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THE BRITISH SIDE OF THE BEHRING SEA
CONTROVERSY.¹

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It is proposed in this article to state briefly some of the arguments which the British government may advance in its controversy with the United States over the seal fisheries in the Behring Sea. It will be assumed, for the purposes of this discussion, that certain facts will be proved or admitted before the arbitrators, to wit: that a large amount of capital belonging to citizens of the United States is invested in the seal fisheries of Behring Sea; that many citizens of the United States are engaged in that industry; that the fur bearing seals inhabit the shores of Alaska, but migrate to the Prybyloff Islands to breed, and that these islands are owned by the United States; that British subjects have been killing female seals in breeding time in the law of open waters of the Behring Sea surrounding the Prybyloff

¹ Mr. Stephen B. Stanton, in the December number, will present the American side of the controversy. See the statement of the case by Henry Flanders, Esq. in the September issue of THE AMERICAN LAW REGISTER AND REVIEW.

Islands, and outside of what is commonly known, in the territorial jurisdiction, as the three-mile limit; and that the circumstances under which these British subjects take the seals are such as have resulted in a distinct diminution in the number of seals in the Behring Sea, and will eventually result in their extermination.

It is believed that the foregoing statement fairly presents the contention of the United States, in so far as these facts are concerned, but although these facts will be considered as admitted for the purposes of this article, it should be borne in mind that they have not been admitted, as yet—at least without considerable qualification—by Great Britain.

From an examination of the correspondence between Mr. BLAINE and Lord SALISBURY, and of various writings including Mr. PHELP'S able article in *Harper's Magazine*, in which the claims of the United States have been set forth, it would appear that, when analyzed, the present condition of the United States, on the law, is that this government has a right to prevent British subjects from killing seals in Behring Sea outside the three-mile limit, for three reasons: 1st, because, owing to the *habitat* and habits of the Alaskan seal, and the circumstances surrounding the seal industry in Behring Sea, the people of the United States have a right of property in the seals which is not divested when they wander beyond the three-mile limit; 2d, because it is *contra bonos mores* for the subjects of any nation to kill animals so useful to all nations under circumstances which threaten speedy extermination of the species; 3d, because Behring Sea is, as between Great Britain and the United States, an open or a high sea in a qualified sense only, for the reason that the United States took from Russia certain jurisdictional rights in this sea, which rights had been conceded and acquiesced in by Great Britain.

These propositions will be taken up in the order in which they have been stated, which is, in the opinion of the writer, their order of merit, and first, therefore, let us examine the contention that the United States has a right

of property in the seals. It will be assumed that all seals whose killing by British subjects it is sought to prohibit, are seals which have been born on American soil, or which have their habitation on American soil; for it is scarcely to be supposed that, on the property theory at least, the United States would claim that it has a right to prohibit the killing of Russian seals in Behring Sea. This right might be claimed on one of the other grounds which has been adduced, but not on the theory of property in the seal. Assuming, therefore, that all the seals which have been killed, or which are in danger of being killed, in breeding time by British subjects are American seals, can there be such a right of property in wild seal roaming at large in Behring Sea as will entitle the United States, or any citizen thereof to prohibit the citizens of another State from killing the seal when found without the three-mile limit?

Now, there is no international law, properly so called, on the subject of property in wild animals, and, therefore, we must, to a certain extent, at least, be guided to our determination by the principles and precedents of the common and civil law, and particularly by those of the common law, because that is the system of law which obtains in both the contending countries.

In his letter to Sir JULIAN PAUNCEFORTE of May 22, 1890, Lord SALISBURY said:

“Fur seals are indisputably animals *feræ naturæ*, and these have universally been regarded by jurists as *res nullius* until they are caught; no person, therefore, can have property in them until he has reduced them into possession by capture.”

