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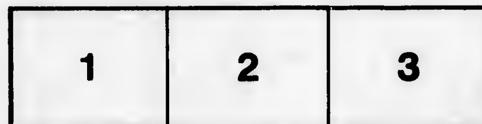

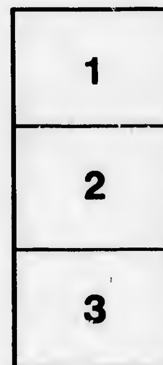

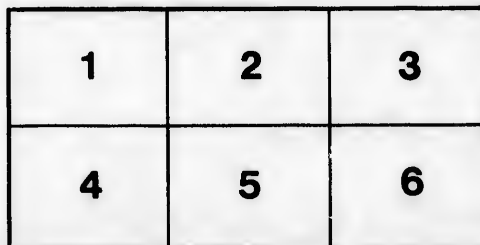

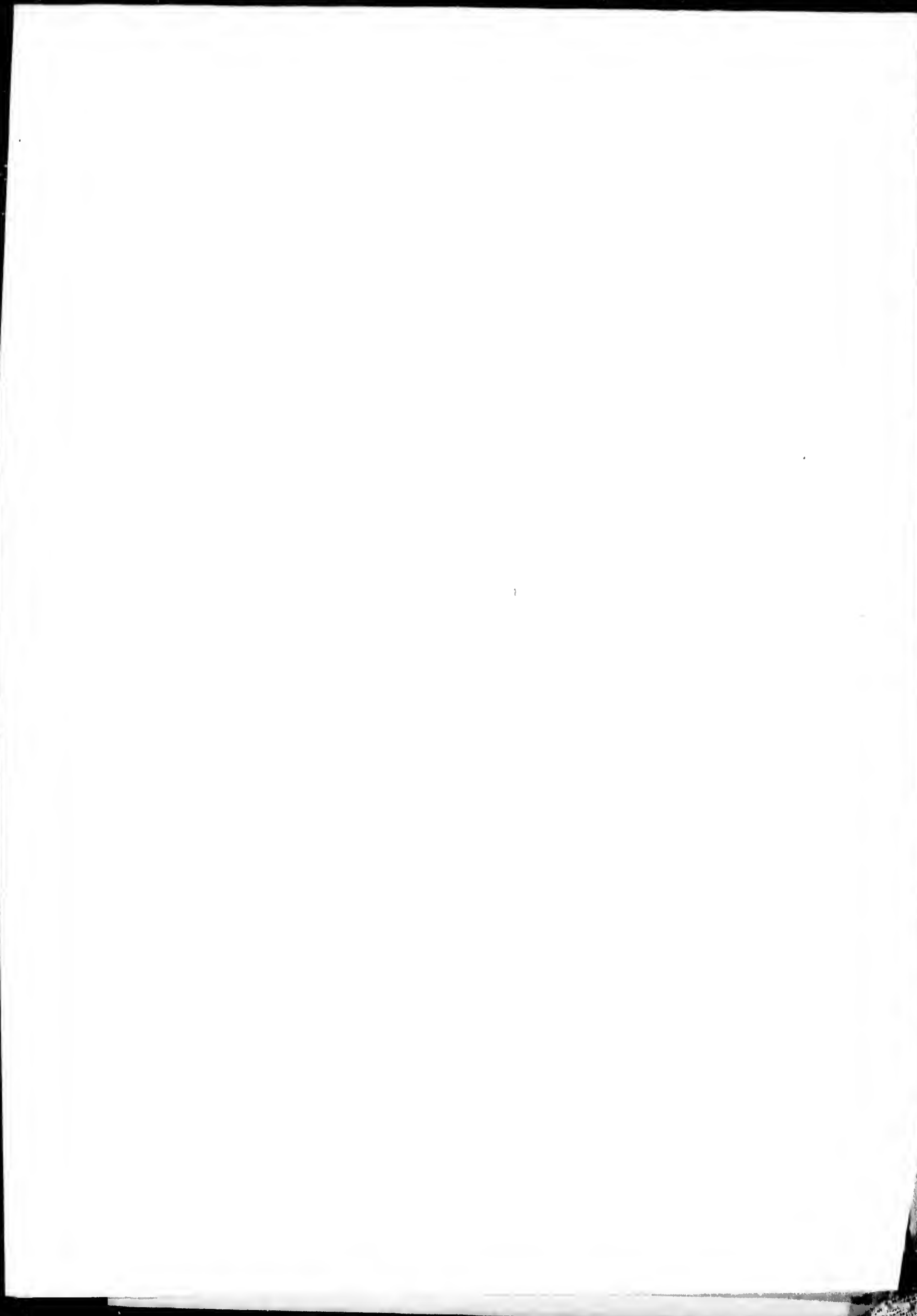

