1-22-1897

Revenue from rental of the seal islands of Alaska.

54TH CONGRESS, 2d Session. } SENATE. { DOCUMENT No. 81.

REVENUE FROM RENTAL OF THE SEAL ISLANDS OF ALASKA.

JANUARY 23, 1897.—Laid on the table and ordered to be printed.

The VICE-PRESIDENT presented the following

LETTER FROM THE SECRETARY OF THE TREASURY, TRANSMITTING, IN ANSWER TO A SENATE RESOLUTION OF JANUARY 5, 1897, INFORMATION RELATIVE TO THE REVENUE DERIVED FROM THE NORTH AMERICAN COMMERCIAL COMPANY BY THE RENTAL OF THE SEAL ISLANDS OF ALASKA.

TREASURY DEPARTMENT,
OFFICE OF THE SECRETARY,
Washington, D. C., January 22, 1897.

SIR: I have the honor to acknowledge the receipt of Senate resolution dated January 5, 1897, the text of which is as follows:

Resolved, That the Secretary of the Treasury be, and he is hereby, directed to furnish, for the information of the Senate, a detailed statement of the public revenue derived from the North American Commercial Company in its annual settlements with the Treasury Department for the exclusive privileges which they enjoy by the terms of the lease of the seal islands of Alaska, dated May 1, 1890; also giving in detail the reason why only $1,100 is returned in his annual report for 1896 as the gross receipts from that company for the privilege of taking 30,000 seal skins in 1896.

In reply, I have the honor to inform you that the rental on account of the lease of the seal islands to the North American Commercial Company for the year 1896 is not due until April 1, 1897.

No payments into the Treasury have been made on account of this lease since the year 1892, when the then Secretary of the Treasury, acting under opinions of the then Attorney-General, dated March 27, 1891 (Op. Atty. Gen., 20, pp. 51–54), April 1, 1891 (Op. Atty. Gen., 20, pp. 62, 63), June 14, 1892 (Op. Atty. Gen., 20, pp. 407, 408), and January 17, 1893 (Op. Atty. Gen., 20, pp. 510, 511), accepted from the lessees of the seal islands in settlement of their indebtedness for that year the sum of $23,972.60 in lieu of $132,659.12, as appeared to be due under the terms of the contract. This sum of $23,972.60 was obtained by reducing the rent in proportion as the number of seals taken by the company that year (7,549) bore to 100,000, which number it was assumed the company had a right to take under the lease. In this settlement the so-called bonus of $7.625 per skin, as provided in the contract, was also reduced in like proportion, as was the rental of $60,000. A similar settlement, it was found on investigation, also had been made in computing the amounts accepted from the lessees for the years 1890 and 1891, except that for the year 1890 only the rental of $60,000 was reduced, the bonus of $7.625 having been paid in full.

When the indebtedness of the company for the year 1893, falling due

April 1, 1894, came up for determination, I concluded, after careful examination, that the action of my predecessor in making said abatement of rent and bonus was not in accordance with law, which conclusion was concurred in by the Attorney-General. (See vol. 20, Op. Atty. Gen., pp. 634 and 732.) I therefore called upon the lessees for the payment of $132,187.50, which sum I considered as due the Government under the lease for the season 1893–94. I also made a demand upon the lessees for the payment of the difference between the amounts which they were allowed to pay on account of their indebtedness for the years 1890, 1891, and 1892 and the amounts which in my opinion and in that of the Attorney-General they were obligated to pay under the terms of their lease.

With both of these demands the lessees of the islands refused to comply, but offered in lieu thereof, in full settlement of their indebtedness for the year 1893, an amount reduced in accordance with the terms of the arrangement made with them by my predecessor abating both rent and bonus. They disputed also the right of the Government to demand further payments on account of previous years, contending that settlements already made constituted a bar to further demands on that account.

By my request suit was brought in the circuit court for the southern district of New York against the North American Commercial Company, the lessees of the islands, as aforesaid, to recover the amount claimed by me to be due for the year 1893–94. In the meantime the lessees refused to pay, when due, the amounts demanded by me for the years 1894 and 1895, computed in accordance with the provisions of the lease, and accordingly the Attorney-General was requested to institute other actions to recover the amounts due for those years also, which actions were duly instituted.

Upon trial of the action to recover the amount due for the year 1893–94, namely, $132,187.50, judgment was rendered on April 27, 1896, in favor of the United States for $94,687.50 and costs. The court found as a matter of law that the defendant company was obliged to pay the full rent reserved in the lease, and was not entitled to any abatement of rent or bonus because of any limitation in the seal catch made by the Secretary of the Treasury under the lease. It further found, however, that the limitation of the catch to 7,500 for this particular year was not made under the lease, but was an act of the Government under an agreement or modus vivendi, so called, entered into with the Government of Great Britain, which virtually, for the time being, put an end to the contract.

