

(editor's note: This paper was transcribed from a handwritten cursive copy with various difficulties. For a perfect rendition, the reader might wish to consult the original, itself a copy, in the volume entitled *Literary Club Papers*, May 30, 1891 to February 6, 1892)

## The Seizure of the Sayward and the Bering Sea

### The Dispute

According to the libel filed in the U.S. District Court for the District of Alaska, Sept. 13, 1887, the schooner, "W.P. Sayward" of Victoria, British Columbia, was, on the 9<sup>th</sup> day of July 1887. seized by the U.S. officer commanding the revenue cutter Rush, "within the limits of Alaskan Territory and in the waters thereof and within the Civil and Judicial District of Alaska, to wit, within the waters of that portion of Berhring Sea belonging to the U.S. in said district"- as forfeited to the U.S. and for the cause as alleged in the Libel, "that the said vessel and her Captain and officers and crew were then and there engaged in killing fur seals within the limits of Alaska Territory, and in the said waters thereof in violation of Sec. 1956 of the Revised Statues of the U.S."; that the "Sawyard" when so seized had on board a full equipment of implements for killing seals and a large number of fur seal skins taken within that jurisdiction, and that the said schooner, her tackle, equipment, and cargo thereby became and were forfeited to the use of the U.S. by virtue of the provisions of said Sec. 1956. The Section referred to reads as follows:

"No person shall kill any otter, mink, marten, sable or fur-seal, or other fur-bearing animals within the limits of Alaska Territory, or in the waters thereof; and every person guilty thereof shall, for each offense, be fined not less then two hundred or more than one thousand dollars, or imprisoned not more than six months, or both; and all vessels, their tackle, apparel, furniture and cargo, found in violation of this section shall be forfeited; but the Secretary of the Treasury shall

have power to authorize the killing of any such mink, marten, sable or other fur-bearing animal, except fur-seals, and under such regulations as he may prescribe; and it shall be the duty of the Secretary to prevent the killing of any fur-seal, and to provide the execution of the provisions of this section until it is otherwise provided by law; nor shall he grant any special privileges under this section.”

On the 15<sup>th</sup> day of September 1889 the Master of the Schooner intervened and filed a claim on behalf of the owners of the schooner, alleging title and ownership in certain individuals naming them, and on the same day the proctor for claimants obtained leave and filed a demurrer to the libel on the ground that the matters set forth therein, were insufficient in law for the U.S. to maintain an action for the forfeiture of the property seized, and that the owners were not bound by law to answer the same.

The demurrer was on the same day overruled by the Court, and thereupon the Master obtained leave and filed an answer, wherein he pleaded on behalf of the owners, after admitting the seizure by a duly commissioned officer of the U.S., and denied that the seizure was made within the waters of Alaska Territory, or, within the Civil and Judicial District of Alaska, or in any portion of the Bering Sea belonging to the U.S. or upon any other waters belonging to liballants navigable from the sea by vessels of 10 tons or over, further denying the killing of fur-seals within Alaska Territory, in the waters thereof, or that the owners were violating any law of the U.S., denying that the schooner, equipment and cargo became forfeited to the U.S., and praying that the Libel of information be dismissed.

The cause was heard and submitted on the merits, and the 19<sup>th</sup> of September 1887, the Court made its finding of fact, and conclusion of Law, sustaining all the allegations contained in

the Libel, and finding that the U.S. the plaintiff, was entitled to a decree of forfeiture. Among others the Court found these facts existed, namely:

Finding 1<sup>st</sup> -: That on the 9<sup>th</sup> day of July, 1887, and theretofore, the master and crew of defendant vessel were engaged in killing and did kill fur-seals, in that portion of Bering Sea ceded by Russia to the United States by the treaty of March, 1867, and within the waters of Alaska, in violation of Section 1956, of the Revised Statutes of the United States, and that the promiscuous shooting of fur-bearing animals in the waters adjacent to the islands of St. Paul and St. George and on that portion of Bering Sea east of 193 degree of west longitude has a tendency to frighten and prevent the said animals from going on these islands, as they have been accustomed to in the past.”

