It is further to be observed that all the dicta uttered on the same occasion support by similar implication the claim even of territorial jurisdiction in *bays*, distinct from the three mile belt on the open coast. On that point very broad views are cited from Kent; and the following passage from another and still later American writer (Wheaton) is quoted with implied approval: "In respect to those portions of the sea which form the ports, harbours, *bays*, and mouths of rivers of any state * where the tide ebbs and flows, an exclusive right of property as well as of sovereignty in those waters may well be maintained." Wheaton's reason for the rule, also quoted, is particularly interesting in the present connection. "The State possessing the adjacent territory, by which these waters are partially surrounded and inclosed, has that *physical power* of constantly acting upon them, and at the same time of excluding at its pleasure the action of any other states or persons, which, as we have already seen, constitutes *possession*." †

The New York *Nation*, an almost impartial American weekly journal, whose editorials on the subject of law and history are usually the work of men of learning and authority, admits that the Senate Committee contention for a definition of the marine league, excluding bays more than six miles wide, would require a reversal of American decisions. The writer seems to urge the expediency of a reversal, on the ground of the vagueness of the headland rule. "When we attempt to claim jurisdiction from headland to headland along so extensive a coast a s ours, it becomes a matter of wholly private judgment whether the claim includes all the space inside a line drawn from Cape Cod to Cape Hatteras, or only the space from Nantucket to Montauk Point or something even less comprehensive"—*Nation*, July 27, 1888.

That any boundary should be a matter of private judgment would certainly be an evil. But the Commissioners who negotiated the recently rejected treaty seem to have made their delimitations according to a principle which accords with international law, and would avoid the suggested difficulty.

The American writer's eminently practical as well as just rule seems to have been kept in mind by the late commission. Their lines are drawn across the great bays from light to light; neccessarily, therefore, between points of land visible on both sides from mid-sea. They include a great part of the Bay of Chaleurs, but exclude parts as broad as the Bay of Fundy.

The real test of the possibility of territorial possession is in the answer to the question, Can trespass be practically defined and substantially prevented? The law does not assign the idea of property apart from the power of protection. Judged by this test, it is obvious that a great gulf like the Bay of Fundy cannot be the subject of national possession. Claims which can only be enforced by cruisers out of sight of land are claims to jurisdiction of the high seas, not claims of territorial right. On the other hand, a line between visible headlands is not an imaginary line. Crossing that line will always be an overt act of trespass. It cannot be committed innocently, nor, in the presence of a vigilant guardian, with impunity. From the shore the offender can be detected, pursued and arrested. Great Britain, always contending with France for this and even a greater extent of possession along her coasts, European and American, has also always commanded the maritime power to enforce her claims. Under these circumstances, is there reasonable ground for narrowing the effect of the geographical terms, the coasts, bays, rivers and harbours of Her Britannic Majesty's possessions, farther than to a line drawn between headlands which are visible midway in ordinary weather from the deck of the class of vessel that from time immemorial has been employed in the trade of deep sea fishing? Something corresponding to this principle seems to have been followed by the Commissioners as a *ratio decidendi* in arriving at the lines proposed in the recently rejected Treaty, to define the extent of the liberty which the United States solemnly renounced by the Treaty of 1818. If so, the agreement dictated by practical common-sense may hereafter be confirmed as a declaration of maritime boundaries as they have always existed at law. Their conclusions curiously correspond with a closer reading of the precise language of the Treaty of 1818, than has been practised in the diplomatic correspondence on either side.

By the treaty of 1818 American fishermen are excluded (subject to exceptions as to Newfoundland and Labrador) from fishing within three marine miles of "the coasts, bays, creeks, or harbours of His Britannic Majesty's dominions in America." The enumeration is worthy of remark. The line is to be drawn three miles from the coasts, and three miles *from* the bays. The whole waters within every indentation that can be described as a creek, harbour or bay, are included in the coast line, and the three miles are to be measured from that line. This is indisputable. The treaty cannot be read in any other way. But what is the geographical definition of a bay? Does it include every partially enclosed space of water, whatever its dimensions? Now it is observed that while the treaty so carefully enumerates "bays, creeks and harbours," it omits one other well known geographical term, "gulfs." The dictionaries define a gulf as a large bay. There is therefore a class of bays so large that they are described as gulfs. If we look for examples, we find them, on the map of this continent, in the Gulf of St. Lawrence and the Gulf of Mexico. These are known by those who have traversed them as wide sea-like expanses, where on both sides the mariner loses sight of the enclosing land. Is not this then what determines (though I confess it is not so stated in any legal or other dictionary that I have searched) the character of a gulf? It is a bay so wide that its boundaries are lost to sight from mid-channel. If it be permitted to lay any stress on analogy in the use of the term "gulf"—I think the sense in which the somewhat rare word is applied, outside the geographical sense, conveys the meaning of complete separation. With that force the translators of the Bible use it in the parable of Lazarus: "Between us there is a *great gulf* fixed."