The amount of the judgment, $94,687.50, was arrived at by allowing the Government the bonus of $7.625 and the tax of $2 stipulated in the lease per skin on 7,500 skins, and reducing the stipulated rental of $60,000 to $22,500. The court stated in its decision that the condition of the fur-seal herd would have warranted the lessees in taking 20,000 skins that year (1893) had they not been restricted to a catch of 7,500 by the terms of the so-called modus vivendi; that had they taken 20,000 skins they would have been obliged to pay the full rental of $60,000, or at the rate of $3 per skin; that as they were limited, however, to a catch of 7,500, they need pay only for that number, but at the full rate of $3 per skin. This would make their indebtedness on account of rent (7,500 by $3) $22,500. Adding the bonus, $7.625, and tax, $2, on each of 7,500 skins, the total rent amounted to $94,687.50, as stated above. The court further held that the counterclaim of the defendants, which was set up in this suit for damages for reduction of the catch under the

modus vivendi, was a valid claim against the Government for the skins which might have been taken were it not for said modus vivendi, but this counterclaim was disallowed on the ground that it had not been presented, before this action had been brought, to the accounting officers of the Department in accordance with section 951 of the Revised Statutes and the act of July 31, 1894.

This decision, so far as the construction of the lease as to abatement of rent and bonus was involved, sustains the position taken by me. The lessees appealed from the judgment rendered, and proceedings on the appeal are still pending in the United States circuit court of appeals. Trial of the subsequent proceedings to recover the amounts due for the years 1894 and 1895 have been suspended pending the final decision in the above suit. The rent for 1896, as stated before, will not be due before April 1, 1897.

I carefully considered whether, under the last section of the lease, I should not put an end to the contract because of the nonpayment of the rent during the years 1893, 1894, and 1895. In view, however, of the fact that the settlements made by my predecessors for the years 1890, 1891, and 1892 were approved by the then Attorney-General in opinions cited on the first page of this communication, and of the further fact that the suit for the rent for 1893 (which involves a construction of the lease which will be applicable to the claims of the Government for the years 1894, 1895, and 1896 when due) is still pending, I deemed it to be my duty to take no proceedings to terminate said lease until finally construed by the courts, especially since the company tendered the amount due upon the theory of settlement adopted by my predecessor as above, which tender I refused to accept. The North American Commercial Company has deposited with the Secretary of the Treasury Government bonds to the amount of $50,000, in accordance with the terms of the lease. The company also has given a bond for $500,000, conditioned for the payment of all rentals, taxes, dues, and other sums of money accruing to the United States under said lease, and generally for the faithful observance of all the covenants and agreements in said lease.

The item of $1,100 referred to in the resolution as appearing in my report to the credit of "Tax on seal skins" is the result of a clerical error in crediting under that head moneys received from individuals for licenses issued to them for the occupancy of certain waste islands in Alaska to be used for the purpose of propagating thereon foxes valuable for their pelts. These licenses were issued under authority contained in the sundry civil act of March 3, 1879, and in accordance with an opinion of the Solicitor of the Treasury dated October 20, 1893, upon payment in advance of the sum of $100 per annum for each island, with the stipulation that the licenses are revocable at the pleasure of the Secretary of the Treasury. During the fiscal year 1896 eleven licenses were so issued, the revenue derived therefrom amounting to $1,100. A list of the islands covered by these licenses, with the names of the persons taking out the same, is appended:

Charles Brown, Chiachi Island.
R. Neumann, Little Koniushi Island.
W. B. Taylor, North Semedi Island.
O. Carlson, Carlsons Island.
T. F. Morgan, Marmot Island.
Byron Andrews, South Semedi Island.
O. W. Carlson, Simeonoff Island.
W. Story, Little Naked Island.
M. L. Washburn, Long Island.
E. Pitelan, Pearl Island.
J. C. Redpath, Ukomak Island.

In addition, one license has been issued since the expiration of the last fiscal year, as follows: Oliver Smith, Middleton Island.

As requested by the resolution, I append a detailed statement of the revenue derived from the North American Commercial Company, in its annual settlements with this Department under its lease of the seal islands, dated March 12, 1890. No lease has been granted to said company by this Department dated May 1, 1890, as stated in said resolution:

Year.	Seals taken.	Amounts paid.	Amounts due and unpaid.
1890	20,995	$269,673 88	$47,403.00
1891	13,482	46,749.23	133,628.64
1892	7,549	23,972.60	108,686.52
1893	7,500	.....	132,187.50
1894	16,031	.....	214,298.37
1895	15.000	.....	204,375.00
1896	30,000	.....	a348,750.00

a Due April 1, 1897.

I herewith inclose a copy of my letter to the honorable Speaker of the House of Representatives, dated February 1, 1896, for further information relating to receipts and expenditures on account of the seal islands of Alaska since their cession to the United States by Russia. I inclose also copy of the contract, dated March 12, 1890, leasing the islands to the North American Commercial Company, and a copy of the opinion of the court in the case herein mentioned.

Respectfully, yours,

J. G. CARLISLE, *Secretary.*

The PRESIDENT OF THE SENATE.

TREASURY DEPARTMENT, OFFICE OF THE SECRETARY,
Washington, D. C., February 1, 1896.

SIR: I have the honor to acknowledge the receipt of copy of House resolution dated the 7th ultimo, the text of which is as follows:

"*Resolved*, That the Secretary of the Treasury be requested to inform the House—

"First. What amount the Treasury received from the lessees of Alaska seal islands for rental and tax each year since the new lease of these islands, from May 1, 1890, to date, together with the number of skins annually taken under the provisions of said lease, and also the amount received from lessees and the number of skins taken each year from 1868 to 1890.