AN ANSWER

TO THE

HON. E. J. PHELP'S PAPER

ON THE

BERING SEA CONTROVERSY

IN

HARPERS' MAGAZINE

FOR APRIL 1891

Robert Raynaer

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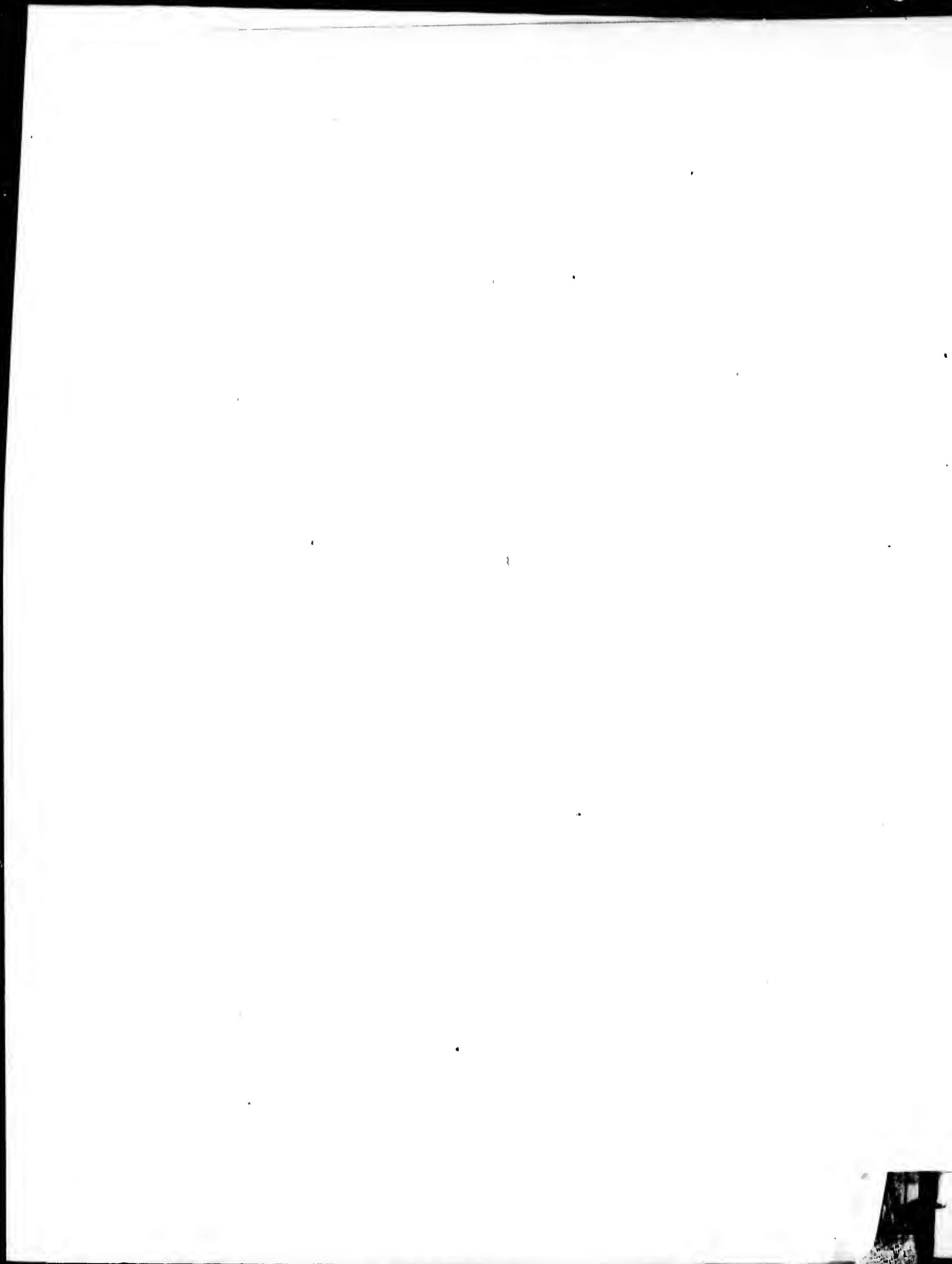

