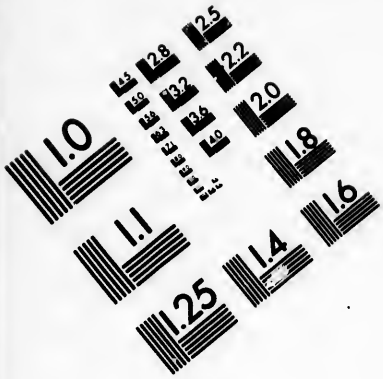

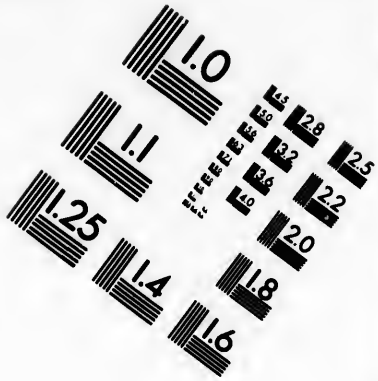

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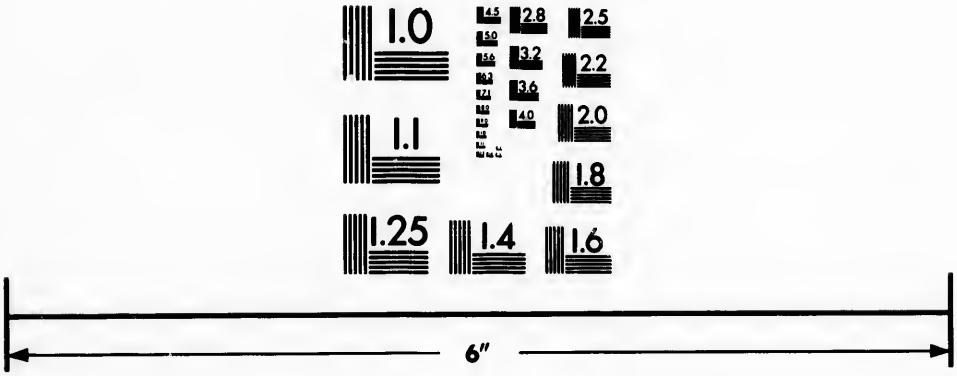

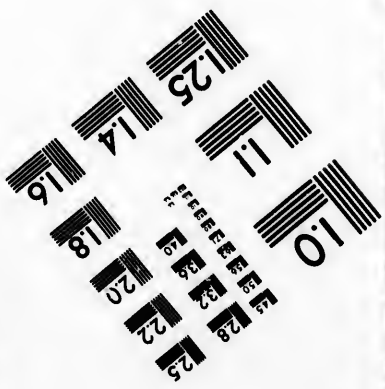

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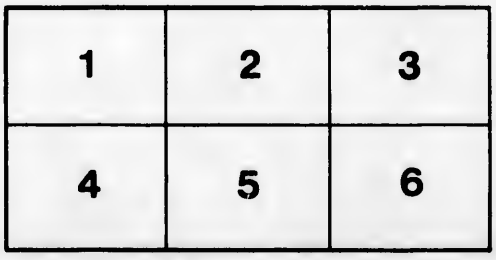

[THE CANADIAN FISHERIES.]

THE INTERNATIONAL SITUATION.

A LETTER FROM

HON. WILLIAM McDOUGALL, C.B.

To the Editor of the "Montreal Herald:"

The publicity given in the United States, as well as in Canada, to the views expressed by me in an off-hand interview with a member of the Ottawa press, on the proper construction of the Convention of 1818 has occasioned some inquiries from abroad and some adverse criticisms at home. The strained predicament of our international relations is undoubtedly a serious question for Canadians. I have been, as you were good enough to inform your readers, a Minister of the Crown in this, my native country, and claiming to be a loyal subject of Her Majesty (whose hand I have kissed and whose personal hospitality I have enjoyed), I am exceedingly anxious that no misapprehension of meaning or misrepresentation of motive shall be possible in my case. Will you, therefore, kindly publish the following re-statement of my views as to the true interpretation of Article I of the Convention of 1818, including a few of the authorities I rely upon to sustain it. The influential position and wide circulation of the *Herald*, as well as my sympathy with its political programme, incline me to ask this favor.

