessel at the rate of five mace per ton, if she shall be over one hundred and fifty tons burden; and one mace per ton, if she be of the burden of one hundred and fifty tons or under, according to the amount of her tonnage as specified in the register; said payment to be in full of the former charges of measurement and other fees, which are wholly abolished. And if any vessel, which having anchored at one of the said ports, and there paid tonnage duty, shall have occasion to go to any others of the said ports to complete the disposal of her cargo, the Consul or person charged with affairs, will report the same to the Commissioner of Customs, who, on the departure of the said vessel, shall note in the port-clearance that the tonnage duties have been paid, and report the same to the other custom-houses: in which case, on entering another port, the said vessel will only pay duty there on her cargo, but shall not be subject to the payment of tonnage duty a second time.

You will notice that in that Article the question of a Commissioner granting export clearance was mentioned, without which, it states, that a vessel could not leave the port. That was the state of trade after the Treaty of Wanghia. The Treaty of Tientsin was dated 18th June, 1858, and Article 3 of that treaty provided that:—



In order that the people of the two countries may know and obey the provision of this treaty, the United States of America agree, immediately on the exchange of ratifications, to proclaim the same, publish it by proclamation in the gazettes where the laws of the United States of America are published by authority, and His Majesty the Emperor of China, on the exchange of ratifications, agrees immediately to direct the publication of the same at the capital and by the governors of all the provinces.

In the Treaty it was agreed that it should be published, and here we find a copy of the proclamation, published by John Ward, the envoy extraordinary and minister plenipotentiary of the United States to China. (Iread.)

Then Article 14 of this Treaty amplifies Article 5 of the Wanghai Treaty. It says:—

The citizens of the United States are permitted to frequent the ports of Canton and Chanchow or Swatow, in the province of Kwangtung; Amoy, Foochow, and Taiwan in Formosa, in the province of Fuhkien; Ningpo in the province Chehkiang; and Shanghai in the province of Kiangsu; and any other port or place hereafter by treaty with other powers or with the United States, opened to commerce; and to reside with their families and trade there, and to proceed on pleasure with their vessels and merchandise from any of these ports to any other of them. But said vessels shall not carry on a clandestine and fraudulent trade at other ports of China not declared to be legal, or along the coasts thereof, and any vessels under the American flag violating this provision shall, with her cargo, be subject to confiscation to the Chinese Government, and any citizen of the United States who shall trade in any contraband article of merchandise shall be subject to be dealt with by the Chinese Government, without being entitled to any countenance or protection from that of the United States; and the United States will take measures to prevent their flag from being abused by the subjects of other nations as a cover for the violation of the laws of the empire.

I am reading that second provision to show that not only was there no inherent right to deal in contraband goods, but what was more the Chinese Government were in a very strong position under the Treaty and that through their representative and official—the Commissioner of Customs, by their leave, license and grace, arranged that on certain terms with their knowledge and in a certain way certain goods should be shipped from Canton. In Article 15 there again we have reference to this old tariff and reference looking forward to a later tariff. The Article

goes on to show that a citizen can deal in lawful merchandise and then we have set out in detail forbidden goods that could not be traded in without special permission. Article 16 again mentions the Commissioner of Customs, a ship on her arrival having to lodge her register with the Consul who had to report to the Commissioner of Customs such report being obviously for the prevention of trading in contraband goods. Articles 12 and 22 deal with the payment of duties and again mentions the Customs. The next treaty which I have to refer to is the Convention of Shanghai of the 8th of November, 1858, and then again in the book I have been quoting will be found a supplementary Treaty between the United States and China where after reciting the treaty of Tientsin and reciting that the tariff of duties to be paid are the same as agreed upon by Treaty of Wanghai, except as may be modified, and then it has various references to considerable modifications after signature and treaties with other nations. In that tariff no mention is made of munitions of war or cartridges, and there we have a negative proof that such trade was not allowed or provided for, but we have in Rule 3 that such should not be traded in.

Import and export trade is alike prohibited in the following articles, gunpowder, shot, cannon, fowling pieces, rifles, muskets, pistols, and all other munitions and implements of war.

Up to this my argument has been to some extent historical but here is one of the two provisions upon which the plaintiff relies. The tariff was set out in full under the Convention of Shanghai, which, as I have already quoted, sets forth that there shall be no trade import and export, in these articles. Article -II of the Burlingame Treaty states:

The United States of America and His Majesty the Emperor of China, believing that the safety and prosperity of commerce will thereby best be promoted, agree that any privilege or immunity in respect to trade or navigation within the Chinese dominions which may have been stipulated for by treaty, shall be subject to the discretion of the Chinese Government, and may be regulated by it accordingly, but not in a manner or spirit incompatible with the Treaty stipulations of the parties.