If there is any room for dispute over the "headland question" it must be really a dispute whether the words in the Treaty of 1818, definitive of the extent of the coast fisheries are to be taken as terms of geographical description or as terms having a sense derived from some definition by international law.

Thus in the contention of the United States, stress seems to be laid, not on the substantial enumeration of "coasts, bays, creeks, or harbours," but upon the words, "of His Britannic Majesty's Dominions in America" as pualifying the geographical terms. A bay, the American Secretary of State seems to argue, is not a bay for the qurposes of the treaty, unless it is less than six miles wide, because it is alleged that is the limit set to maritime dominion.

The principal rule of construction of treaties is that like contracts or Acts of Parliament they are to be construed according to the grammatical meaning of their language in its popular signification; subject to an exception as to technical terms, which are to be construed according to their technical meaning. Local descriptions, says Vattel, are to be construed according to the geographical propriety of expression of the period when the treaty was made (Vattel, iv. s. 33). The "bays, creeks and harbours of a country" is sufficiently definite term, a familiar, popular, and also a recognized geographical term. The "bays of a country" are the enclosures of water formed by the headlands or projections of the coast line of the country. Had the same words, at the date of the treaty, or have they now any established technical sense different from their popular sense as geographical terms? In other words, have the limits of maritime or territorial jurisdiction ever received an authoritative definition? The existing differences of opinion upon the subject are a sufficient answer to this question. Some writers have favoured the utmost extent of the headland theory. Among them are numbered the greatest American writers, some of them quite near to the time of the Treaty. Kent in his Commentary, edition of 1825, collates the opinions of lawyers on the subject at that time.

"The extent of jurisdiction over the adjoining seas is often a question of difficulty and of dubious right. As far as a nation can conveniently occupy, and that occupancy is acquired by prior possession or treaty, the jurisdiction is exclusive. Navigable waters which flow through a territory, and the sea-coast adjoining it, and the navigable waters included in bays, and between headlands and arms of the sea, belong to the sovereign of the adjoining territory, as being necessary to the safety of the nation and to the undisturbed use of the neighbouring shores."

It is worthy of note that while modern American statesmen, in presenting their contention, are in the habit of proceeding from the three-mile coast limit to define the extent of jurisdiction over bays—that is to say, that bays form part of the coast if not exceeding the double limit of six miles—that is, from shore to shore: on the other hand it will be seen that the older writers *first* lay down the law respecting inclusion of bays within the coast jurisdiction, as a simple and settled rule; and afterwards proceed to deal with the vaguer question of jurisdiction outward from the open coast. Kent proceeds in another place:—

"It is difficult to draw any precise or determinate conclusion, amidst the variety of opinions, as to the distance to which a state may lawfully extend its exclusive dominion over the seas adjoining its territories, and *beyond* those portions of the sea which are embraced by harbours, gulfs, bays and estuaries, and *over which its jurisdiction unquestionably extends*. All that can reasonably be asserted is, that the dominion of the sovereign of the shore over the contiguous sea extends as far as is requisite for his safety and for some lawful end. A more extended dominion must rest entirely upon force, and maritime supremacy. According to the current of modern authority, the *general* territorial jurisdiction extends *into the sea* as far as cannon shot will reach, and no farther, and this is usually calculated to be a marine league.

"The executive authority of this country, in 1793, considered the whole of Delaware Bay to be within our territorial jurisdiction; and it rested its claims upon those authorities which admit that gulfs, channels and arms of the sea belong to the people with whose lands they are encompassed; and it was intimated that the law of nations would justify the United States in attaching to their coasts an extent into the sea, beyond the reach of cannon shot." Vol. 1, p. 29.