The owners then interposed a motion in arrest of the decree of forfeiture, and assigned as reasons in support of the motion among others that:

1<sup>st</sup>- That the libel of information herein does not state facts sufficient in law to enable the United States to have and maintain this action for the forfeiture of the property seized herein.

2<sup>nd</sup>- That the evidence produced on the part of the United States in this cause is not sufficient upon which to base a decree of forfeiture.

3<sup>rd</sup>- That from the evidence produced on the part of the United States it appears that this Court has no jurisdiction over the subject matter of this cause.

4<sup>th</sup>- That the act of Congress under which the seizure herein was made is contrary to the spirit of international law and ultra vires, in that it purports to give the United States jurisdiction over a portion of the high seas more than three marine leagues from its shores, and purports to establish

an international boundary line in mid-ocean with no definite terminal points and impossible to determine by absolute measurement or clearly define by marks.”

The motion in arrest was denied by the Court, and on the same day, September 19<sup>th</sup>, 1887, a decree of forfeiture was entered in accordance with the prayer contained in the libel of information.

Subsequently an appeal of the case to the Supreme Court of the United States was perfected. This appeal was in due course dismissed by the Supreme Court; Whereupon the application for a writ of prohibition, praying that the Alaska judges be prohibited from enforcing the original decree of forfeiture, was, early in the present year filed in the Supreme Court at Washington. There the case is pending now for decision of one of the most important questions ever presented for adjudication in any court.

Out of these questions have sprung all the recent diplomatic negotiations and correspondence relative to the right of British subjects to kill and take fur-seals in the waters of Bering Sea; and very recently the parliament of Great Britain, with a view to meeting the demands of our own Government for arbitration on the question of the right to take seal in these waters, has enacted a law prohibiting subjects of her Britannic Majesty from killing fur-seals within the Territory in dispute for a period of about one year; and imposing heavy penalties for the violation of the law during the closed season. And the president of the U.S. on the 5<sup>th</sup> day of June issued a proclamation to the same effect.

For the purpose of this article the technical points of law involved in the “Sayward” case may be dismissed from further consideration, and that case and the question to be submitted to the Board of Arbitration may all be resolved into one, namely, Has the United States

Government the exclusive right to take fur-seals within the waters of Bering Sea; and has this government the right to protect the fur-seal from wanton destruction within these waters?

In discussing this question it becomes important in the final place to consider the facts from a historical point of view.

In the year 1741, Vitus Bering, under authority of the Russian government, made his first voyage of discovery into those waters which have since borne his name, and discovered not only the principal islands in that vicinity, but the outlines of the Alaska coast, and took possession in the name of the Russian Government of all that territory bounded in a general way, on the north by the Arctic Ocean; on the south by the parallel of 55 degrees; on the east by a line extending north and south from Prince of Wales Island through Mt. St. Elias; and on the west by a line running from the Arctic Ocean down through the center of the Bering Strait, and thence in a south westerly direction to the 190<sup>th</sup> degrees of west longitude, so as to include the Aleutian Islands. This includes distinctively the fur-seal islands of St. Paul and St. George of the Pribilof group, and the waters within which the seizure of the "Sayward" was made.