"Second. What has been the cost of policing Bering Sea and the North Pacific each year since 1890, and also the amount expended for the support of the natives of the seal islands by the Treasury Department each year since 1890."

In reply thereto I have to inform you that the number of seals taken by the lessees of said island since 1890, the amounts received by the Government from the said lessees in return for the privilege of taking seals on the islands, and the amounts which remain due to the Government and unpaid by the lessees on account of this privilege during the same years are as follows:

Year.	Seals taken.	Amounts paid.	Amounts due and unpaid.
1890	20,995	$269,673.88	$47,403.00
1891	13,482	46,749.23	133,628.64
1892	7,549	23,972.60	108,686.52
1893	7,500	.....	132,187.50
1894	16,031	.....	214,298.37
1895	15,000	.....	a204,375.00

a Due on or before April 1, 1896.

In explanation of the above statement of "Amounts due and unpaid," I have to inform you that reductions having been made by my predecessors in the amounts, which, under their lease, the present lessees of the islands were required to pay as annual rental and tax since 1890, I entertained the belief, supported by an opinion of the honorable the Attorney-General that these reductions had been made without warrant of law. This question having arisen in determining the amount of rent

due for the years 1893 and 1894, I refused to be bound by the settlements made by my predecessor in office, and made demands upon said lessees for the amounts of $132,187.50 and $214,298.37, due, respectively, for those years. Payment of these amounts having been refused, suits were instituted in the circuit court for the southern district of New York to recover the whole amount claimed to be due for the years 1893 and 1894. These suits are still pending.

As requested, I append a statement of the number of seals taken for all purposes on the seal islands during the years 1870 to 1889, both inclusive, together with the respective amounts paid by the lessees each year as rental and tax for the privilege:

Year.	Seal taken.	Rental and tax.	Year.	Seal taken.	Rental and tax.
1870	23,773	$101,080.00	1880	105,718	$317,594.50
1871	102,960	322,863.38	1881	105,063	316,885.75
1872	108,819	307,181.12	1882	99,812	317,295.25
1873	109,177	327,081.25	1883	79,509	251,875.00
1874	110,585	317,494.75	1884	105,434	317,400.25
1875	106,460	317,584.00	1885	105,024	317,489.50
1876	94,657	291,155.50	1886	104,521	317,452.75
1877	84,310	253,255.75	1887	105,760	317,500.00
1878	109,323	317,447.50	1888	103,304	317,500.00
1879	110,511	317,400.25	1889	102,617	317,500.00

In addition to the above there was covered into the Treasury in the year 1873 the amount of $29,529.17, realized from the sale of seal skins by Government agents, and in 1885 $1,000 as a forfeiture for taking seals unlawfully.

As to the cost of policing Bering Sea and the North Pacific each year since 1890 I have to state that the honorable the Secretary of the Navy upon request has informed this Department that the cost of maintaining vessels of the United States Navy in these waters since 1890, including pay and rations of officers and crews and repairs to the vessels during and immediately following the performance of said patrol duty, was as follows:

1890	No patrol by Navy.
1891	$133,281.64
1892	233,931.31
1893	183,067.74
1894	452,768.18
1895	No patrol by Navy.

The expense incurred by revenue cutters in patrolling Bering Sea from 1890 to 1895, inclusive, including pay and rations of officers and men, is as follows:

1890	$36,846.66
1891	51,650.70
1892	66,672.57
1893	47,385.79
1894	56,439.63
1895	148,677.74

From these figures it would seem that the total cost of policing these waters during the period in question is $1,410,721.96.

The amounts which have been expended by the Government for the support of the native inhabitants of the seal islands of Alaska follow:

1893	$11,337.32
1894	18,319.44
1895	25,563.21

While not requested by the resolution, I append a statement of the amounts expended for salaries and traveling expenses of agents to the seal fisheries of Alaska each year since the date of the first appropriation for that purpose:

1876	$2,752.68	1886	$7,937.49
1877	8,080.49	1887	16,174.13
1878	10,892.50	1888	10,184.52
1879	16,381.78	1889	13,027.10
1880	9,571.02	1890	10,747.71
1881	4,248.09	1891	15,396.83
1882	15,263.06	1892	16,071.33
1883	11,090.32	1893	11,168.27
1884	13,811.64	1894	10,953.09
1885	13,102.61	1895	10,308.38

While these islands were ceded to the United States in 1867, no appropriation for salaries and expenses of Government agents thereon appears to have been made prior to 1876.

The following is a summary of the amounts already set forth:

Number of seals taken under lease—	
1870	1,977,337
1890	80,557
Amounts received:	
Under lease of 1870	$5,981,036.50
Under lease of 1890	340,395.71
Miscellaneous	30,529.17
Total	6,351,961.38
Amount due and unpaid, awaiting outcome of pending litigation	840,579.03
Amounts expended:	
Policing waters	1,410,721.96
Support of natives	55,219.97
Salaries and expenses of agents	227,163.04
Total	1,693,104.97

Respectfully, yours,

J. G. CARLISLE, *Secretary.*

Hon. THOMAS B. REED,
Speaker of the House of Representatives.