An Answer to the Honorable E. J. Phelps's Paper on the Bering Sea Controversy, in Harpers' Magazine for April, 1891.

An opinion on this question, by a gentleman of the standing and the antecedents of Professor Phelps, is one which, as a matter of course, will secure the respectful attention of every one wishing to inform himself on the real merits of the case. His ripe scholarship in the science of law, and the exceptional opportunities for acquiring special and exact information, which his position as one of the participators in the official discussions gave him, invest his utterances on the subject, in the eyes of the great mass of his countrymen, almost with the authority of a decision by a judge, after a fair trial. Moreover, the Professor is a Democrat, and the mere fact of the endorsement by this Democrat, of the position assumed in the matter by our present Republican administration, will be taken by a great many of both political parties as the strongest prima facie evidence of the impregnability of that position.

The Professor's paper is, therefore, one which the opponents of Mr. Blaine's policy in the matter cannot afford to pass over in silence; because, such silence would be construed, by the public, as a confession of the impossibility to give any valid and conclusive answer.

Discussions of this kind in the press are, in some respects, not unlike trials in court before a jury, but with this great difference that, in press discussions, there is no presiding judge to enforce upon the respective pleaders that invariable rule of the courts which insists upon the presentation of the truth, the whole truth, and nothing but the truth. In the absence of such a superior power, a writer who addresses a jury composed of readers, is at liberty to decide for himself whether he will act as an ex-parte advocate, who not only repeats unhesitatingly his client's misstatements, but superadds misstatements of his own, and then wrenches the law to fit his case, or, whether he will act as an impartial judge, who, after having himself scrutinized the evidence, sums it up truthfully, and states the law justly.

A comparison of the evidence as presented by Mr. Phelps with that presented by the official documents, and an analysis of his argument will show which of these two roles he has chosen to take in his article.

The objection to his argument is twofold. In part, it is perfectly logical and consistent, but based upon premises wrong in fact and in law; in part it is made up of illogical and inconsistent deductions from correct premises, and, consequently no part of his argument will hold water, any more than that charming boat of the French poet:

> "le plus beau des canots,
> il n'avait qu'un défaut,
> c'était d'aller au fond de l'eau."

To begin with, there is a grave difference between our author's narrative, and the official documents, as to *the sequence of events.**

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*Reference to authorities will be by page, i. e.:
p. 767, H. M.—Harpers' Magazine, April, 91.
p. 20, S. E. D. 106. 50C. 2S.— Senate Executive Document No. 106. 50th Congress, 2d Session
p. 59 H. E. D. 450. 51 C. 1S.— House " " " 450. 50th " 1st Session
and the mention of the number of a page alone, will always refer to the document last cited. All italics are mine, unless specialized as "O. I"—original italics.

"During the administration of President Cleveland, and *as soon as these depredations were made known*, our government applied to that of Great Britain" with a proposal for a convention to regulate sealing in Bering Sea. (p. 767 H. M.) Secretary Blaine insists repeatedly, and especially 30 June 1890, that the sealing complained of began only in 1886, (p. 89, H. E. D. 450.51 C. 1 S.) According to S. E. D. 106.50 C. 2 S.,

pp. 20.30 & 40, our first seizures of British sealers were made, 1 & 2 Aug. 1886
" 26.36 & 47 " " condemnations of them " " 4 Oct. "
" 84. footnote " " overtures for a convention " " 19 Aug. 1887.

