THE SEAL ARBITRATION, 1893

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THE SEAL ARBITRATION.

The area of Behring Sea is about 800,000 square miles. It is the northern part of the Pacific Ocean, and washes the North East Coast of Asia and the North West Coast of North America. The Aleutian Islands, which extend from the Peninsula of Alaska in a south westerly direction across the Pacific Ocean to within about three hundred miles of Kamtchatka, mark its southern boundary; while at the north it is separated from the Arctic Ocean by Behring Straits. The Straits separate Asia from North America, and at their narrowest part are about 50 miles wide. The extreme width of Behring Sea from East to West is about 1,200 miles. Its greatest length is about 800 miles. The entrance to the sea from the south is through the water stretches or "passes" of the Aleutian Archipelago —several of which are upwards of fifty miles wide, and through the stretches of open sea separating the Coast of Asia from the Commander Islands, and the Commander Islands from the Aleutian group—stretches, respectively, of about one hundred and two hundred miles. The entrance to the sea from the north is by Behring Straits. The whole extent of the sea has been navigated without let or hindrance by British and other nationals, from an early period, for the general purposes of commerce and adventure.

It was only for a brief period in 1821 that any restriction was suggested with regard to portions of the sea adjoining the coast—a restriction which, on protest, was promptly with-

drawn. The Robben Island, near the Asiatic Coast, South of Behring Sea, and the Commander Islands before referred to also contain seal "rookeries." They belong to Russia.

The Pribyloff Islands contain the principal "rookeries" or breeding resorts for the seals in the eastern part of the Behring Sea. They are four in number—but the seals resort only to the two principal, St. Paul and St. George. The Pribyloff group was discovered by a Russian, whose name it bears, about 1786. It is situated in latitude 57° north, about 300 miles from the mainland of Alaska, and about 200 miles north of Unalaska, one of the islands of the Aleutian Archipelago.

To these two islands the female seals resort about the middle of July of each year, and almost immediately after give birth to their young. The males, about the same time, or a little earlier, take up their positions on the rookeries, each attempting to establish his own *seraglio*. Between these, violent conflicts take place for the possession of coveted females. Conception takes place in the females very shortly after the delivery o their young. The mothers generally remain on or near the island until the young pups are able to swim. It is while the seals are on the Island, that portions of them, chiefly males between the age of three and seven years, are driven apart and clubbed to death for their skins, under regulations established on the Islands. As a rule the herd, male and female, or more correctly, what is left of it, takes its departure about the end of August or the middle of September, going southward through the passes of the Aleutian Islands—and hundreds of miles south of them into the broad expanse of the Pacific Ocean. The northern migration again commences in January or February, the seals

passing along the coast of California and British Columbia through the Aleutian passes and into the Behring Sea, finally reaching the breeding islands in July. The seals are hunted on the open waters of Behring Sea, and during their journey northward, when many of the females are gravid, are killed by the pelagic sealers. This sort of killing is the subject of special complaint by the American Government; while, on the other hand, it is contended that the main cause of the dimunition in the number of the seals is the reckless and indiscriminate killing of them on the breeding islands by the lessees of that government. There can be little doubt that both modes of killing urgently called for prudent regulation, and for the protection of the seal against the acts of man, but the jurisdiction of the Paris Tribunal was not sufficiently large to enable it to deal with the whole subject. For this reason it just escaped being the greatest of International Courts. The questions of right and jurisdiction unreservedly submitted to it were treated and decided on lines that have received the approbation of all the best contemporary jurists. This result is what was expected from a tribunal composed of the most eminent publicists and lawyers of our day. But they were restricted in their finding upon the second branch of the submission—the framing of regulations for the preservation of the seal race. Their decisions on questions of right and jurisdiction are in conformity with the well settled principles of international law. Had the tribunal been freely permitted to frame regulations for the protection and preservation of the seal species, it would have added a fresh chapter to international law. The arbitrators indicate in their recommendations, not only the want of complete jurisdiction, but also how the chapter might have been completed.

ORIGIN OF THE CONTROVERSY.