Copy of contract between the United States and the North American Commercial Company, under which said company is granted the exclusive right of taking fur seals upon the Pribilof Islands in Alaska.

This indenture, made in duplicate this twelfth day of March, 1890, by and between William Windom, Secretary of the Treasury of the United States, in pursuance of chapter 3 of title 23, Revised Statutes, and the North American Commercial Company, a corporation duly established under the laws of the State of California, and acting by I. Liebes, its president, in accordance with a resolution of said corporation adopted at a meeting of its board of directors held January 4, 1890:

Witnesseth: That the said Secretary of the Treasury, in consideration of the agreements hereinafter stated, hereby leases to the said North American Commercial Company for a term of twenty years, from the first day of May, 1890, the exclusive right to engage in the business of taking fur seals on the islands of St. George and St. Paul in the Territory of Alaska, and to send a vessel or vessels to said islands for the skins of such seals.

The said North American Commercial Company, in consideration of the rights secured to it under this lease above stated, on its part covenants and agrees to do the things following, that is to say:

To pay to the Treasurer of the United States each year during the said term of twenty years, as annual rental, the sum of sixty thousand dollars, and in addition thereto agrees to pay the revenue tax, or duty, of two dollars laid upon each fur-seal skin taken and shipped by it from said islands of St. George and St. Paul, and also to pay to said Treasurer the further sum of seven dollars sixty-two and one-half cents apiece for each and every fur-seal skin taken and shipped from said islands, and also to pay the sum of fifty cents per gallon for each gallon of oil sold by it made from seals that may be taken on said islands during the said period of twenty years, and to secure the prompt payment of the sixty thousand dollars rental above referred to, the said company agrees to deposit with the Secretary of the Treasury bonds of the United States to the amount of fifty thousand dollars, face value, to be held as a guarantee for the annual payment of said sixty thousand dollars rental, the interest thereon when due to be collected and paid to the North American Commercial Company, provided the said company is not in default of payment of any part of the said sixty thousand dollars rental.

That it will furnish to the native inhabitants of said islands of St. George and St. Paul annually such quantity or number of dried salmon, and such quantity of salt and such number of salt barrels for preserving their necessary supply of meat as the Secretary of the Treasury shall from time to time determine.

That it will also furnish to the said inhabitants eighty tons of coal annually, and a sufficient number of comfortable dwellings in which said native inhabitants may reside; and will keep said dwellings in proper repair; and will also provide and

keep in repair such suitable schoolhouses as may be necessary, and will establish and maintain during eight months of each year proper schools for the education of the children on said islands; the same to be taught by competent teachers, who shall be paid by the company a fair compensation, all to the satisfaction of the Secretary of the Treasury; and will also provide and maintain a suitable house for religious worship; and will also provide a competent physician or physicians, and necessary and proper medicines and medical supplies; and will also provide the necessaries of life for the widows and orphans and aged and infirm inhabitants of said islands who are unable to provide for themselves; all of which foregoing agreements will be done and performed by the said company free of all costs and charges to said native inhabitants of said islands or to the United States.

The annual rental, together with all other payments to the United States, provided for in this lease, shall be made and paid on or before the first day of April of each and every year during the existence of this lease, beginning with the first day of April, 1891.

The said company further agrees to employ the native inhabitants of said islands to perform such labor upon the islands as they are fitted to perform, and to pay therefor a fair and just compensation, such as may be fixed by the Secretary of the Treasury; and also agrees to contribute, as far as in its power, all reasonable efforts to secure the comfort, health, education, and promote the morals and civilization of said native inhabitants.

The said company also agrees faithfully to obey and abide by all rules and regulations that the Secretary of the Treasury has heretofore or may hereafter establish or make in pursuance of law concerning the taking of seals on said islands, and concerning the comfort, morals, and other interests of said inhabitants, and all matters pertaining to said islands and the taking of seals within the possession of the United States. It also agrees to obey and abide by any restrictions or limitations upon the right to kill seals that the Secretary of the Treasury shall judge necessary, under the law for the preservation of the seal fisheries of the United States; and it agrees that it will not kill, or permit to be killed, so far as it can prevent, in any year a greater number of seals than is authorized by the Secretary of the Treasury.

The said company further agrees that it will not permit any of its agents to keep, sell, give, or dispose of any distilled spirits or spirituous liquors or opium on either of said islands or the waters adjacent thereto to any of the native inhabitants of said islands, such person not being a physician and furnishing the same for use as a medicine.

It is understood and agreed that the number of fur seals to be taken and killed for their skins upon said islands by the North American Commercial Company during the year ending May 1st, 1891, shall not exceed sixty thousand.

The Secretary of the Treasury reserves the right to terminate this lease and all rights of the North American Commercial Company under the same at any time on full and satisfactory proof that the said company has violated any of the provisions and agreements of this lease, or in any of the laws of the United States, or any Treasury regulation respecting the taking of fur seals or concerning the islands of St. George and St. Paul or the inhabitants thereof.

In witness whereof, the parties hereto have set their hands and seals the day and year above written.

WILLIAM WINDOM, *Secretary of the Treasury.*

NORTH AMERICAN COMMERCIAL COMPANY,
By I. LIEBES,
President of the North American Commercial Company.