(If these broad doctrines of the older writers are to be deemed to be limited by the majority of opinions in the great case of Queen *v.* Keyn, the same case affirms, as far as can be done by dicta, the claim to an exclusive property in *fisheries* within the "chambers" of the coast, as well as to three miles from the outline of the land.) It cannot be said that the coasts, bays, creeks or harbours of a sovereign's dominions are words having, or which have ever had, any special meaning as terms of law. They have, therefore, no technical sense that can be imported into the construction of a document or contract to overrule the well understood geographical meaning of the words. What is beyond doubt is that Great Britain was in the habit of claiming upon her coasts an extent of maritime jurisdiction co-extensive with the geographical sense.

Under the circumstances, the United States will have difficulty in contending that there was in 1818, or is even now, any definition of maritime dominion sufficiently distinct to even raise an alternative to the simpler construction of the treaty according to the language.

The treaty was intended to define and settle controversies, not to give rise to them. Can its framers be deemed to have intended to override an intelligible geographical description by an unsettled political qualification? The parties in such a case must be deemed to have worded their agreement with reference to some understood sense, which can only be the popular or geographical meaning of the terms.

The language, I think, has been justly interpreted and well applied by the commissioners who prepared the delimitations in the draft of 1888; which it is to be hoped may be considered as still lying open for reconsideration and mutual adoption.

The argument, from expediency, is rather in favour of the enlargement than the narrowing of the rules of maritime jurisdiction. Modern scientific experience is gradually demonstrating the wisdom of treating fish, not more, but much less as creatures *ferœ naturæ*. They ought rather to be made the objects of a kind of farming. Unless their existence is protected, and their multiplication specially encouraged, it seems that mankind may have to deplore the ultimate extinction of this invaluable source of human food. This kind of farming requires expensive protection, an investment, as it were, in long-time improvements. It can hardly be doubted that this farming of the sea, like the farming of land, will be better carried on under a system of settled ownership than upon the principle of treating the fisheries as a right of common.

O. A. Howland.

* Wheaton, it is to be observed, uses almost the language of the treaty of 1818.

† Queen v. Keyn, p. 74.

LITERATURE, NATIONALITY, AND THE TARIFF.

THE close of another year in what we are fain to call the national life of Canada — though it still lacks the essential characteristics of nationhood—suggests a review, if it could be undertaken, with the necessary space at one's disposal, of the literary output of the last twelve months, and some estimate of its varied achievements in the field of native authorship. The subject is an inviting one, as the successes of the year have exceeded those of any previous period, while Canadian writers have, out of the country as well as in it, made good their claim to public favour, and, from the literary brotherhood of other lands, secured a large and cordial measure of recognition. But the review of the year's work which we have suggested is too large and serious an undertaking for a brief paper, to which we are in this issue confined. It is therefore not here attempted.

It is, however, gratifying to note the facts we have mentioned, though recognition abroad, while it is scantily awarded at home, is apt to draw the native writer, to our loss, to the centres in which he is appreciated, and where he is sure to find both congenial and remunerative employment. Canada has no such literary markets as are found in London, New York, or Boston. She has not such as are to be met with even in Philadelphia, Cincinnati, or Chicago. But, if she cares at all for the intellectual life, she has or ought to have what these centres cannot well have—a just pride in Canadian letters and an ardent public interest in the national advancement. The native writer who has not these patriotic influences at his back is at an especial disadvantage, for, in the absence of other incentives, they are as the breath in his nostrils to encourage and inspire him in his work. We may found new magazines and set on foot whatever other literary enterprises we like, but without patriotic feeling, or any well-defined national sentiment to support them and bid them god-speed, they are in danger of sharing the fate of their ill-starred predecessors, and unless exceptionally well-endowed are likely to come to naught.

Indifferent as the field is in Canada for the pursuit of literature, it is a pity that public apathy should conspire with other drawbacks, such as the lack of population and wealth, to render it still less attractive. The result of this indifference is what we see constantly going on, the withdrawal of the native writer from Canada, and the carrying of good work to other and better markets. We talk with horror of political annexation, yet we pay no heed to the annexation of another kind, which is drafting off across the line not only the brains and pens of the country, but the hopes and hearts of those who move and inspire them. The extent of this literary exodus, which is absorbing the local talent of almost every section of Canada, few are aware of, though its reality may be seen by a glance at the current issues of many of the American magazines. Nor is it the States alone that are drafting off the native writer and opening to him the avenues of literary employment and fame. Not a few are now finding, even in London, both the field and the opportunities denied them at home. Nor is the general exodus, which is sapping the life and energies of the country, a less appalling fact. We neither keep our own people nor those who currently come to the country. Of the latter so much as seventy-five per cent. pass annually from Ontario alone