

enforcement a novelty. As the Government of the United States chooses to put an end to the arrangement under which the fishermen of that country were accustomed to frequent Canadian waters with so much freedom, the obligation of giving notice to those fishermen that their rights were thereafter, by the action of their own Government, to be greatly restricted, and that they must not infringe the Laws of Canada, was surely a duty incumbent on the Government of the United States rather than on that of Canada. This point cannot be better expressed than in the language reported to have been recently used by Mr. Bayard, the United States' Secretary of State, in his reply to the owners of the "George Cushing," a vessel recently seized on a similar charge: "You are well aware that questions are now pending between this Government and that of Great Britain in relation to the justification of the rights of American fishing-vessels in the territorial waters of British North America, and we shall relax no effort to arrive at a satisfactory solution of the difficulty. In the meantime, it is the duty and manifest interest of all American citizens entering Canadian jurisdiction to ascertain and obey the Laws and Regulations there in force. For all unlawful depredations of property or commercial rights this Government will expect to procure redress and compensation for the innocent sufferers."

### *Interpretation of the Treaty.*

Mr. Phelps, after commenting in the language already quoted from his letter on the claim for the Customs penalty, treats, as the only question, whether the vessel is to be forfeited for purchasing bait to be used in lawful fishing. In following his argument on this point, it should be borne in mind, as already stated, that in so far as the fact of the bait having been intended to be used in lawful fishing is material to the case, that is a fact which is not admitted. It is one in respect of which the burden of proof is on the owners of the vessel, and it is one on which the owners of the vessel have not yet obtained an adjudication by the Tribunal before which the case has gone.

Mr. Phelps admits "that if the language of the Treaty of 1818 is to be interpreted literally, rather than according to its spirit and plain intent, a vessel engaged in fishing would be prohibited from entering a Canadian port for any purpose whatever, except to obtain wood or water, or to repair damages, or to seek shelter."

It is claimed on the part of the Government of Canada that this is not only the language of the Treaty of 1818, but "its spirit and plain intent." To establish this contention, it should be sufficient to point to the clear unambiguous words of the Treaty. To those clear and unambiguous words Mr. Phelps seeks to attach a hidden meaning by suggesting that certain "preposterous consequences" might ensue from giving them their ordinary construction. He says that with such a construction a vessel might be forfeited for entering a port to "post a letter, to send a telegram, to buy a newspaper, to obtain a physician in case of illness, or a surgeon in case of accident, to land or bring off a passenger, or even to lend assistance to the inhabitants, &c."

There are probably few Treaties or Statutes the literal enforcement of which might not, in certain circumstances, produce consequences worthy of being described as preposterous.

At most, this argument can only suggest that, in regard to this Treaty, as in regard to every enactment, its enforcement should not be insisted on where accidental hardships or "preposterous consequences" are likely to ensue. Equity, and a natural sense of justice, would doubtless lead the Government with which the Treaty was made to abstain from its rigid enforcement for inadvertent offences, although the right so to enforce it might be beyond question. It is for this reason that, inasmuch as the enforcement of this Treaty, to some extent, devolves on the Government of Canada, the Parliament of the Dominion has in one of the sections already quoted of the Statute relating to fishing by foreign vessels (31 Vict., cap. 61, sec. 19) intrusted the Executive with power to mitigate the severity of those provisions when an appeal to executive interference can be justified. In relation to every law of a penal character the same power for the same purpose is vested in the Executive. Mr. Phelps will find it difficult, however, to discover any authority among the jurists of his own country or of Great Britain, or among the writers on international law, for the position that, against the plain words of a Treaty or Statute, an interpretation is to be sought which will obviate all chances of hardship and render unnecessary the exercise of the executive power before mentioned.

It might fairly be urged against his argument that the Convention of 1818 is less open to an attempt to change its plain meaning than even a Statute would be. The latter is a declaration of its will by the supreme authority of the State, the former was