[North American Commercial Company, incorporated December, 1889.]

Attest:
H. B. PARSONS, *Assistant Secretary.*

United States circuit court, southern district of New York.

The United States of America against The North American Commercial Company.

WALLACE, *Circuit Judge:*

This is an action to recover rent for the year 1893 accruing under a lease executed March 12, 1890. By that instrument the plaintiffs, by the then Secretary of the Treasury, leased to the defendant for twenty years, from the 1st day of May, 1890, the exclusive right to engage in the business of taking fur seals on the islands of St. George and St. Paul, in the Territory of Alaska, and to send a vessel or vessels to said islands for the skins, and the defendant agreed to pay as annual rental the sum

of $60,000 and $7.62½ for each fur skin taken and shipped, together with a revenue tax of $2 upon each skin, payment to be made on or before the 1st day of April of each and every year during the existence of the lease. The lease contained the following covenants on the part of the defendant:

"It also agrees to obey and abide by any restrictions or limitations upon the right to kill seals the Secretary of the Treasury shall judge to be necessary under the law for the preservation of the seal fisheries in the United States, and it agrees that it will not kill or permit to be killed, so far as it can prevent, in any year a greater number of seals than is authorized by the Secretary of the Treasury. It is understood and agreed that the number of fur seals to be taken and killed for their skins on said islands by the North American Commercial Company during the year ending May 1, 1891, shall not exceed 60,000."

The plaintiffs allege that the defendant, pursuant to the lease, took and shipped 7,500 fur-seal skins from said islands during the year 1893, whereby there became due by its terms, besides the $60,000, the sum of $72,187.50—in all, the sum of $132,187—which was payable April 1, 1894, and has not been paid.

The defendant denies that during that year it took any seals from said islands or shipped any skins whatever under the lease. It alleges that the Secretary of the Treasury did not limit or restrict the right of the defendant to take seals under the agreement during 1893, pursuant to the authority conferred on him by law to do so to the extent necessary for the preservation of the herd; that prior to the 1st day of April, 1893, the United States entered into an obligation, by treaty, with the Government of Great Britain, whereby they engaged not to permit any taking of seals for their skins upon the said islands, and in order to perform the same, prohibited this defendant from taking any seals for their skins at any time during that year; that by reason thereof the defendant could not, during that year, take any fur seals for their skins; that the prohibition was not necessary for the preservation of the seals upon said islands; that by preventing the defendant from taking any skins under the agreement the plaintiffs violated their agreement and subjected the defendant to loss in the sum of at least $283,725, and that prior to the beginning of the suit defendant duly presented to the accounting officers of the Treasury, for their examination, its demand aforesaid, and that the same has been by said accounting officers disallowed.

The decision of the case requires a determination of the nature and extent of the rights and obligations of the parties under the lease, and whether upon the facts there has been an invasion by the plaintiffs of the contract rights of the defendant, whereby it has been deprived of the privileges to which it was entitled. The terms of the covenant which qualifies the exclusive right demised to the defendant of engaging in the business of taking fur seals on the islands are very comprehensive, and the present controversy is the outgrowth of a difference of opinion between the parties respecting its scope and effect. What was intended to be included in the general right granted to the defendant is manifest. It was not the exclusive right of killing the seals upon the islands or of killing any specified number of seals, but of engaging in what at the time was known as a business—a definite pursuit which had been regulated by law and official supervision.

By the acquisition of Alaska in 1868, the United States became the proprietor of the seal fisheries appurtenant to the islands of St. George and St. Paul. Those islands are the breeding ground of the herd, which in the early spring moves northward to Bering Sea, and are the habitat of the herd during the summer and fall. The seals land in great numbers upon the islands, dividing into families, consisting of a male or bull and many females or cows. The younger seals, or bachelors, are not admitted to the breeding ground, but are driven off and destroyed in great numbers by the bulls; and until they are 3 or 4 years old occupy other portions of the islands, passing through lanes out to and in from the sea at intervals. They multiply in such excess of the breeding requirements that a large proportion of them can be killed without diminishing the birth rate of the herd, and their skins are exceedingly valuable. By protecting the females and restricting capture to the bachelors, the fisheries are capable of a permanent and annual supply of skins, affording a valuable source of revenue.

The subject soon attracted the attention of Congress, and by the act of July 1, 1870, a code of regulations was adopted designed to protect the fisheries and secure a revenue to the Government therefrom. This act made it unlawful to kill seals upon the islands or adjacent waters, except during certain specified months, or to kill any female seals; regulated the manner in which the natives of the islands might be permitted by the Secretary of the Treasury to kill young seals for food and old ones for clothes, and prescribed penalties and forfeitures for violation of its provisions. The act also authorized the Secretary of the Treasury to lease to proper and responsible parties, having due regard to the interests of the Government, the native inhabitants, and the protection of the seal fisheries, for a term of twenty years, the right to engage in the business of taking fur seals on the islands, at an annual rental of not less than $50,000, and at the expiration of said term or the surrender or

forfeiture of any lease, to make other similar leases. He was required in making leases to have due regard to the preservation of the seal-fur trade of the islands, and to exact from lessees an obligation "conditioned for the faithful observance of all laws and requirements of Congress, and of the regulations of the Secretary of the Treasury touching the subject-matter of taking fur seals and disposing of the same."