Consequently, our forcible measures preceded our diplomatic measures by more than a whole year. If any diplomatic steps were taken before 19 Aug. '87, by our government for a friendly and peaceable arrangement, it has not seen fit to publish anything about them, and as Mr. Phelps declares that he is writing, without attempting to state anything not already laid before the public, (p 767 H. M.), I shall likewise confine myself to the documents officially published.

The importance of this order of sequence becomes evident from some later remarks of Mr. Phelps. "The *application made* by the American government to Great Britain *when the depredations* complained of BEGAN, for a convention, by agreement of the countries interested, under which the capture of the seals should be regulated, *was the proper course to be taken. International courtesy required it* BEFORE *proceeding to any abrupt measures.*" (p. 773. H. M.)

If our official publications can be relied on, "international courtesy," as defined by Mr. Phelps himself, so far from having been observed by us, as he implies, has, therefore, been grossly violated by us. It was "a word and a blow, and the blow first." We began to seize in August '86, to condemn in the October following, but we did not begin to move for a convention until fully twelve months after our seizures. No complaint was made and no warning was given by us. Indeed, there could not have been, for the whole tenor of Mr. Bayard's despatches shows, that the news of the seizures of '86 came upon him with all the unexpectedness of an "untoward event." And it was the same with the seizures of '87; for he writes, 13 Aug. '87(p 49 S. E. D. 106.50 C 2 S.), that he knew nothing of them, until he received the information on 11 Aug. '87 from the British Minister, and also that, "having no reason to anticipate any other seizures. . . . ."

Perhaps, Mr. Phelps thinks that a mere seizing of a few small vessels, their confiscation, and the condemnation of their captains and mates to heavy fines and imprisonment, are not "abrupt measures," and that "abruptness" would be fairly chargeable only if we had incontinently hanged, drawn and quartered every one of the piratical crews!

A brief recapitulation of events will show that our failure to comply with the requirements of "international courtesy," which at the beginning of the embroglio was evidently accidental, so far as Secretary Bayard was concerned, had apparently, become intentional under the present administration.

26 Jan'y. '87. The Attorney General gives telegraphic orders to release the seized British sealers (p. 56).
3 Feb'y. '87. Official advice of this to the British Minister (p. 12).
19 Aug. '87. Overtures for a convention (p. 84.)

Cessation of all interference during '88, but "very clear" if unofficial, assurance from Mr. Bayard, that "pending negotiations" there would be no interference with British sealers (p. 2 & 6 H. E. D. 450.51 C.1S.)

28 Feb'y '89. Abortive attempt of the House to declare Sect. 1956, U. S. Rev. Statutes applicable to all the waters of Bering Sea within the boundary lines of the treaty ceding Alaska. Complete "back down" of the House, at the instance of the Senate, resulting in the explicit and significant statement that the new law left out "the words that are descriptive of the boundaries of Alaska."

No official assertion, on our part, of any exclusive right to, or of any jurisdiction over ex-territorial waters in Bering Sea, exclusive or concurrent, as to foreigners there, and no warning that we intend to assume either, until 22 Jan'y' 90 in Mr. Blaine's great "bonos mores" despatch, though more and very peculiar "abrupt measures" had been resorted to by our cruisers from July '89. The nearest approach to anything of the kind is 19 Aug. '87, in Mr. Bayard's despatch, initiating steps for a convention. "Without raising any questions as to the exceptional measures which the peculiar character of the property in question"—which by the context is not the seals, but, the fur-seal fisheries"—"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." p. 84 S. E. D. 106. 50 C. 2 S.

