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THE AMERICAN SIDE OF THE BEHRING SEA CONTROVERSY.[1]

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To destroy the last and most valuable seal fishery of the world is to violate no right and to transgress no law. Such is the contention of Great Britain in the Behring Sea Controversy.

In his clear and able article entitled, "The British Side of the Behring Sea Controversy," in the November number of this magazine, Mr. Godkin assumes for the purpose of argument "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." We may take this to be equally the position assumed by the British Government in the discussion of the legal aspects of the Behring Sea Controversy. It is true that the destructive character of the methods of

[1] See "The British Side of the Behring Sea Controversy," by Lawrence Godkin, Esq., in the November number of The American Law Register and Review (1892).

fishing pursued by the Canadian sealers of the Behring Sea is a fact at issue between the two countries, and awaits final determination at the hands of the Board of Arbitration, which convenes in Paris during the coming winter. Nevertheless, the attitude of Great Britain in this matter is practically one of demurrer, whereby it contends that even if the fact be as the United States states it, this country is not thereby justified in its policy of interference in the Behring Sea. We shall, therefore, follow Mr. GODKIN'S lead in arguing upon the assumption of such fact.

It is not the purpose of this article to take up the question of property rights in the Behring Sea seal fishery or in the seals themselves, or that of jurisdiction over the waters of the Behring Sea, derived by transfer from Russia. These questions have received skillful elaboration in the recent diplomatic correspondence between Great Britain and the United States. But we wish now to approach the controversy from another standpoint—from the standpoint of British sealing rather than that of American interference. We wish to take the cue given by Secretary BLAINE, when, in replying to the protests of the British Government against the United States seizure of Canadian sealing schooners, he neatly turned the situation upon Great Britain, thus:

"In turn, I am instructed by the President to protest against the course of the British Government in authorizing, encouraging and protecting vessels which are not only interfering with American rights in the Behring Sea, but which are doing violence as well to the rights of the civilized world." [1]

England has been so occupied with proving the United States wrong, that she has omitted to prove herself right. In her anxiety to deny the national claims of the United States, she has neglected to show sufficient international justification for her own course.

One of two things must be true about the waters of

[1] Letter from Mr. BLAINE to Sir JULIAN PAUNCEFOTE, May 29, 1890

the Behring Sea and the seal fishery contained therein. Either they belong to, or are within, the jurisdiction and control of the United States, as that country claims, or else they are the common property of all mankind. These are the alternatives on the question of ownership which confront Great Britain. She denies the former; therefore she admits the latter.

This article will, therefore, take England at her word, accept the theory of ownership and jurisdiction in the Behring Sea for which she contends, *i.e.*, free sea and common property, and attempt to show that even on that theory Great Britain is guilty of an international offence justifying the intervention of the United States.

Assuming then that the Behring Sea is a free sea, what are its characteristics; and assuming that its seal fishery is common property of the world, to whom does it belong? The sea is what GROTIUS calls "public according to the law of nations," or "common property of all by the law of nature."

"That is named public . . . . which belongs not to any particular nation, but to civilized humanity; what in law is called public, according to the law of nations; that is, common to all, the individual property of none. . . . . The sea is the common property of all." [1]

This common character of the sea necessarily excludes the idea of its use by any one people so as to interfere with its similar use by another:

"The use of common property because it belongs to all, can no more be torn from all by one, than I may be deprived of what is mine. This is what CICERO calls one of the strongest bulwarks of justice, that common property should be reserved for the use of all." [2]

That characteristic which in part gave rise to the law of its freedom, *i. e.*, its sufficiency for the use of all, is inalienable from a free sea:

"It is manifest," as VATTEL puts it, "that the use of

[1] GROTIUS' "Mare Liberum," Cap. V.
[2] Id.

the open sea, which consists in navigation and fishing, is innocent and inexhaustible, that is, he who navigates or fishes in it, does no injury to any one, and that the sea, in these two respects, is sufficient to all mankind." [1]

The use of a resource of the sea in such a manner as to interfere with its common use by others, is clearly a violation of the law of the commonalty of the sea. "The right of navigating and fishing in the open sea," says VATTEL, "being then a right common to all men, the nation who attempts to exclude another from that advantage, does it an injury."