The act also contained the following provision:

"SEC. 3. And be it further enacted, that for the period of twenty years from and after the passing of this act the number of fur seals which may be killed for their skins upon the Island of St. Paul is hereby limited and restricted to seventy-five thousand per annum; and the number of fur seals which may be killed for their skins upon the Island of St. George is hereby limited and restricted to twenty-five thousand per annum: *Provided*, That the Secretary of the Treasury may restrict and limit the right of killing, if it shall become necessary for the preservation of such seals, with such proportionate reduction of the rents reserved to the Government as shall be right and proper; and if any person shall knowingly violate either of the provisions of this section he shall, upon due conviction thereof, be punished in the same way as provided herein for a violation of the provisions of the first and second sections of this act."

Pursuant to this enactment, and in 1870, a lease was made by the Secretary of the Treasury for the term of twenty years to the Alaska Commercial Company. That lessee, during the whole term of its lease, was allowed to take annually the full quota of 100,000 skins, but during one year contented itself with taking only 75,000.

In the revision by Congress in 1874 of the laws of the United States, the lease to the Alaska Commercial Company was specifically recognized and the provisions of the act of July 1, 1870, were substantially reproduced. The revisers treated the act of 1870 as conferring authority upon the Secretary of the Treasury, after the expiration of the first period of twenty years, to prescribe the conditions of leases, except in respect to the length of term and the minimum rental, and they treated the provision in that act fixing the maximum take, and requiring a proportionate reduction of rent in case the Secretary of the Treasury should reduce it, as applicable only to the twenty-year period ending July 1, 1890, and this would seem the natural and reasonable construction of that act.

Whether that construction was correct or not, the revision was the legislative declaration of the statute law upon the subject on and after the 1st day of December, 1873, and in the absence of any obscurity in the meaning the court can not look to the preexisting statutes to see whether or not they were correctly incorporated in the revision (United States *v.* Bowen, 100 U. S., 508). By act of March 24, 1874, Congress amended the original act so as to authorize the Secretary of the Treasury to "designate the months in which fur seals may be taken for their skins on the islands of St. Paul and St. George, in Alaska, and in the waters adjacent thereto, and the number to be taken on or about each island respectively." The effect of this act was to abrogate the provisions of the preexisting law by which for a period of twenty years no more than 75,000 seals could be killed on the Island of St. Paul and 25,000 on the Island of St. George, and to confer upon the Secretary of the Treasury full discretion in the matter. Its manifest intent was to permit him to authorize more or less to be killed during that period as well as thereafter. It repealed by implication so much of the Revised Statutes as was inconsistent with it, because it took effect as a subsequent statute, although later in point of time (Rev. Stat., 5601).

Passed as it was by the same Congress which in the Revised Statutes had recognized the existing lease to the Alaska Commercial Company, it must be presumed that the act of March 24, 1874, had that lease in contemplation and was not intended to impair the vested rights of the lessee. Consequently it should be read as intended to remove the limitation upon the number of seals which might be taken by that lessee, relegate the designation of the number to the discretion of the Secretary of the Treasury, but entitle the lessee to a proportionate reduction of rent in case the Secretary at any time during the twenty-year term should designate a less number than the original maximum, and after the expiration of that period to leave it wholly to the Secretary of the Treasury in the exercise of his discretion to determine what number a lessee should be permitted to take.

The present lease must be read in the light of the existing situation when it was made, and as controlled by the laws relating to and authorizing it; and, as thus read, its meaning and the intention of the parties seem so clear that any reference to the preliminary proposal and bid is unnecessary. It was intended to secure to the defendant the exclusive right of taking the annual product of the fisheries, subject to the regulations prescribed by the statutes, and subject also to such further restrictions and limitations as the Secretary of the Treasury, in the exercise of his discretion, should deem necessary for the preservation of the fisheries. When restricted by the Secretary of the Treasury the defendant was not to be entitled to kill a greater

number of seals than authorized by him. In the absence of such restrictions its privileges were coextensive with those of the previous lessee.

It is not unusual for a contractor with the Government, as with other municipal bodies, to repose upon the good faith and discretion of some public officer who represents the Government and is responsible for the protection of its interest in the transaction. Such contractors frequently consent to stipulations by which the value of the contract is substantially controlled by the judgment of such an officer. In such contracts, however, it is implied that the public officer will not act arbitrarily or capriciously, but will exercise an honest judgment. (Chapman *v.* Lowell, 4 Cush., 378; Kihlberg *v.* United States, 97 U. S., 398; Bowery National Bank *v.* The Mayor, 63 N. Y., 336.) The party who has agreed to be bound by that judgment is entitled to have it exercised in good faith by the officer nominated, and can not be bound by the substituted judgment of another authority. The defendant was willing to assume, as it was justified in doing, that a Secretary of the Treasury of the United States would not abuse the power with which the contract intrusted him. And if, by any legitimate exercise of that power, it has been disappointed in the fruits of the contract, it would have had no just reason to complain.