BLACKSTONE says that an individual may have a qualified property in creatures that are *feræ naturæ* “*propter privilegium*,” that is, he may have the privilege of hunting, taking and killing them, in exclusion of other persons, so long as they continue within his liberty; and may restrain any stranger from taking them therein; but the

instant they depart into another liberty, this qualified property ceases.¹

The only way in which one can acquire property in wild animals is by reclaiming them. There are three ways of reclaiming a wild animal: by killing it, and getting possession of the carcass; by getting physical control of it—that is, by getting it in such position that its movements can be controlled—and lastly, by taming it.²

A brief review of some of the practical applications of the above principles by the Courts of the United States may illuminate the question. For instance, bees are not the subject of property until actually hived, and he who first encloses them in a hive becomes their proprietor.³ And doves are wild animals, and not the subject of larceny, unless they are in the owner's custody, as in a dove house, or in a nest, before they are able to fly.⁴ Fish, unless reclaimed, confined, or dead, and valuable for food, are not considered to be property.⁵ One who hunts a fox acquires in it no property merely by the pursuit; and so, if another, in the sight of the pursuer kills it and appropriates it to his use, no action will lie.⁶ And in one of the United States, at least, the common-law right to hunt for animals *feræ naturæ* in the uncultivated and unenclosed grounds of another has been recognized.⁷

And so, in the civil law, it is the rule that there can be no property in wild animals unless they have been reclaimed; and even after they have been reclaimed, the right of property in them can be divested by their escape, unless they are capable of identification.⁸ Now it must be conceded that fur seals are *feræ naturæ*, and

¹ Blackstone's Commentaries, Book 2, Ch. 25.

² Bishop's Criminal Law, Vol. II., sec. 775, 776.

³ Gillet v. Mason, 7 Johnson, 16.

⁴ Commonwealth v. Chase, 9 Pick., 15.

⁵ State v. Krider, 78 N. C., 481.

⁶ Buster v. Newkirk, 20 Johnson, 75.

⁷ Broughton v. Singleton, 2 Nott & McCord, 338; McConico v. Singleton, 5 Mill, South Carolina, 244.

⁸ Grotius, Rights of War and Peace, Bk. 2, Ch. 8.

it can scarcely be contended that the United States has reclaimed the Alaskan seals. It is difficult, therefore, to discover any principle or precedent of municipal law upon which the United States can base a claim to a right of property in the Alaskan seals—at least, when they are beyond the three-mile limit.

But it may be contended that the matter in controversy is not one to be decided by precedents, or want of precedents, or codes, or omissions from codes in municipal law, which confine and narrow the determination of questions of *meum* and *tuum* as between individuals; that the case, under the circumstances under which it has arisen, is to be decided by a higher law and broader principle. This brings us to the consideration of the contention that the killing of the seals is *contra bonos mores*. A satisfactory definition of an act which is said to be *contra bonos mores*, as used by Mr. BLAINE, may be an act which is contrary to some rule of conduct which is recognized by civilized nations to be a rule of conduct *for reasons of morality*. The last three words of this definition are important; for an act may be contrary to some rule of conduct which has been recognized on grounds of *expediency*. The rules which have been generally adopted by civilized communities prohibiting the killing of game at certain seasons of the year, come within the latter category. We prohibit the killing of partridges in breeding time, not because it is more immoral to kill them at that time, but because, if it is not prohibited, we shall have fewer partridges to kill next year. And so, it may be inexpedient to allow the killing of female seals in breeding time, because it will result in the extermination of the species; and, for that reason, it may be for the advantage of both nations that Great Britain and the United States should agree upon a close season in Behring Sea, during which the killing of seals should be prohibited; but it is not contrary to any recognized rule of morality to kill them at that time. It is only contrary to natural and reasonable economy. But, because a thing has been generally prohibited for economic reasons,

it does not follow that it is contrary to moral law, or opposed to any rule of international law.