To what Mr. Phelps is pleased to call, "the ordinary mind" (p. 767 H. M.) this passage appears like a very distinct official pledge, (corroborating the un-official assurance,) that just as little as we intended to raise these questions by *argument*, did we intend to raise them by *acts of force*. And the diplomatists seem to have put the same construction upon this and upon the occurrences related. For there is no indication that anything out of the common may be impending, until 24 Aug. '89 p. 2 H. E. D. 450.51 C. 1 S. when there is a British enquiry as to rumors of searching and seizing, and a request for stringent counter instructions, which elicited that extraordinary explosion of courtesy from Mr. Blaine in his reply of same date "that the same rumors, *probably based on truth*, have reached the Government of the United States, but that up to this date there has been no official communication received on the subject."

Of course, people's ideas of courtesy, whether international or individual, differ. In Mr. Phelp's eyes our official action and non-action may be quite as much in strict accordance with the requirements of the case, as was undoubtedly in the eyes of our President, his late refusal to receive the obligatory ceremonial call upon him of the Canadian representatives, who had come on public business by official appointment. It all depends upon the standard of courtesy which one applies. The popular idea has always been that this standard is even a higher, a more exacting one, in the intercourse of diplomatists, than in that of "ordinary minds." Measured by the amenities usual among ordinary, well-bred people, our official treatment of, and our responses vouchsafed to, Great Britain and Canada have the savor of that evasiveness, which Paddy pleaded in excuse to the charge of having behaved like a boor. "What did you say, Paddy?" "Oh, I gave an evasive answer, I merely told the fellow to go to . . . . (Sheol).

Concerning the negotiations for a convention to prescribe a "close time" Mr. Phelps says (p.767 H. M.) "This proposal was not met on the part of the British government by any assertion of the right of the Canadians to destroy the seal in the manner complained of, or by any vindication of the propriety of that business."

Why should it have been thus met? The right had been asserted and vindicated already twice before, in the despatches of 30 Oct. '86 and 9 Jan'y '87 (p. 8 & 10, S. E. D. 106 50 C. 2 S.) Besides, as we have just seen, in our initial proposition, we had expressly declined to argue on questions of right, and Mr. Phelps himself corroborated this in his despatch of 12 Nov. '87 " . . . . . . ; such agreement to be entirely irrespective of any questions of conflicting jurisdiction in those waters." (p. 87.)

"But it is to be borne in mind," says Mr. Phelps, (p. 771 H. M.) " in this discussion that *Great Britain has never yet*, in all the correspondence that has taken place,*asserted the right of the Canadians to do what they have been engaged in.* The question is not one of abstract theory. *It is whether the Canadian ships have an indefeasible right to do precisely what they have done* and are doing, *despite the necessary consequences* that must follow."

If this allegation were true, the puzzle would be how any controversy could have arisen. But to make it possible for Mr. Phelps to put forth these allegations, he must have "dis-remembered" not a few British despatches, in which the assertion of the said right was made; not only in the negative form of protests against our preventing Canadians from sealing, coupled with demands for indemnification, but also in the most expressly and broadly affirmative form.

In the two despatches, 30 Oct. '86, and 9 Jan'y '87, cited above, the sealing done is characterized as "the *peaceful—peaceable—and lawful occupation of Canadian citizens on the high seas.*"

"Her Majesty's Government would deeply regret that the pursuit of furseals on the high seas by British vessels should involve even the slightest injury to the people of the United States. *If the case should be proved*, they will be ready to consider what measures can be properly taken, for the remedy of such injury, *but they would be unable* ON THAT GROUND *to depart from a principle on which free commerce on the high seas depends.*" (p. 62 H. E. D. 450. 51 C. 1 S. 22 May 1890.) "Her Majesty's Government do not deny that if all sealing were stopped in Bering Sea, except on the islands in possession of the lessees of the United States, the seal may increase and multiply at an even more extraordinary rate than at present, and *the seal fishery* on the island may become a monopoly of increasing value, *but they cannot admit that this is a sufficient ground to justify the United States in forcibly depriving other nations of any share in this industry in waters which, by the recognized law of nations, are now free to all the world.*" (p. 64.)

In the absence of an agreement the British Government "are *unable to admit that the case put forward on behalf of the United States affords any sufficient justification, for the forcible action already taken by them against peaceable subjects of Her Majesty engaged in lawful operations on the high seas.*" (p. 64.) "*The rights they*"—the British Government—"*have demanded have been those of free navigation and fishery* in waters which, previous to their own acquisition of Alaska, the United States declared to be free and open to all vessels". (p. 64.)