The contention for the defendant that the Secretary of the Treasury did not limit or restrict its right to take seals under the lease for the year 1893, but that it was prohibited by the Government of the United States from exercising the right, and was thus deprived of the benefit of its contract, rests on the effect of the convention between the Governments of the United States and Great Britain known as the modus vivendi. By that convention the United States promised, during the pendency of the arbitration between the two Governments relating to the Bering Sea controversy and the preservation of the seals resorting to those waters, to prohibit seal killing on the islands in question "in excess of 7,500 to be taken on the islands for the subsistence of the natives," and to use promptly its best efforts to insure the enforcement of the prohibition.

The events which led to the convention are matters of public history and need not be recited. Undeniably the preservation of the seal fisheries upon the islands was one of the objects which influenced it. But its adoption was not necessary for their preservation, except in the sense that the fisheries were likely to be destroyed by pelagic sealing, and without the modus vivendi pelagic sealing could only be suppressed by force and at the risk of war. It was adopted for the purpose of avoiding irritating differences and to promote a friendly settlement between the two Governments touching their rights in Bering Sea. There never was a time in the history of the seal fisheries when it was necessary or even desirable to limit the killing upon the islands to the number specified in the modus vivendi. As has been stated, the killing was always confined to the bachelor seals, and when thus confined did not cause any diminution in the annual product of the herd. The destruction of the herd was caused by the killing of the females on the high seas, while on their migration southward, by the pelagic sealers. The killing of 100,000 annually by the previous lessee did not perceptibly affect the supply, and it was not until 1890, when the inroads of the pelagic sealers began to threaten the ultimate extirpation of the herd, that it was materially affected.

By the adoption of the modus vivendi and its enforcement by the Government during the years 1891, 1892, and 1893, a situation was created which was not within the contemplation of the parties to the lease. It seems to have been supposed by both parties when the lease was made that after the first year of the term, during which the defendant was to be limited to a take of 60,000 seals, the normal quota of 100,000 could probably be killed. Because this was the understanding the Secretary of the Treasury, who was in office until March 4, 1893, acting upon the advice of the then Attorney-General, consented to accept of the defendant a reduced rental during the period of the modus vivendi in lieu of the rental fixed by the lease. Besides the rental, the defendant by the terms of its contract assumed quite onerous obligations. It agreed to supply the inhabitants of the island with coal, provide them with comfortable dwellings, establish and maintain schoolhouses and a house for religious worship, provide them with competent physicians and necessary medicines, and also to provide the necessaries of life for the widows and orphans and aged and infirm inhabitants, all at its own expense.

It would be preposterous to suppose that the defendant, or any other lessee, would have assumed the obligations of the contract had it been understood that the privilege leased was to be of such comparatively insignificant value as it proved. By the enforcement of the modus vivendi the defendant was prohibited from killing any seals. As appears by the diplomatic correspondence, the clause authorizing the killing of 7,500 seals upon the islands "for the subsistence of the natives" was inserted for the benefit of the defendant as well as the natives, with the purpose and expectation that while the latter should have the meat the defendant should have the skins as a pro tanto satisfaction of its contract rights. There is no evidence, however, that the defendant consented to or was consulted about that provision of the convention.

That the enforcement of the prohibition was a breach of the contract by the Government does not seem to admit of doubt. It was an invasion of the privilege in the nature of an eviction. Notwithstanding the defendant was permitted, ex gratia, to receive some benefits from its contract, its privilege during the period of the modus vivendi was suspended and practically annulled. When the Government enters into a contract with an individual or corporation it divests itself of its sovereign character so far as concerns the particular transaction and takes that of an ordinary citizen; and it has no immunity which permits it to recede from the fulfillment of its obligation. As was said in Cooke *v.* The United States (91 U. S., 398) "if it comes down from its position of sovereignty and enters the domain of commerce, it submits itself to the same laws that govern individuals there."

It will not do to say that the situation when the modus vivendi was entered into was such as would have justified the Secretary of the Treasury in limiting the quota to 7,500, and consequently that the defendant was not deprived of any substantial part of its contract. The assumption would not be true as a matter of fact, for the evidence is that 20,000 bachelors, and probably more, could have been killed upon the islands during 1893. Moreover, the defendant did not agree that the judgment of the Government might be substituted for that of the Secretary of the Treasury in determining what number it might be permitted to take; and to compel it to accept the substituted judgment would deprive it of the only guaranty contained in its contract for just and reasonable treatment. By the convention, the Secretary of the Treasury was shorn of all power and discretion in the matter. He did not assume or attempt to fix the quota for 1893. All the seals taken upon the islands during that year were taken by the Government itself, through the agents of the Treasury Department; but the defendant was permitted to cooperate in selecting the seals to be killed, and to take and retain the skins, apparently pursuant to an understanding with the Secretary of the Treasury. In this way, and in this way only, the defendant received 7,500 skins.