"We may, moreover, say, that a nation, which, without a title, would arrogate to itself an exclusive right to the sea, and support it by force, does an injury to all nations whose common right it violates." [2]

Such an arrogation to herself of an exclusive right to the sea, we claim it to be on the part of Great Britain to destroy the seal fishery of the Behring Sea. The right to fish in a free sea is not unlimited. No nation may exercise that right regardless of the equal rights of others. *Sic utere tuo ut alienum non laedas* must hold true here as well as elsewhere. The destruction of a fishery has the same effect upon the right of others as would their forcible exclusion from that advantage or the arrogation to oneself of an exclusive right. If its effect be the same, it must fall within the same rule of law. Great Britain claims the right to catch seals in the waters of the Behring Sea because it is a free sea. Then all other nations must have the same right. Whence does she draw her authority for putting an end to that right of other nations, by destroying the fishery itself to which the right relates?

It is true that by her acts of destructive seal fishing, she does not immediately exclude others from participation in seal catching. For the present, she leaves all other nations free to come in and join her in the work of exterminating the seal by pelagic sealing. But her course

[1] VATTEL'S "Law of Nations," § 281.

[2] Id., §§ 282 and 283.

of action, although no abridgment of the temporary right of other nations, is a violation and total annihilation of their permanent right. "In exterminating the species, an article useful to mankind is totally destroyed in order that temporary and immoral gain may be acquired by a few persons."[1] All nations have the right *in futuro* as well as now, to catch seals in the Behring Sea, which right carries within it the incidental right as against each other to the perpetuation, or at least preservation from destruction of that seal fishery. PHILLIMORE declares that "no presumption can arise that those who have not hitherto exercised such rights, have abandoned the intention of ever doing so."[2] For a few years at most, Great Britain may leave the free and commonright to catch seals in the Behring Sea undisturbed. But at the end of that time, the fishery will be gone, carrying with it the right of the world to its enjoyment. This differs but in name from an exclusion of others from a common advantage and an arrogation by Great Britain to herself of an exclusive right to the sea, which is practically a theft of common property.

A measure of the international offence committed by Great Britain in persevering in methods of fishing leading to the destruction of the common property of all nations is to be found in the condition of the fur seal industry before it was interrupted by the acts of England. Let us glance at the picture presented by Mr. BLAINE of the universally beneficial way in which that industry was then conducted. Its remote scene of operation was a "sea which," as he describes it, "lies far beyond the line of trade, whose silent waters were never cloven by a commercial prow, whose uninhabited shores have no port of entry and could never be approached on a lawful errand under any other flag than that of the United States."[3] "The entire business was . . . conducted peacefully,

[1] Letter from Mr. BLAINE to Sir JULIAN PAUNCEFOTE, May 29, 1890.

[2] "Commentaries upon International Law," by Sir ROBERT PHILLIMORE. Vol. I, § 174.

[3] Letter from Secretary BLAINE to Sir JULIAN PAUNCEFOTE, December 17, 1890.

lawfully and profitably—profitably to the United States, for the rental was yielding a moderate interest on the large sum which this government had paid for Alaska, including the rights now at issue; profitably to the Alaskan Company, which, under governmental direction and restriction, had given unwearied pains to the care and development of the fisheries; profitably to the Aleuts, who were receiving a fair pecuniary reward for their labors, and were elevated from semi-savagery to civilization and to the enjoyment of schools and churches provided for by the government of the United States; and, last of all, profitably to a large body of English laborers who had constant employment and received good wages." [1]

Connecting Behring Sea with the Pacific Ocean are the passes which separate the islands of the Aleutian chain. Through these, in the late spring, draw the returning hordes of the fur seal after their wintering in the warmer waters of the Pacific. "The convergence and divergence of these watery paths of the fur seal to and from the Seal Islands resembles the spread of the spokes of a half wheel —the Aleutian chain forms the felloe, while the hub into which these spokes enter is the small Pribyloff group." [2] So that upon the seal islands of the Pribyloff group, St. George and St. Paul is cast nearly the whole mass of these returning fur seal millions. Here, then, are their natural rookeries.