Mr. Phelps states (p. 771 H. M.) that "Mr. Blaine inquires in his *recent* communication," —then it must be in his depatch of 17 Dec. '90.— "whether the United States government is to understand that her Majesty's government maintains *that the right contended for by Canada exists*. This is a question to which he will not be likely to obtain a direct reply."

Well, Mr. Blaine has perpetrated a good many absurdities in his part of the controversy, but it is not he who has been guilty of this particular one. He knew that Great Britian had persistently asserted that the right contended for by Canada does exist, and he asked no such question as Mr. Phelps states. Mr. Phelps has merely misread the query really put, which referred to an entirely different matter, namely, the British St. Helena act. After citing this act (p. 41. H. E. D. 144. 51 C. 2 S.) and commenting on it at length, Mr. Blaine asks (p.42.) "Is this Government to understand that Lord Salisbury justifies the course of England? Is this Government to understand that Lord Salisbury maintains the right of England, at her will and pleasure, to obstruct the highway of commerce in mid-ocean, and that she will at the same time interpose objections to the United States exercising her jurisdiction beyond the 3-mile limit, in a remote and unused sea, for the sole purpose of preserving the most valuable fur seal fishery in the world from remediless destruction." It is, therefore, an inquiry whether England denies the force of this particular" tuquoque, argument!

Concerning the negotiations for a convention, Mr. Phelps charges Great Britain with procrastination, and evasion of the real issue, and the substitution for this, of abstract and incidental questions and of colonial contentions "without committing themselves"—i. e. the British ministers—"directly, upon the decisive point on which the controversy turns" (p. 772 H. M.) Canada, he implies, is a spoiled child which has outgrown parental authority, a greedy marplot, who robs the neighbor's seal-roost, and Great Britain, whilst inclined to do herself what is proper, is a blindly indulgent parent, afraid and impotent herself to coerce her brat, yet protecting it from the requisite disciplining by the neighbor! All this is no doubt Mr. Phelps's honest opinion, but it is nevertheless the direct opposite of the actuality.

We have just seen, that Great Britain has met the exact issue most squarely by asserting explicitly Canada's (and everybody else's) right to seal on the high seas, even if it should injure our seal produce. There is not the slightest evasion of the real issue; but, nevertheless, she is willing to inquire whether any injury is being done to the United States, and if so, to adopt remedial measures. The testimony advanced by us was, that such sealing as the Canadians practised would very soon exterminate these animals in Bering Sea and vicinity (p. 88-96. S. E. D. 106. 50 C. 2 S.) *On the strength of this testimony* Lord Salisbury "assented" to a close time, and there is a contention between the two governments, or more strictly speaking, between Mr. Phelps, our Minister in London at the time, and Lord Salisbury, as to the exact terms of agreement assented to. The documents published leave a great deal of the subject in the dark, and it must be remembered that Mr. Bayard stated officially that: "Other correspondence, of a confidential character, and as yet incomplete, exists" which it was then—12 Feb'y '89 and has ever since been—deemed inexpedient to publish (p. 1) The part of the correspondence published shows the following: 12 Nov., '87, Mr. Phelps reports that he has