The following are the material portions of the text to be construed:

"Article I. Whereas differences have arisen respecting the liberty claimed by the United States for the inhabitants thereof to take, dry, and cure fish in certain coasts, bays, harbors and creeks of His Britannic Majesty's dominions in America, it is agreed between the high contracting parties that the inhabitants of the said United States shall have for ever, in common with the subjects of His Britannic Majesty, the liberty to take fish of every kind" on certain specified parts of the coast of Newfoundland, the Magdalen Islands, Labrador, &c., "with liberty forever to dry and cure fish in any of the unsettled bays, harbors and creeks," &c., of the described coasts, but requiring previous agreement with the settlers, if any, for this purpose.

"And the United States hereby renounce any liberty here-
"tofore enjoyed or claimed by the inhabitants thereof to take,
"dry, or cure fish on or within three marine miles of any of
"the coasts, bays, creeks, or harbors of His Britannic Majes-
"ty's dominions in America not included within the above-
"mentioned limits; provided, however, that the American
"fishermen shall be permitted to enter such bays or harbors
"for shelter, and of repairing damages therein, of purchasing
"wood, and of obtaining water, and for no other purpose
"whatever. But they shall be under such restrictions as may

"be necessary to prevent their taking, drying, or curing fish "therein, or in any other manner whatever abusing the priv-"ileges hereby reserved to them." (Convention 1818.)

The Canadian contention may be stated as follows:

1. That by renouncing forever any liberty theretofore enjoyed or claimed to take, dry, or cure fish on or within three marine miles of the coasts, bays, creeks, or harbors, &c., the United States renounced, also "forever," the liberty theretofore enjoyed "by the inhabitants thereof," to enter the bays, harbors, &c., with fishing vessels for the purpose of barter or trade in goods or commodities of any kind except "purchasing wood."

2. That by renouncing the liberty to take, dry, or cure fish within the three miles, the "inhabitants of the United States" also renounced the right of "innocent passage" in vessels used for fishing purposes over the high seas within three miles of the coasts, &c.

3. That fishing vessels within the three-mile limit may lawfully be seized by Canadian cruisers, or vessels of war, and, refusing to submit, may be pursued, fired upon, and captured by force.

4. That vessels so captured if found [by a Canadian court] guilty of [*a*] "fishing," or [*b*] "preparing to fish," or [*c*] "to have been fishing," within three marine miles of any of the coasts, &c., or [*d*] "has entered such waters for any purpose not permitted by the law of nations, or by treaty or convention, or by any law of the United Kingdom or of Canada," or [*e*] "having entered" the three-mile limit, has "failed to comply with any such law," shall, with their rigging, cargo, &c., "be forfeited" and sold for the benefit of the captors.

(Canadian Fisheries Act, 31 Vic., Cap. 61, and amendments.)

The United States contention, as I understand it, may be stated as follows:

1. That Article I of the Convention of 1818 was a renunciation by the United States of a right previously enjoyed by the inhabitants thereof "to take, dry, and cure fish on or within three marine miles of any of the coasts, bays," etc., mentioned therein; and that nothing else was renounced, either expressly or by implication.

2. That the motive or consideration for that renunciation was the agreement of Great Britain to acknowledge the common right "forever" of the inhabitants of the United States to take fish, etc., on the coasts of Newfoundland and other specified parts of British territory.

3. That the United States have never reasserted or claimed the liberty renounced by Article I, and therefore have not violated the Convention of 1818.

4. That while the said Article deprives inhabitants of the United States of any liberty they before enjoyed to take, dry, or cure fish, on or within three marine miles of any of the coasts, bays, etc., mentioned therein, it does not deprive them of any other right or privilege secured to the inhabitants of the United States by treaties of commerce and navigation between the two nations.

5. That Canada's assumption of power to convert the renunciation of a right to take fish in a certain part of the sea,

and to dry and cure the fish so taken on certain "coasts," into an affirmative contract against "commercial intercourse," which is secured by treaty to all the inhabitants of the two countries, is not only unwarranted by the terms of the Article, but is a breach of comity, and an act unfriendly and vexatious, which justifies reprisal.