Very soon after the discoveries made by Bering, the subjects of Russia began to turn their attention to the resources of Alaska. Numerous parties and companies were organized for the express purpose of engaging in the fur trade and fisheries in that territory. Much competition arose between the Russian subjects; and after many disturbances and annoyances growing out of the indiscriminate trading the Emperor Paul granted a charter of "Ukasz" of far reaching and exclusive privileges to the Russian American company. It is important to observe some of the provisions of this "Ukaz." Hubert H. Bancroft – in his "History of the Pacific States" furnishes a translation of this remarkable document. It provides as follows:

“Sec. 10” The exclusive right most graciously granted to the Company for a period of twenty years, to use and enjoy on the above described extent of country and islands, all profits and advantages derived from hunting, trade, industries and discovery of new lands, prohibiting the enjoyment of these profits and advantages not only to those who would wish to sail to these countries on their own account, but to all former hunters and trappers who have engaged in this trade and have their vessels and fur at these places and other companies which have been formed, will not be allowed to continue their business unless they unite with the present company with their free consent, and after private companies have withdrawn in a reasonable time. Nobody will have any privileges but this one company, which will be protected in the enjoyment of all the advantages mentioned.”

This document contains a further provision to this effect:

“And for the purpose of aiding the company in its enterprises we allow the Commander of our land and sea forces to employ said forces in the Company’s aid, if occasion requires it.”

This company maintained an exclusive monopoly in all that territory from the time of its organization until the cession to the United States. All writers agree that prior to the cession to the United States, the fur-seal trade and fisheries in Bering Sea and its Alaska tributaries were the chief source of revenue and trade; that little was known of the Alaskan Territory proper’ but that Russian interests concentrated in the fur-seal and fisheries in Bering Sea; and they all seem to agree that the government of Russia, through this Russian American Company, maintained undisputed and absolute sway in all that dominion until the year 1867, when the United States became the purchaser.

Charles Sumner, in the Senate, on April 9<sup>th</sup>, 1867, advocated in an exhaustive and masterly speech, the ratification of the treaty of purchase. His speech is a mine of valuable

information and research on the whole subject of Alaska, from the date of discovery to the purchase by the United States. Under the head of the "Government of Russia", Summer says.

There were various small companies of which, that at Kodiak, was the most considerable, all finally fused into one large trading company known as The Russian American Company, organized in 1799, under a charter from the Emperor Paul, with the power of administration throughout the whole region, including coasts and islands. In this respect it was not unlike the East India Company which has played such a part in English history. The powers of the company are sententiously described by the "Almanach de Gotha" for 1867, where under the head of Russian it says, that to the present time Russian American has been the property of a company.

Summer further says, that according to Krusenstern, "every one must obey the iron rule of the American Company. The chief agent of the American Company is the boundless despot over an extent of country which, comprising the Aleutian Islands, stretch as from 5 degrees to 71 degrees of latitude, and from 130 d to 190 d of longitude and he adds in a note, "There are no courts of justice in Kodiak in any of the company's possessions." And in summarizing, Summer says, "And here we have noticed the existing government, which was found to be nothing but a fur company whose only object is trade."

While taking this historical view of Alaska and its territories, it is well to make a few observations on what may be termed the character and habits of the fur-seal and its surroundings. It may be confidently asserted that the St. Paul and St. George Islands of the Pribilof group are the sole and peculiar domicile of the seal. The peculiar structure and location of the islands make them indispensable to the life and propagation of the seal. Without these islands and contiguous waters, the seal could not exist. If he is not a voter there it is not because he has failed to acquire a residence. The seal not only has a residence on the islands, by the, with his family, has what

may be designates as a suburban residence in the adjacent waters of Bering Sea. Referring to the seal in the speech before mentioned Summer says,

The seal, amphibious, polygamous, and intelligent as the beaver, has always supplied to the largest multitude of furs to the Russian Company. The Russians were led to adopt the plan of the Hudson Bay Company, killing only a limited number of males who had attained their full growth, which can be easily done from the known and systematic habits of the animal.”