It is true that the collection of rules for the conduct of civilized nations, in their relations with each other, which is called International Law, has grown up and developed out of the necessities of civilization and fundamental principles of morality; but they are rules which have been tacitly assented to, relied on, and applied by the great powers for generations, until they have become an unwritten international code, whose binding force is recognized. An example is to be found in the crime of piracy. Independent of any treaty, convention or express agreement of any kind, it is recognized by all the nations that each nation may seize and punish a pirate, no matter of what nation the pirate may claim to be a citizen. But, unless a specific act is a violation of some of the fundamental principles of morality, or has, in some way, been recognized by the great powers as an offence against the law of nations, no nation has the right to forcibly prevent the citizens of another nation from the commission of that act, or punish them for its commission, except within its own territorial jurisdiction. There the nation is, of course, supreme. The United States may prevent the killing of seals in breeding time within the three-mile limit, just as it may prevent the killing of buffalo in the United States; but, outside of the three-mile limit, it may not, unless the killing of animals *feræ naturæ* under such circumstances is contrary to some moral law recognized by Great Britain and the United States, or is a recognized offence against the unwritten code of international law, or unless the nations have expressly covenanted and agreed that this act shall be considered unlawful; and, even in the latter case, only such nations as have entered into the covenant or agreement are bound by its terms.

An illustration and example of international law established and binding only by convention or assent of the parties, may be found in the instances cited by Mr. BLAINE, of the assumption by Great Britain of jurisdiction of the

high seas beyond the three-mile limit. Mr. BLAINE pointed out, for instance, in his letter of December, 17, 1890, to Sir JULIAN PAUNCFORTE, that, in 1816, while the first NAPOLEON was a captive on the island of St. Helena, Great Britain passed a statute forbidding the ships of any nationality to hover within eight leagues of the coast of that island. By the Treaty of Paris in 1815, the governments of Great Britain, Austria, Russia and Prussia had agreed that Great Britain should be the custodian of NAPOLEON. But assume that an attempt had been made by Great Britain to seize a ship of any other nation, not a party to the Treaty of Paris, as, for instance, a ship of the United States, for a violation of this hovering Act, it is reasonable to suppose that the British government would have at once disavowed the Act, and the ship would have been released, for the reason that the offence of hovering within eight leagues of the coast of St. Helena was not an offence against the recognized law of nations, but, at the utmost, was only a violation of the Treaty of Paris, which was binding only upon the parties who assented to it. It is reasonable to suppose this, because such was the principle applied by Lord STOWELL in the case of "Le Louis."¹ "Le Louis" was a French ship employed in the slave trade. She was seized by an English armed vessel off the coast of Africa. Lord STOWELL ordered her release upon the ground that the British Slave Trade Act could not affect the rights or interests of foreigners, unless it was founded upon the principles, and imposed regulations, that were consistent with the law of nations. He pointed out that trading in slaves, though generally recognized to be wicked, and though forbidden by the British Parliament, was not forbidden by the law of nations; nor had France, though disapproving of the slave trade, ever allowed that the offence of trading in slaves by French subjects should be cognizable by any authorities except their own. Lord STOWELL'S language is pertinent here.

"But," he said, "a nation is not justified in assuming

¹ 2 Dodson, 211.

rights that do not belong to her, merely because she intends to apply them to a laudable purpose; nor in setting out upon a minor crusade of converting other nations by Acts of unlawful force.”

And so of the other illustrations, adduced by Mr. BLAINE, of jurisdiction outside the three-mile limit assumed by Act of the British Parliament. Grant, if you like—what is, however, not the case—that all such Acts were so worded as to be intended to affect the citizens of other nations than Great Britain, still they would be null and void as against such foreign nations, unless assented to by them or unless in conformity with the law of nations. The killing of seals in breeding time is not, any more than the slave trade was, an offence against the recognized law of nations, and no Act of Congress of the United States or claim of that government can make it an offence against the law of nations in so far as any other government is concerned, unless such other government acquiesce in that proposition.