The defendant, having accepted a partial performance of the contract, must make a commensurate compensation to the plaintiffs. It might have refused to accept the skins, and in that case could have successfully resisted any claims for rental, but having accepted some of the fruits of the contract, it can not retain them without making a just remuneration. (Tomlinson *v.* Day, 2 Brod. & Bing., 680; Smith *v.* Raleigh, 3 Camp., 513; The Fitchburg Cotton Manufactory Cor. *v.* Melven, 15 Mass., 268; Lawrence *v.* French, 25 Wend., 443; McClurg *v.* Price, 59 Pa. St., 420; Day *v.* Watson, 8 Mich., 536; Watts *v.* Coffin, 11 Johns. R., 499; Lewis *v.* Payn, 4 Wend., 423.) It is quite impracticable, if not impossible, to determine the amount for which the defendant should respond, except by ascertaining the value of its privileges during the year in question and adjusting the value of the partial benefit proportionately to that of the whole benefit it would have derived if it had been permitted to fully enjoy the privilege.

As has been stated, the evidence is that if the defendant had been allowed to exercise its right to take the seals in the customary way it could have obtained 20,000 skins. This number is less than the estimate of the experts, but the accuracy of their conclusions is somewhat impaired by the fact that a smaller quota was assigned to the defendant in 1894, after the termination of the modus vivendi. If it had taken 20,000 skins there would have been due to the Government, besides the $60,000 rental, a per capita payment of $192,500; in all, the sum of $252,500. Upon this basis the contract value per skin would have been $12.62½, and for the 7,500 skins $94,687.50.

According to the evidence the defendant could have realized, at the average market prices for 1893, the sum of $24 for each skin, a total for the 12,500 which it was prevented from taking by the act of the Government of $300,000, and the capture and marketing of the whole number would not have entailed upon the defendant any additional expense. There would have been payable, however, under the contract the further sum, at the basis of $12.62½ per skin, of $157,812.50. Thus the defendant sustained a net loss, in consequence of the breach of its contract, in the sum of $142,187.50, for which it has a just claim against the Government.

Notwithstanding the defendant's claim is one for unliquidated damages, it would seem to be a proper matter of counterclaim or credit were it not for the fact that the conditions prescribed by section 951 of the United States Revised Statutes have not been complied with by the defendant. (Gratiot *v.* United States, 15 Peters, 338; United States *v.* Wilkins, 6 Wheat., 135; United States *v.* Eckford, 6 Wallace, 484; United States *v.* Ringgold, 8 Peters, 150). That section, which originated in the act of March 3, 1797, has received a very liberal construction by the Supreme Court, "extending it to matters even distinct from the cause of action, if only such as the defendant is entitled to a credit on, whether equitable or legal." (United States *v.* Buchanan, 8 How., 105.)

By that section, however, no claim for a credit shall be admitted in suits brought by the United States against individuals, except such as appear to have been presented to and disallowed in whole or in part by the accounting officers of the Treasury, unless it is proved that the defendant is in possession of vouchers not before in

his power to procure, and was prevented from exhibiting his claim for such credit at the Treasury by absence from the United States or by some unavoidable accident. It has not been shown that the claim has been presented to the accounting officers of the Treasury, nor that the defendant has been prevented by any cause from making presentation. Consequently the defendant must seek its remedy by a suit against the Government brought conformably to the provisions of the act of March 3, 1887 (Supp. Rev. Stat., vol. 1, p. 559).

It follows that the plaintiff is entitled to judgment in the sum of $94,687.50.

For the United States: Wallace Macfarlane, United States attorney; Max J. Kohler, assistant United States attorney.

For the defendant: James C. Carter, George H. Balkam, N. L. Jeffries.

(Indorsed:) United States circuit court, southern district of New York, The United States of America *agst.* The North America Commercial Company. Wallace, circuit judge, United States circuit court. Filed April 27, 1896. John A. Shields, clerk.

United States of America *v.* The North America Commercial Company.

WALLACE, *circuit judge:*

In ruling that the defendant could not be allowed for its counterclaim in this action because its claim for damages had not been presented to and disallowed by the accounting officers of the Treasury, the fact was overlooked that the act of Congress of March 30, 1868 (sec. 191 of the Revised Statutes), was repealed by the act of July 31, 1894. Under section 191 of the United States Revised Statutes, as construed by the Supreme Court in United States *v.* Harmon (147 U. S., 268–275), the decision of the Comptroller of the Treasury was final and conclusive so far as the executive department was concerned, and that officer and not the Secretary of the Treasury was the accounting officer to whom the claim should have been presented and by whom it should have been disallowed to authorize the credit to be admitted upon the trial under section 951.

The repeal of section 191, had it not been for the supplementary legislation of Congress, would have left the laws as they stood prior to the act of March 30, 1868, and the action of the Secretary of the Treasury, as the head of a Department, in rejecting the claim would have rendered it unnecessary for the defendant to take any further steps in respect to its presentment; but the act of July 31, 1894, provides that the Auditor for the Treasury Department shall receive and examine all accounts relating to * * * the Alaskan fur-seal fisheries and certify the balances arising therefrom to the Division of Bookkeeping and Warrants, and also provides that the balances so certified upon the settlement of public accounts shall be final and conclusive upon the executive branch of the Government. In view of this statute, I am constrained to hold that the presentation of the account in 1865 to the Secretary of the Treasury was not sufficient.

(Indorsed:) United States of America *v.* The North American Commercial Company. Wallace, circuit judge. United States circuit court. Filed June 10, 1896. John A. Shields, clerk.