Well-authenticated facts also justify the statement that from 1874 to the date of cession to the United States, the Russian Government maintained and enforced the strictest regulations for the preservation of the seals, protecting the breeding seals and exempting all female seals from slaughter. Having thus reviewed the history of Alaska and the fur-seal trade of that territory the next inquiry arises, what property rights did the United States acquire by the purchase. The best information on this lead is to be found in the Articles of Cession. The President of the United States, in his proclamation issued on the 20<sup>th</sup> of June, 1867, incorporates therein the Articles of Convention as greed upon, and signed March 30<sup>th</sup>, 1867, by the Russian and American Plenipotentiaries, W.N. Seward on behalf of the United States and Baron Eduard De Stoeckl, on behalf of Russia.

Article I recites:

“His Majesty, the Emperor of the Russians, agrees to cede to the United States all territory and dominion now possessed by His said Majesty in the continent of America and in the adjacent islands, the same being within the geographical limits here in set forth.” It is not necessary here to repeat the boundaries of the territory conveyed,

Article 4<sup>th</sup> provides:

“His Majesty the Emperor of all the Russias, shall appoint with convenient dispatch, an agent or agents, for the purpose of formally delivering to a similar agent or agents, on behalf of the United States, the Territory dominion, property, dependencies and appurtenances, which are ceded as above and for doing any other act which may be necessary in regard thereto.

Article 6 related to the consideration of \$7,200,000 to be paid in gold within ten months after the exchange of the ratification of the Convention. The article further recites: The cession of territory and dominion made, is hereby declared to be free and unencumbered by any reservations, privileges, franchises, grants, possessions by any associated companies, whether corporate or incorporate, Russian or any other, or by any parties except merely private individual property holders; and the cession hereby made, conveys all the rights, franchises, privileges now belonging to Russia, in the said territory or dominion, and appurtenances thereto.”

A very important of the negotiations leading to the final agreement is found in a communication to the Secretary of State, the Hon. Wm. H. Seward, addressed to Baron De Stoeckl, and dated one week prior to the signing of the Articles, in which the distinguished Secretary says:

“I have the honor to acquaint you that I must insist upon that clause in the sixth article of the draught which declares the cession to be free and unencumbered by any reservations, privileges, franchises, grants or possessions by any associated companies, whether corporate or incorporate Russian, or any other, &c, and must regard it as an ultimatum; with the President’s approval, however I will add two hundred thousand dollars to the consideration money on the account.”

It will be seen that this ultimatum was agreed to, and that the cession was upon the conditions word for word.

Although the instructions drawn up and signed by the Russian authorities at the time for the transfer to the United States of all this territory and dominion recite that the Russian American Company possesses in the colonies, large stores of furs and other property, and for the removal of which by the Russians ample time and facilities were to be allowed, yet not a word is said or written about reserving a right or privilege thereafter to fish or take seal in any part of the territory or dominion ceded.

Mr. Charles Summer in his speech already quotes, under the head of the “Character and Value of Russian America”, says upon this point:

With the extinction of the St.Petersburg fur corporation under the present treaty, the London corporation will remain the only existing fur company on the continent, but necessarily restricts mink operation to British territory. It remains to be seen into whose hands the commerce on the Pacific side will fall, now that this whole region will be open to the unchecked enterprise of our citizens.” According to the same author, the addition of \$2,00,000 over the \$7,00,000, were paid for the purpose of getting rid of claims for the Russian American fur company, and an ice company theretofore operating in that territory and to obtain a clear an unencumbered title.

The motives leading to and prompting the purchase are stated by the same distinguished authority to have been: “The desire to secure the fur trade and fisheries of that territory; to secure the interests of the Pacific States; the extension of national domain; the extension of Republican institutions; the foreclosure of adverse British possession, and the amity if Russia.

By the purchase of Alaska, our government acquired not only the vast territory of Alaska, with its many islands and resources, but a vast extent of sea coast, reaching from the Artic Ocean

down to lower California, with the exception of about 300 hundred miles of coast bordering on British Columbia.