In these islands the fur seal is obliged annually to haul out for the purpose of breeding and shedding its pelage.

The male seals or bulls require little food during the five or six summer months, sustaining existence on the blubber secreted beneath their skin. They, therefore, remain ashore watching the rookeries. Thus it is that the greater part of seals found during the summer at any distance from the islands are females in search of food for

[1] Letter from Mr. BLAINE to Sir JULIAN PAUNCEFOTE, March 1, 1890.

[2] Report of Hon. Henry W. Elliott, of the Smithsonian Institute, to Mr. Bayard, December 3, 1887.

themselves and their young. Great discrimination in the selection of the seals was exercised and enforced by the Alaska Company. Only the young bulls were permitted to be slain; they were first driven inland from the sandy parts of the islands whither the old bulls had driven them, and then clubbed to death in order that their skins might not be perforated.

On the other hand, if these seals are hunted in the sea, not only is discrimination impossible, but nearly one out of every three so slaughtered sinks and is lost. Besides, as we have stated, nearly none but the females frequent the open sea during the summer.

These conditions of seal life led the United States early in her possession of this territory of Alaska to enact a law that "no person shall kill any . . . fur seal . . . . within the limits of Alaska Territory or in the waters thereof."[1] The exclusive right to take seals was then sold to the Alaska Company, which conducts its business in the careful and conservative manner above described.

"Into this peaceful and secluded field of labor, whose benefits were so equitably shared by the native Aleuts of the Pribyloff Islands, by the United States and by England, certain Canadian vessels in 1886 asserted their right to enter, and by their ruthless course to destroy the fisheries and with them to destroy also the resulting industries which are so valuable."[2]

These words well express the international indictment against Great Britain.

It is claimed, however, that according to the slave trade decision, made in the great case of Le Louis,[3] pelagic sealing cannot be construed into an international offence. Le Louis was a French ship engaged in the slave traffic which was seized by a British armed vessel in 1816 for violating the terms of the British Slave Trade Act. The question arose on the trial whether participation

[1] U. S. Revised Statutes, § 1956.

[2] Letter from Mr. BLAINE to Sir JULIAN PAUNCEFOTE, January 22, 1890.

[3] 2 Dodson, 211.

in the slave trade was an international offence, and so one which would warrant the capture upon the high seas of the vessel of one power by that of another; and it was held that it was not. Then argues Mr. GODKIN:

"The killing of seals in breeding time is not, any more than the slave trade was, an offence against the recognized law of nations."

But the grounds for the decision show its inapplicability to the Behring Sea Controversy. Lord STOWELL held that the act for which the vessel of one nation could in time of peace seize the vessel of another nation must be "unquestionably and legally criminal by the universal law of nations;" and that participation in the slave trade was not an act of this character. The reason is at once apparent. In 1816 when Le Louis was captured nations were still divided on the question of the lawfulness of the slave trade, and individuals on its morality even. From the beginning of history, slavery and its necessary incident, the slave trade, had been a recognized institution, sanctioned at times by nearly universal usage and intrenched in the private law of nearly all nations. Lord STOWELL himself thus describes how far from internationally criminal the slave trade at that time was:

"Let me not be misunderstood, or misrepresented, as a professed apologist for this practice, when I state facts which no man can deny,—that personal slavery arising out of forcible captivity is coeval with the earliest periods of the history of mankind,—that it is found existing (and as far as appears, without animadversion) in the earliest and most authentic records of the human race. That it is recognized by the codes of the most polished nations of antiquity,—that under the light of Christianity itself, the possession of persons so acquired has been in every civilized country invested with the character of property, and secured as such by all the protection of law,—that solemn treaties have been framed and national monopolies eagerly sought, to facilitate and extend the commerce in this asserted property,—and without any opposition, except the protests of a

few private moralists, little heard and less attended to, in every country, till within these very few years, in this particular country. If the matter rested here, I fear it would have been deemed a most extravagant assumption in any court of the law of nations, to pronounce that this practice, the tolerated, the approved, the encouraged object of law, ever since man became subject to law, was prohibited by that law, and was legally criminal. But the matter does not rest here. Within these few years a considerable change of opinion has taken place, particularly in this country. Formal declarations have been made and laws enacted in reprobation of this practice; and pains, ably and zealously conducted, have been taken to induce other countries to follow the example; but at present with insufficient effect; for there are nations which adhere to the practice, under all the encouragement which their own laws can give it. What is the doctrine of our courts of the law of nations relatively to them? Why, that their practice is to be respected."

But destruction of another's property is an act of a very different nature. It is forbidden by the law of every civilized nation. Can it be doubted that if in time of peace France undertook to attack and demolish British property, Great Britain would be justified in interfering and capturing the French offenders? Now substitute for British property in this illustration, common property, that is, property belonging not to one nation alone, but to all nations alike, and is the offence of destruction any less, but not rather greater? Such an act, we claim, complies with Lord STOWELL'S test of international crime, *i. e.*, it is an act which is "unquestionably and legally criminal by the universal law of nations.

In applying the case of Le Louis to the present question, Mr. GODKIN has disguised the actual destruction threatened, under the more harmless term, "the killing of seals in breeding time." But even if the violation of national game laws regarding seals should have as its consequence merely the usual diminution of the species, if

such a violation can be made a punishable offence by an individual or a national owner, why is it not equally a punishable offence when directed against all mankind? The absence of express international regulations on the subject, which is unavoidable under the present imperfect organization of international law, affects the question of notice only and does not alter the character of the offence.

Mr. GODKIN objects, further, to the application of the term *contra bonos mores* to a method of sealing which he admits to be destructive of the species. He states that an act to be *contra bonos mores* must be one which is "contrary to some rule of conduct which is recognized by civilized nations to be a rule of conduct *for reasons of morality.*" Destruction of a seal fishery, says he, is not immoral but only inexpedient. We do not agree with Mr. GODKIN that immorality is of necessity implied in the expression *contra bonos mores.* A more natural rendering of it would appear to be "tortious" or "criminal;" and in the context in which Mr. BLAINE employed it, "internationally tortious or criminal." Into an act of this character, immorality might or might not enter as in the case of ordinary torts and crimes. Nevertheless the act of destruction of the world's most valuable seal fishery falls clearly within the terms of even Mr. GODKIN'S interpretation of *contra bonos mores.*

If to take the property of another is immoral, its destruction, which is a method of taking precluding a return, is doubly so. That the property destroyed is not the property of an individual or of one nation, but of all nations, of mankind at large, renders the act not less but rather the more immoral.

The question next arises, to what extent and by what means are international wrongs of this character prevented or punished. Does the equitable maxim *ubi jus ibi remedium* prevail in international as well as in private jurisprudence? It is well established that the powers may in concert legislate and act for the general welfare of mankind. Such care

for the universal welfare has even been carried to the length of interfering for that object in the internal affairs of nations. This is the well-known principle of intervention. Prominent illustrations of its exercise may be found in the international regulations adopted for the protection of the lives or rights of christians in Turkey and China. An instance in which the motive was perhaps less the actual safety or welfare of those in whose behalf the intervention was undertaken than it was the interests of commerce and the repose of Europe, is the Greek Revolution of 1828. England as well as other European powers then determined that the welfare of mankind at large authorized interference in and control over the acts of another nation, not merely upon the high seas which is outside of all national jurisdiction, but even within the limits of the jurisdiction of another nation. The reasons which the powers then assigned as sufficient for that intervention are given in the preamble of the treaty which was signed by France, Russia and Great Britain, at London, on July 6, 1827, and wherein it is recited that these nations were "penetrated with the necessity of putting an end to the sanguinary contest which by delivering up the Greek provinces and the isles of the Archipelago to all the disorders of anarchy, produces daily impediments to the commerce of the European States, and gives occasion to piracies which not only expose the subjects of the high contracting parties to considerable losses, but, besides, render necessary burdensome measures of protection and repression."[1]