Hence it would seem that the Government of the United States has no right to protect the seals by prohibiting their killing outside the three-mile limit, unless there is some other claim of jurisdiction than that derived from the general principles of international law. And this brings us to the consideration of what jurisdictional rights the United States has in Behring Sea by treaty or assent of Russia or Great Britain. It is impossible within the space allowed for this article to do full justice to this branch of the subject. It involves a discussion of maps which cannot be reproduced here, but the main proposition contended for by the United States may be answered thus. By an imperial ukase of the Emperor Alexander, issued in 1821, Russia claimed exclusive jurisdiction of a marginal belt of Behring Sea, extending one hundred Italian miles from the shore. This claim was resisted by the United States.¹ The result was the Treaty of 1824 between the United States and Russia, by which it was provided that

¹ Letter from J. Q. Adams to Mr. Poletica, March 30, 1822.

the respective citizens and subjects of the United States and Russia "shall be neither disturbed nor restrained, either in navigation or fishing," in any part "of the great ocean commonly called the Pacific Ocean or South Sea." By a treaty between Russia and Great Britain, concluded in 1825, it was provided "that the respective subjects of the high contracting parties shall not be troubled or molested in any part of the ocean commonly called the Pacific Ocean, either in navigating the same, in fishing therein," etc.

It will be observed that both of these treaties were entered into with the view of determining the jurisdiction of Russia in the Behring Sea, and that they were entered into after both the United States and Great Britain had expostulated against the ukase before mentioned. Mr. BLAINE contends that neither the words "the great ocean commonly called the Pacific Ocean or the South Sea," in the Treaty with the United States, nor the words "the ocean commonly called the Pacific Ocean" in the Treaty with Great Britain, was intended to include the Behring Sea; and in his letter to Sir JULIAN PAUNCEFORTE, of December 17, 1890, Mr. BLAINE says:

"If Great Britain can maintain her position that the Behring Sea at the time of the treaties with Russia of 1824 and 1825 was included in the Pacific Ocean, the Government of the United States has no well grounded complaint against her."

The reasons why it would seem that the Behring Sea, at the time of these treaties, was intended to be included in the Pacific Ocean is that, in the first place, the dispute to settle which the treaties were made, was in part, in relation to the jurisdiction claimed by Russia over Behring Sea; and, in the second place, because in his statement to Mr. MIDDLETON, in his letter of July 22, 1823, Mr. ADAMS uses the following clause:

"From the tenor of the ukase, the pretensions of the Imperial government extend to an exclusive territorial jurisdiction from the forty-fifth degree of north latitude on the Asiatic coast to the latitude of fifty-one degrees north on

the western coast of the American continent; and they assume the right of interdicting the navigation and the fishery of all other nations to the extent of one hundred miles from the whole of that coast. The United States can admit no part of these claims."

And, as Lord SALISBURY expressed it in his letter to Sir JULIAN PAUNCEFORTE, of August 2, 1890, in order to infer that the United States did not intend to include Behring Sea in its denial of Russia's claim of jurisdiction, we would have to conclude "that, when Mr. ADAMS used these clear and forcible expressions, he did not mean what he seemed to say; that, when he stated that the United States could admit no part of these claims, he meant that they admitted all that part of them which related to the coast north of the Aleutian Islands."

By the fourth article of the Treaty between the United States and Russia, it was provided that "during a term of ten years, counting from the signature of the present convention, the ships of both powers on which belong to their citizens or subjects, respectively, may reciprocally frequent, without any hindrance whatever, the interior seas, gulfs, harbors and creeks upon the coast mentioned in the preceding article for the purpose of fishing and trading with the natives of the country." Thereafter, the term of ten years mentioned in Article 4 having expired, the question arose between the United States and Russia as to whether the expiration of that period of time did or did not affect the right granted by Article 1 of the treaty, to frequent the coasts of Behring Sea. This question was never settled, and Russia refused to comply with the request of the United States to renew Article 4 of the treaty.

Such were the rights of Russia and the United States respectively when Alaska was ceded to the United States in 1867. By the treaty of cession of 1867, all the rights and privileges which Russia had in Behring Sea passed to the United States; and if, as would appear to be the case, Russia never had a jurisdictional right extending to one hundred Italian miles of the coast of Behring Sea, the