The recent difference between Great Britain and the United States, in regard to sealing in the Behring Sea, had its origin in the seizure by American Cruisers of Canadian sealing vessels frequenting that sea in 1886. Great Britain and the United States were at peace, and under the circumstances, the seizure of the Canadian vessels at distances varying from 60 to 100 miles from the nearest land was an act of war. The seized vessels were conveyed to Sitka in Alaska, and there the masters and mates were tried in a Prize Court and condemned to fine and imprisonment, their vessels being detained and their crews turned adrift for the alleged violation of a statute of the United States, which provides that "No person shall kill any otter, mink, marten, sable, or *fur-seal*, or other fur bearing animal within the limits of Alaska or the waters thereof." Against these seizures and condemnations Great Britain protested, pointing out that such seizures on the high seas were in violation of the law of nations. To this protest the American Government rejoined that the seizures and condemnations were made in virtue of certain clauses of the revised statutes of the United States regulating the taking of Seals and other fur-bearing animals in the waters and territory of Alaska. The judgments in effect held that the Behring Sea was *mare clausum*—and was ceded as such—the water as well as the land—by Russia to the United States in 1867.

This is the first appearance of the *mare clausum* doctrine in connection with the controversy. It was strongly combated by Great Britain from the outset. The British Foreign Secretary promptly pointed out that, at and long before the cession of Alaska to the United States, Russia had formally recognized that Behring Sea was open to the ships of all nations, and that

when Russia in 1821 had attempted to enlarge the jurisdiction from three miles to 100 miles from the Shore on the North West Coast of America and East Coast of Asia, both England and the United States protested against any excess of maritime jurisdiction beyond the three miles recognized by international law, and that these protests resulted in the formal abandonment by Russia of the claim to extended jurisdiction. It will be seen that the judgment of the Alaskan Court went further than the most extreme pretensions of Russia, and assumed that Russia practically owned the Behring Sea, and that it was transferred to the United States with the Islands in it as well as the mainland of Russian America.

The wording of the treaty does not justify this interpretation, as all that the Emperor of Russia transferred was within prescribed bounds "his territories, and his sovereignty over them." The British protest, too, made clear that it was beyond the power of Congress to apply the municipal law of the United States beyond three miles from their own shores—saving against their own citizens; and that other nationals could not be deprived of the freedom of the seas by any amount of legislation at Washington. The seizures ceased for a season.

In 1887 Mr. Bayard, then American Secretary of State, announced the release of the vessels seized, the discharge of persons arrested—"but without conclusion of any question that may be found to be involved in these cases of seizure."

Further seizures were made in 1887 and 1889, and against these, strong remonstrances were addressed to the American Government. These seizures occasioned a long correspondence between the two Governments, and that correspondence resulted

in the Treaty of the 29th of February, 1892, providing for reference to an international tribunal of the matters that had formed the subject of the correspondence.

It will be found that, during this correspondence, the United States not only changed the original ground put forward for the making of the seizures, but took up fresh ground, which included not merely the validity of the title derived from Russia, but a right of ownership in, and of protection of, the Seals. In order to a right understanding of the treaty, it is necessary to refer to the correspondence, showing the scope of the subject matter in controversy; and in order to rightly understand the award, it is necessary to recur to both the treaty and the correspondence.

THE DIPLOMATIC CORRESPONDENCE.

The protests of Great Britain against the seizure of its ships on the high seas, and the defence of the United States that the seizure was made and penalties imposed in virtue of a municipal law of the United States, need not be referred to, further than to add, that the Canadian Government took prompt steps to test the strength of this pretension, by applying to the Supreme Court of the United States for a writ of prohibition to restrain the execution of the Alaskan judgment in the case of the W. P. Sayward—one of the seized vessels. The Supreme Court heard arguments, but evaded a decision on the validity of the seizures, holding that as the question of the jurisdiction of the Alaskan Court had not been raised when the case came up for trial in Alaska, it could not be raised in appeal. The Court made no intimation of its opinion—and the owner of the W. P. Sayward and the Canadian Government took nothing by their motion. The application, however, was a clever tactical man-