The jurist WHEATON, commenting on this recital of reasons, implies that the protection of commerce is no pretext or incidental motive merely. He writes:

"'Whatever,' as Sir JAMES MACKINTOSH said, 'a nation may lawfully defend for itself, it may defend for another nation if called upon to interfere.' The interference of the christian powers to put an end to this bloody contest might, therefore, have been safely rested upon this

[1] Wheaton's International Law, § 69.

ground alone without appealing to the interests of commerce and of the repose of Europe, which, as well as the interests of humanity, are alluded to in the treaty as the determining motives of the high contracting parties."[1]

Now, if nations may for the common welfare of mankind or for their commercial interests so interfere within the confines of an offending nation, can it be doubted that they may interfere to protect common property and universal rights outside of the confines of an offending nation.? Can it seriously be questioned that the powers of the civilized world possess authority to protect and control the use of property reserved for the use of all mankind, such as the Behring Sea seal fishery? We have already shown that by destroying the fishery, England, in VATTEL'S language, "arrogates to" herself "an exclusive right to the sea," and we may, therefore, aptly quote against her his remarks: "That a nation which without a title would arrogate to itself an exclusive right to the sea, and support it by force, does an injury to all nations whose common right it violates, and all are at liberty to unite against it in order to repress such an attempt. Nations have the greatest interest in causing the law of nations, which is the basis of their tranquility, to be universally respected. If any one openly tramples it under foot, all may and ought to rise up against him; and, by uniting their forces to chastise the common enemy, they will discharge their duty toward themselves and toward human society of which they are members."[2]

But it is perfectly obvious that adequate international protection cannot always be obtained or afforded through the regular steps of convention, treaty and concerted action. In many cases, protection of the common rights or property of mankind will demand immediate action; before international justice could be meted out by regular procedure, much time must elapse, and during the interval irreparable damage might ensue. Delay of the remedy might even lead to destruction of the subject matter of the dispute. It

[1] Wheaton's International Law, § 69.
[2] Vattel's Law of Nations, § 283.

is unreasonable to ask that the relief demanded by the exigencies of the occasion be withheld until representatives of all nations concerned convene and authorize some definite course of action. It would, for instance, be disastrous stickling for international propriety to insist that only expressly and formally delegated agents of the powers can repel a trespass upon mankind's common property. In international as well as in municipal law, it must be possible to check at the outset acts which if unchecked will, before the arrival of relief dispensed through the slower channels of justice, do irreparable damage. In municipal law, the danger is averted by the interlocutory injunction. Such a remedy then there must needs be for the perfect protection of common rights and property in international law. The procedure in the case of the international interlocutory injunction must, of course, comply with the necessities of the situation. There is no permanent international tribunal to which an immediate application for such a remedy may be made. Therefore, the event must justify the act; an appropriate international convention must subsequently ratify the enforcing of the temporary injunction, or else, in close analogy to municipal law, impose upon the nation needlessly applying such a remedy the payment of damages for the consequence of its rash act.