Therefore we have it by Treaty that arms shall not be traded in, and of course it was within the right of the Chinese Government to allow through its responsible officers trading in prohibited articles on its own terms. In this case we have a statement to that effect and it was actually stated in the Treaty and agreed to between both nations that if there was to be any

privilege or immunity granted to trading in such articles it should be subject to the direction of the Chinese and regulated by them accordingly. So much for the first part of my case, that there could be no inherent right on the part of the defendant to export these arms from Canton, and what was more as a citizen of the United States he was bound by treaty not to export them. The Chinese Government through their responsible officer could if it desired, allow such a trade to be carried on as a privilege but they could impose their own terms upon such trade. Further, the United States, by treaty, by which the defendant was bound, has agreed that in the event of any such privilege being granted the Chinese Government could impose its own terms and the transaction was to be regulated by such terms. I have shown that a Commissioner of Customs was representative of the Chinese Government in all such matters. With regard to the second part of my case as to whether there was any actual duress or undue pressure put upon the defendant in regard to the export of these goods, I will call Mr. Drew who will prove firstly that it was a matter of export. These rifles were not brought to Canton by the *Abbey*, and in all these treaties there are various regulations about the re-exporting of goods. They did not apply in this case at all because I will prove that these munitions of war did not arrive in the *Abbey* or the *Pasig*, the name of the vessel before she became *Abbey*, but were actually landed and delivered in totally distinct steamers. There can therefore be no question of re-exporting and not breaking cargo. The next point is that the defendant did not wish to take the goods back again to Hongkong where they came from but he wished to take them to Singapore. That was his expressed wish and intention to the Commissioner of Customs. The Chinese authorities were quite prepared not only to allow these goods to go back to Hongkong by any steamer at all so long as they went, but actually went the length of saying they would send them by a Government transport. Hongkong, however, was not the place they were wanted to go to and the offer was refused. The United States Consul informed the defendant that there was no treaty right by which he could ship the goods to Singapore and as the Chinese Government had to absolve themselves from responsibility to any foreign government (being a neutral power) it allowed the arms, prohibited goods, to be shipped to Singapore on the consideration that the defendant executed the bond produced, through the Commissioner of Customs, undertaking to forward the arms direct to Singapore. The American Consul was present when

that bond was signed so that he would naturally see that there was no duress and if there had been the defendant as a grown man could have pointed out the fact. He wanted to take the arms out of Canton harbour and to do so he chose to sign the bond but now does not wish to abide by it.

Edward B. Drew being duly sworn said: I am the Commissioner of the Imperial Maritime Customs at Canton. I am the plaintiff in this case.

Mr. Wilkinson: You have seen the bond, are you the Mr. Drew mentioned therein?—Yes.

Mr. Wilkinson: The arms arrived in two lots?—Within a week from about the 17th to the 24th July by the steamers *Choyang* from Hongkong and the *Powan* from Hongkong. Both were British steamers and I think there were altogether 6000 Mauser rifles and half a million Mauser cartridges. They were landed by the authority of the Commissioner of Customs acting in accordance with a document known as a *Hu-chiao*, a sort of pass issued by the Chinese provincial Authorities at Canton.

Mr. Platt: I want to know exactly—

Mr. Wilkinson: It was a stamped Chinese document granted by the Viceroy at Canton?

Witness: "Chinese Authorities" is the right expression. I cannot swear if it was by the Viceroy or the superintendent of customs—so called. The *Abbey* arrived at the port of Canton; she arrived on a Sunday in the middle of July, and the date can be found in the calendar; 16th or 17th, I think. She was then known as the *Pasig*, a British steamer.

Mr. Wilkinson: What cargo did she carry?—She had no cargo but she was full of coal. Her papers were taken to the British Consulate.

Mr. Wilkinson: When did the *Pasig* become the *Abbey*?

His Honor: If you will pardon me, I have here the certified copy of the bill of sale and transfer of the ship to the American flag.

The Bill of Sale was put in and marked Exhibit C.

Mr. Wilkinson: Do you remember the date when she became the American ship *Abbey*?—So far as I know about the 5th of August. It was reported to me.