From this historic review, can it be questioned that the United States acquired from Russia undisputed dominion over the entire territory of Alaska, including its islands, and the contiguous waters of Bering Sea, together with the unimpeachable right to exclusive dominion over the fur-seals domiciled in that territory? We think there can be no question that Russia possessed these rights, and that the United States acquired all the right which Russia possessed.

It remains to take a glimpse at a few of the authorities on the subject of mare clausum and international law.

Wheaton in his treatise on international law, upon the subject of mare clausum says (P.331): “The King of Denmark asserted supremacy over the south and the two Belts which form the outlet of the Baltic Sea into the ocean, and that claim vested upon immemorial prescription, and was sanctioned by treaties with other powers.” The same writer (P.320) says:

“The maritime territory of every state extends to the ports, harbors, bays, mouths of rivers and adjacent parts of the sea enclosed by head-lands belonging to the same State.” And on p.322 says the same writer: “The exclusive territorial jurisdiction of the British Crown over the enclosed parts of the sea along the coasts of Great Britain has minimally extended to those bays called the King’s Chambers, that is, portions of the sea cut off by lines drawn from one formation to another. The same jurisdiction is also asserted by the United States over the Delaware Bay and other bays and estuaries forming portions of their territory.”

Further on the same writer continues, “Besides those bays, gulfs, straits, and mouths of river and estuaries which are included by capes and head-lands belonging to the territory of the state and jurisdictions a right of property over certain portions of the sea have been claimed by different nations on the ground of immemorial use.”

Chancellor Kent in his Commentaries (Vol.1P.28), in treating of the same subject says; “The claim of dominion to close or narrow seas is still the theme of discussion and controversy. Puffendorf admits that in a narrow sea the dominion of it and the right of shipping therein may belong to the sovereigns of the adjoining shores. Vattel also lays down the position that the various uses to which the sea contiguous to the coast may be applied render it justly subject of property.

People fish there and draw from it shells, pearls, amber, &c; and who can doubt, he observes, that the pearl fisheries of Bahrain and Ceylon may be lawfully enjoyed as property? Chitty, in his Work on Commercial Law, had entered into an elaborate vindication of the British title to the four seas surrounding the British Islands, and known by the name of British Seas, and consequently to the exclusive right of fishing and of controlling the navigation of foreigners.”

Applying thee principals so briefly touched upon to the territory in dispute, it is perfectly apparent that the waters of Bering Sea, from their peculiar location and surroundings, barricaded so to speak, on the south by a long chain of almost unbroken islands, and on the east and north by the impregnable walls and mountains of the Alaska coast, fall within the doctrine embraced in the term, mare clausum.

The right to maintain Bering Sea as mare clausum might be further sustained by citations from Grotius, Brynkershoek and Selden. The rule of law cannot be said to be invariable,

depending as it does upon the circumstances governing each particular case. The weight of authority would seem to sustain the claim of the United States to maintain dominion in the waters described as a closed sea. From the foregoing review, it follows, that having the property in the fur-seal territory, and the seals belonging therein, the United States possessed the attendant right to enforce the protection and preservation of that property at all hazards. Hence it follows that we cannot indorse or approve the present policy of the administration in submitting to arbitration, questions that had no place in arbitration.

Where the Government showed its weakness, and failure to comprehend the situation, was, when at the first inroads of those marauders and poachers it failed to defend its possessions and property by the strong arm of military, and naval forces. But in defense of the present administration, it must be said that the first inroads of poachers upon that territory, occurred under a preceding administration. The bars once being let down it becomes extremely perilous to undertake to undo what has become regarded as a precedent [ ] into an alleged National right.

The decision of the Supreme Court of the United States in the "Sayward" case may be fairly anticipated, and this to the extent of affirming that the original decree of forfeiture will be sustained. But whatever the judgment of that court may be, it can as easily be predicted that the British Government having put the entering wedge in gaining a submission to arbitration, the United States has yielded her strongest point and hereafter need never hope to retain undisputed possession and property in the fur-seals of Alaska.

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June 20, 1891