In the Behring Sea controversy the need of such an immediate remedy, as that above discussed, can easily be pointed out. In 1886, the methods of sealing began in the Aleutian Straits and in the open waters of the Behring Sea, which Mr. GODKIN'S assumption justifies us in characterizing as methods "such as have resulted in a distinct diminution in the number of seals in the Behring Sea, and will eventually result in their extermination." For three summers, were they not only unchecked by Great Britain, but were even encouraged; and but for the protests and active interference on the part of the United States these methods would doubtless have continued to be employed to this day. During the seasons of 1891 and 1892 the United States was forced to buy off British sealing by renouncing

during those seasons its catch upon its own shores, although this had always been conducted, as has been shown, with perfect safety to the perpetuation of the species. From Secretary BAYARD'S circular letter of August 19, 1887, to the recent correspondence resulting in the selection of the Board of Arbitration which is to meet in Paris during the coming winter, frequent efforts have been made by both countries to bring the matters in dispute before an international board of arbitration. And yet now at the end of six years, the questions are still open and the controversy unsettled.

Is it seriously maintained by Great Britain that for a period of six years during which time, despite every effort of both countries, no international tribunal could be agreed upon to which to submit the dispute, the slaughter of seals in Behring Sea should have been allowed to continue? Should the civilized nations of the earth, including the United States, have been passive on-lookers to this destruction, simply because no international convention had commissioned any particular one of them to step in and interfere? Is it consistent to proceed with measures for the settlement of a dispute, and at the same time to take no steps for the preservation of the subject-matter itself? It would rival the famous Jarndyce chancery suit, if when the dignitaries of the high contracting parties should be about to set their hands and seals to an agreement having for its purpose the preservation of the seal species, they should suddenly discover that the seal species has already been exterminated. The mockery which such a discovery would make of international justice would be crowned on learning that this extermination was the work of one of the high contracting parties themselves.

There is another analogy from the private law injunction which should be noticed here. To obtain a temporary injunction it is not necessary to prove beyond doubt that the act to be enjoined will work irreparable damage but simply to give *prima facia* evidence of that fact by affidavit. Without wishing to institute too exact parallels, yet we think that

the solemn statement of a nation must in International Law be equivalent in weight, and should be equivalent in effect to such an affidavit. Therefore, even if the allegation of the United States regarding the destructiveness of the British methods of catching seals be untrue, yet Great Britain should have desisted from the methods complained of until they could be judicially passed upon. This is not asking that she permit the United States to determine the fact or the law finally. In the matter of the effect of pelagic sealing upon seal life, there is presented between the two countries, a clear-cut issue of fact. And it is but reasonable and in analogy to the existing principles of law in other fields, to demand that pending the decision of that issue, the matter and the property shall be left in *statu quo.* It is better that Great Britain should forego the profits of a few season's catch, than that the fishery be destroyed forever. Nearly all undressed fur seal skins are shipped to London, and it is estimated that their dressing and dyeing gave employment in that city to 10,000 people. Her own interest in this industry, therefore, furnishes to England a sufficient reason for avoiding even the risk of injuring the seal fishery; but the interest which the world has in the preservation of this, its last and greatest seal rookery, furnishes an imperative one.

If, as has been shown, more speedy action than that obtainable through regular international procedure be in many cases indispensable,—action in the nature of a temporary injunction,—by whom shall such injunction be enforced? Necessarily by the nation or nations most interested in averting the threatened injury. Sir JAMES MACKINTOSH says that "whatever a nation may lawfully defend for itself, it may defend for another people."[1] It would be no extension of the spirit of this remark, to extend its letter thus: "Whatever a nation may lawfully defend for itself, it may defend for all the world." The lack of express and previous international sanction in such national

[1] Wheaton's "Law of Nations," p 561.

interference for the protection of international rights, is bridged over by the common law principles of agency and ratification. A nation which in an emergency takes upon itself to act as an agent for all other nations, trusts like any ordinary agent to the subsequent ratification of its act by the principal for whom it acts. But that ratification, when given, acts retrospectively and lends to the action of the agent nation all the sanction and force which the action of the concerted powers under the same circumstances would have had. Nor is this principle of agency by ratification new in its application to International Law. The Berlin Convention of 1878 insisted that the Treaty of San Stefano which embodied the results of the Russo-Turkish War then just concluded, should be submitted to it for revision and approval. This demand was rested on the theory that in declaring and waging war upon Turkey, Russia had acted as agent for the other European powers who with her had signed the Treaty of Paris of March 30, 1856. According to this treaty no one of the contracting parties might disturb the existing condition of affairs in Southeastern Europe. Russia was therefore forced either to plead guilty to a breach of faith toward the other signatory powers and accept from them such penalty therefor as they might impose upon her, or else admit that she had acted as their agent. She virtually chose the latter by laying the treaty unreservedly before the powers; and they in turn revised the treaty in many most essential points. England, it is now interesting to remember, was then foremost in advocating this international agency theory against Russia.