If I have correctly stated the material points or issues between the parties in this international dispute, I may be permitted, I hope, as a Canadian citizen, to express my belief that the contention of our neighbors as to the true meaning and scope of the fishery article of the convention of 1818, cannot be honestly denied. 1st. Because the *words* import that the subject-matter is the settlement of "differences" respecting the liberty claimed "to take, dry, and cure *fish*." The preamble, which our champions seldom quote, expressly limits the article to this *one* subject. Courts and lawyers, since the time of Coke, have regarded the preamble of a statute as "the key" to its meaning. (Coke, 4th inst., 330.) In our days preamble are not much used in statutes, but they are still deemed essential in treaties and conventions. (*See* the Treaty of Washington, 1871.) 2nd. Because it is a well settled rule with jurists and legal tribunals that words are to be understood according to the subject of them. The rule was thus expressed by the civilians: *Verba generalia restringuntur ad habilitatem rei vel aptitudinem personæ*. (General words must be restricted to the nature of the subject-matter or the aptitude of the person.) Bacon, Max. Reg. 10. 3rd. Because distinguished writers on international law (acknowledged as authorities in this department of jurisprudence by the learned of both nations) inform us that: "Treaties of every "kind when made by competent authority are as obligatory "upon nations as private contracts are binding on individuals, "and they are to receive a *fair and liberal interpretation*, and "to be kept with the most scrupulous good faith. Their "meaning is to be ascertained by the same rules of construc-"tion and course of reasoning which we apply to the inter-"pretation of private contracts." (Kent's International Law, edited by Dr. Adby, late regius professor of laws in the University of Cambridge, 1877. p. 391.)

Another passage may be quoted as bearing upon the recent action of Congress: "If a treaty should in fact be vio-"lated by one of the contracting parties, either by proceed-"ings incompatible with the particular nature of the treaty, or "by an intentional breach of any of its articles, it rests alone "with the injured party to pronounce it broken" (pp. 391, 392).

Dr. Lieber, a very high authority on the rules of interpretation and construction, declares that "the more the text par-"takes of the nature of a compact or solemn agreement the "closer ought to be its construction," and that "words are "always understood as having regard to the subject matter." (Legal and Political Hermeneutics, Prof. Hammond's edition, 1880, pp. 136, 159.)

The rule of *close construction* was applied in a famous controversy between the same parties as to the "true construction and meaning" of Article I of the Treaty of Ghent, respecting the "carrying away" of slaves by British ships at the close of the war of 1812. Having been referred to the

Emperor of Russia, that distinguished arbitrator (advised, no doubt, by the first diplomat of his time, Count Nesselrode,) held that he must decide "upon the construction of the text of the article as it stands," and "according to the literal and grammatical sense." The respective plenipotentiaries acquiesced, and the Czar gave judgment in favor of the slave owners, *strictissimi juris*. The dispute, which began in 1814, was finally adjusted in 1826 by the payment of $1,204,000 by Great Britain.

Have we forgotten that precedent? Are we about to enter upon a war of *reprisals* over the meaning of an incidental phrase in a contract about *fish*, to be followed by a war of blood? Heaven forbid!

I submit that we are estopped by the judgment of the Halifax Commisssion from claiming that commercial intercourse was interdicted to American fishing vessels by the words "for no other purpose whatever" in the Convention of 1818. Among "the privileges secured" to the United States by the Treaty of Washington, for which Canada claimed compensation at Halifax, were: "Access to the shores for the "purpose of engaging sailors, *buying* supplies, transferring "cargoes, and *trafficking* generally in British ports and har- "bors, etc." In the British case before the Commission it is averred that "these advantages are indispensable to the "success of foreign fishing on Canadian coasts." Now, if trading privileges are neither allowed nor prohibited by the Convention of 1818, but owe their existence to the Treaty of 1794, and other subsequent treaties of commerce and navigation, as I contend, they were certainly not "accorded" by the Treaty of Washington. Therefore, they could not be the subject of compensation. And therefore the Commission decided: "That it is not within the competence of this tribunal "to award compensation for commercial intercourse between "the two countries, nor for the purchasing of bait, ice, supplies, "etc., nor for the permission to tranship cargoes in British "waters." (Protocol No. 33.)

Even Sir Alexander Galt, the British Commissioner, was compelled to repudiate this preposterous claim that "commercial intercourse" was a thing to be bought and paid for in hard cash. It is true he appended an argumentative apology for not dissenting from his co-judges, though in view of the solemn declaration he had taken to decide according to "justice and equity," I would, as an ex-colleague and friend of that gentleman, have been better pleased if he had omitted the apology.

Let us have done with shams and pretences. Let us frankly admit that we are still a colony; that we are minors; that we have no flag which maritime nations are bound to respect, except the flag of England. Let us not forget that a *Canadian* cruiser firing upon an American vessel while navigating the "high seas" in time of peace is violating the law of nations and incurring very serious risks. And, finally, let us confess that neither the official interpretation nor the enforcement of ancient treaties and conventions between Great Britain and the United States have been assigned to us by the high contracting parties.

I am, &c.,

WM. McDOUGALL.

OTTAWA, *April 16, 1887.*