His Honor: Here is the best evidence of that (Exhibit C. produced.) The bill of sale is dated 20th July 1898, and was witnessed before E. Bedloe, Consul, and signed before him on August 5th.

Witness: I was informed of the transfer on the 5th August, about 5 minutes to 4 in the afternoon. I was told of a letter received from the British Consul. At the same time a letter was handed to me signed by the U. S. Consul. The British Consul's letter notified me that the Pasig had been sold to Mr. Sylvester, and the U.S. Consul's informed me that the vessel had been sold and her name was the *Abbey*.

Mr. Wilkinson: Both those reports were to you officially?—Yes.

Mr. Wilkinson: What was the next official act or application?—That I should then issue to her a permit to ship certain arms and cartridges and clear her for Singapore.

Mr. Wilkinson: Was that application in writing or made verbally?—In writing I am pretty certain. The application was accompanied by a Chinese document. That certainly was in writing—it was a *Hu-chow* or pass, for arms to be shipped. The application was for a Customs permit to ship to Singapore.

Mr. Platt: If that document is written we must have it. We cannot have the terms of a written document stated without seeing it.

Mr. Wilkinson: It is a matter for his Honor. If it is possible however for us to get it we will do so.

His Honor: Who made this application for the permit to ship?

Witness: The captain of the *Abbey*.

His Honor: In your office?—Yes.

His Honor: Did he appear in person?—I am not certain but that he did appear in the general office downstairs; I was in my office upstairs. It was reported to me that the *Abbey* had applied to clear in the usual way.

Mr. Wilkinson: Have you this *Hu-chow* here?—No, it is in Canton.

His Honor to Mr. Platt: Let Mr. Drew testify to this and have a copy sent to me. (To witness) Give me just what this document was to the best of your recollection.

Witness: It stated to the best of my recollection this, that Mr. Sylvester had imported certain arms and ammunition. That a portion of these had been found by the Chinese Authorities, for whom they were imported, to be undesirable. That a buyer had been found in Hongkong for this rejected portion and that the export of them was hereby authorised.

His Honor: To any particular place?—The place was not stated.

Mr. Wilkinson: Where is that official document now?—I think it is in the archives of the Chinese Superintendent of Customs at Canton, an official known as a *Hop po*.

Mr. Wilkinson: Was all this at five minutes to four?—Yes, I did not carefully read the Chinese document at 5 minutes to 4. I read it the following morning, as the office was closing at 4, and there was no time to attend to it. The ship would like to have cleared that afternoon but I said the parties must wait until next morning in order to allow me to look more carefully into it. I read it next morning.

Mr. Wilkinson: Did you grant a permit after reading it carefully?—No, I refused to.

Mr. Wilkinson: Did you convey the grounds of your refusal to the defendant or captain of the vessel?—Yes, I did. I cannot recollect whether I conveyed them personally to Mr. Sylvester or whether it was to the U.S. Consul. But Mr. Sylvester was made cognisant of that I suppose on the 6th August. I have every reason to suppose that everybody connected with the ship knew what was going on.

Mr. Wilkinson: What were the actual grounds of your refusal?—The grounds were that the *Hu-chow* implied permission to re-export to Hongkong and that as the *Abbey* was to go elsewhere than to Hongkong I could not recognise that document valid for shipment per *Abbey*.

Mr. Wilkinson: Had you any communication with the issuer of the document or had he any communication with you?—Yes, I immediately consulted the Chinese Authorities at Canton.

His Honor: You mean the official who issued this *Hu-chow*?—Yes.

His Honour: Who issued it?—I think it was the *Hop-po*; I can almost say so absolutely. I went to him and told him that I was afraid the *Abbey* would take these arms somewhere she ought not to take them, and I pointed out to him that the *Hu-chow* implied permission to take them to Hongkong, and told him that there could be no objection to the arms being allowed to be conveyed to Hongkong, but that it would be imprudent for the Chinese Government to allow them to be shipped on board the *Abbey* and then clear the *Abbey* for Singapore.

His Honor: Did the Chinese official to the best of your recollection or the *Hop-po*, the issuer of the *Hu-chow*, did he agree with that or did he insist on a permit to Singapore?—He agreed with my procedure.

His Honor: Did he revoke that *Hu-chow*; was there ever any new *Hu-chow* issued in regard to this shipment?—There was another subsequently issued. I wrote at once to the Viceroy and pointed out to him what I had said to the *Hop-po* and he agreed.