The foregoing principles inevitably point to the United States as the nation which by interest, ability and circumstance is constituted international agent to intervene for the protection of the seal fishery of the Behring Sea. The loss involved in the injury of this fishery, although falling on the whole civilized world, falls first and most severely upon the United States. The United States is intrenched in the islands and on the shores of that part of Behring Sea to which the controversy relates. It has upon that sea

its patrol of revenue cutters and cruisers for the enforcement of obedience, at least by its own citizens, to the statutes enacted by it for the preservation of the seal. If, in the Behring Sea controversy, international law is to be enforced by national action, it is difficult to see how a nation can be more naturally and logically constituted an agent for the enforcement of that law than is the United States.

But it may be objected that the United States has not acted in the function of agent, has named no principal, but, on the contrary, in her claims of national jurisdiction over the waters in question and national property rights in the seal fishery, has acted solely on its own behalf. Whereas in order to admit of ratification, the act to be ratified must have been done, not on account of the actor or some third person, but as agent for and on behalf of the person who ratifies.

We reply that throughout this controversy the United States has expressly declared its action to have been taken not with a view to its own interest solely but as well in the interest of the civilized world. To England, it has repeatedly made clear its international role. The universal interest of all nations in the preservation from destruction of the Behring Sea seal fishery has ever been the chiefest sanction to which the United States has reverted. Through all the intricacies of the diplomatic discussion of questions of jurisdiction and property carried on between the two countries, the United States has ever kept clearly in view the welfare of the seal fishery itself. Said Mr. BLAINE explicitly to Sir JULIAN PAUNCEFOTE: in order to establish the ground that the Canadian vessels were engaged in a pursuit which was in itself *contra bonos mores*, "it is not necessary to argue the question of the extent and nature of the sovereignty of this government over the waters of the Behring Sea; it is not necessary to explain, certainly not to define, the powers and privileges ceded by His Imperial Majesty, the Emperor of Russia, in the treaty by which the Alaskan territory was transferred to the United

States. The weighty considerations growing out of the acquisition of that territory, with all the rights on land and sea inseparably connected therewith, may be safely left out of view, while the grounds are set forth upon which this Government rests its justification for the action complained of by Her Majesty's Government."[1]

The grounds, which he then proceeds to set forth, are the value of the seal fishery to the world, the prudent manner in which the taking of seals had theretofore been conducted, and the inevitable extermination of the species which pelagic sealing threatened.

This prevailing thought of the preservation of the seal, independently of all national considerations, has been present even in the incipiency of the controversy. When, in 1887, Secretary BAYARD sent circular letters to our representatives in Great Britain, Germany, France, Japan, Russia and Norway-Sweden with reference to an international settlement of the difficulty, he summed up the situation thus:

"Recent occurrences have drawn the attention of this department to the necessity of taking steps for the better protection of the fur-seal fisheries in Behring Sea.

"Without raising any question as to the exceptional measures which the peculiar character of the property in question might justify this Government in taking, and without reference to any exceptional marine jurisdiction that might properly be claimed for that end, it is deemed advisable—and I am instructed by the President so to inform you—to attain the desired ends by international co-operation."

Our ministers to these countries were thereupon "instructed to draw the attention of the government to which" they were respectively "accredited, to the subject, and to invite it to enter into such an arrangement with the Government of the United States as will prevent the citizens of either country from killing seal in Behring Sea at such times and places, and by such methods as at present are

[1] Letter from Mr. BLAINE to Sir JULIAN PAUNCEFOTE, Jan. 22, 1890.

pursued, and which threaten the speedy extermination of those animals and consequent serious loss to mankind."[1]

Later, the British Government is informed by the United States: "In the judgment of this Government the law of the sea is not lawlessness. Nor can the law of the sea and the liberty which it confers and which it protects, be perverted to justify acts which are immoral in themselves, which inevitably tend to results against the interests and against the welfare of mankind. . . . The forcible resistance to which this Government is constrained in the Behring Sea is, in the President's judgment, demanded, not only by the necessity of defending the traditional and long-established rights of the United States, but also the rights of good government and of good morals the world over."[2]

"In exterminating the species," wrote the same pen, "an article useful to mankind is totally destroyed in order that temporary and immoral gain may be acquired by a few persons."

And even more clearly did Mr. BLAINE state this non-national character of United States interference and its role as universal agent, when, in replying to the protests of the British Government against our seizure of Canadian sealing schooners, he threw upon England the burden of justification thus:

"In turn I am instructed by the President to protest against the course of the British Government in authorizing, encouraging and protecting vessels which are not only interfering with American rights in the Behring Sea, but which are doing violence as well to the rights of the civilized world."[3]

It remains to observe how the theory of international jurisdiction in Behring Sea and commonalty of property in its fisheries affects the question of damages for loss sustained in consequence of injury to or the cessation of the seal

[1] Letter from Mr. BAYARD, Secretary of State, to Mr. VIGNAUD, August 19, 1887.

[2] Letter from Mr. BLAINE to Sir JULIAN PAUNCEFOTE, May 29, 1890.

[3] Letter, BLAINE-PAUNCEFOTE, May 29, 1890.

industry. We think that the theory upon which the rightfulness of United States' interference to prevent the wanton destruction of the seal is decided, be it that of national jurisdiction or that of international agency, will not affect the amount of damages if any to be awarded to the United States. On the theory treated in this article, damages if awarded should be for the infringement of international or universal rights rather than national. They would thus be awarded to all nations concerned rather than directly to any one nation. A limit to the number of recipients of such an international award might well be found in the possibility of liquidating the amount of injury sustained. A large part of the loss resulting from the cessation of the seal catch since the adoption of the *modus vivendi* has undoubtedly fallen upon Great Britain herself, for, as we have said, the seal-skin trade has its centre in London. But upon the United States chiefly has fallen the loss in question. Not only has the wanton slaughter of seals by Canadian sealers so far lessened the number that come to our shores that such a partisan authority as the Inspector of Fisheries for British Columbia asserts that a continuation of such methods of sealing "will soon deplete our fur seal fishery;"[1] but Great Britain has demanded as a condition precedent of a close season in these waters on her part, that the United States shall forego its entire catch in excess of 7,500—the bare number necessary (in the language of the *modus vivendi*) "for the subsistence and care of the natives." Both Mr. BLAINE and Mr. BAYARD have pointed out that the value of Alaska consists in the seal fisheries. By causing the United States the temporary loss of the profits from these fisheries, Great Britain has temporarily lost to the United States that resource of Alaska for the sake of which in 1867 it purchased the territory. This loss is fairly represented by the annual rental paid to the United States by the Alaska Company for the privilege of the exclusive catching of seals on the Pribyloff Islands. This rental is the cost at which for the past twenty years the Company

[1] Report of Thomas Mowat.

has found it profitable to carry on its business. But, in addition to this, the Alaska Company, through the Government of the United States, should have re-imbursed to it the profits from which the prohibition of seal catching contained in the *modus vivendi* and demanded by Great Britain, has cut it off.

According to such a standard of amount and distribution, we submit that the International Board of Arbitration might justly award damages. If its decision as to the facts of seal life with reference to the effect of pelagic sealing be the same as that conceded and assumed in the discussion of the legal questions in this controversy, the damages so awarded should be decreed to be paid by Great Britain.

New York, November, 1892.