proposed to the British Minister "that *by mutual agreement*" "a code of regulations *should be* adopted for the preservation of the seals in Bering Sea from destruction at improper times and by improper means . . . . . "
"His Lordship promptly acquiesced in *this proposal*," and asks Mr. Phelps *to submit* "*a sketch of a system of regulations*," which request the latter communicates to Mr. Bayard (p. 87.) Feb'y 7, '88 Mr. Bayard, replying to this, *does not send the desired sketch*, but thinks it expedient, *before making a definite proposition*, to describe some of the conditions of seal life; . . . . " and for this purpose he encloses letters from two experts, Messrs. Clarke and Elliott, neither of which submit "regulations," (pp. 88-96.) The only definite thing which Mr. Bayard states is, that extermination can only be obviated by the prevention of the killing north of 50° N. between 160° W. and 170° E. from April 15 to Nov. 1, and that such prevention "within a marine belt of 40 or 50 miles from the islands during that period would be ineffectual . . . . " (p. 89.) Feb'y 25, '88, Mr. Phelps reports, "Lord Salisbury assents to your proposition to *establish, by mutual arrangement*" . . . . " a close time for fur seals" between April 15 and Nov. 1, and 160° W and 170 E in the Bering Sea. "He will also join" the U. S. Government "in any preventive measures it *may be thought best to adopt* . . . . " (p. 97.) March 2, '88, Mr. Bayard writes, "In regard to the trial of offenders for violation of the *proposed regulations*, provision *might be made* for such trial by handing over the alleged offender to the courts of his own country." (p. 98.) Early in April, '88 the Russians take part in the conferences wishing, "to include in the *proposed arrangement* that part of Bering Sea in which the Commander Islands are situated, and also the sea of Okhotsk." (p. 98) April 20, '88, our chargé d'affaires, Mr. White, reports a conference on April 16, "for the purpose of discussing" "the details of the proposed conventional arrangement . . . " Russia wanted her rookeries included, and *also the importation of firearms, munitions and liquors prevented.* "Lord Salisbury expressed no opinion with regard to the latter proposition, but suggested: "that besides the whole of Bering Sea, those portions of the Sea of Okhotsk and of the Pacific Ocean north of "47° N." "should be included in the *proposed arrangement.*" He also intimated that a close season up to Oct. 1 might be long enough. Mr. White, himself said . . . I should be obliged to refer to you the *proposals which had just been made* . . . ."

"Meanwhile, the Marquis of Salisbury promised to have prepared *a draught convention for submission* to the Russian ambassador and to myself." (p. 100) May 1, '88, Mr. Bayard writes, that he does not object to the inclusion of the Sea of Okhotsk. "Nor is it thought absolutely necessary to insist on the extension of the close season till" Nov. 1, but " . . . it seems advisable to take Oct. 15 instead of Oct. 1 as the end of the close season, though Nov. 1 would be safer. Thinks it advisable to regulate the subject of firearms and liquors separately. (p. 101.) 20 June '88, Mr. White reports, that he called *May 16* at the Foreign Office for more "discussing." "*Unfortunately*, Lord Salisbury had just received a communication from the Canadian government stating that a memorandum on the subject would shortly be forwarded to London, and expressing a hope that, pending the arrival of that document, no further steps would be taken in the matter by her Majesty's Government. Under these circumstances, Lord Salisbury felt bound to await the Canadian

memorandum before proceeding to draft the convention." (102.) This is the last despatch referring to the negotiations, through Mr. Phelps, which we have published in *extenso.*

Mr. Blaine, in his despatch of May 29, '90, refers to an unpublished letter of Mr. Phelps, of 12 Sept. '88, as stating that the convention had been "virtually agreed upon, except in its details; but, that Canada objected to any such restrictions, and that until its consent could be obtained, Her Majesty's Goverment was not willing to enter into the convention." (p. 68, H. E. D. 450 51 C. 1 S.) Thereupon, Mr. Blaine breaks out with ". . Lord Salisbury would have dealt more frankly, if, in the beginning, he had informed Minister Phelps that no arrangement could be made unless Canada concurred in it, and that all negotiation with the British Government direct was but a loss of time." (p. 68.) He also refers to "pointed assurance" given 23 April, '88, by Lord Salisbury that: "it is now *proposed* to give effect to a seal convention by order in council, not by act of Parliament" (p. 67).

Nothing published by our Government gives such a despatch, *as far as I am aware*, and Lord Salisbury denies, 20 June '90, the proposal, but points out how already, April 27, '88, Mr. White was informed by note that . . . "he"—Lord Salisbury—"had to refer to the Canadian Government . . ." and April 28, '88, concerning the necessity of an act of Parliament (p. 90 and 91). He further cites from his note, 16 April, '88, to the British Minister at Washington: "At this preliminary discussion it was decided *provisionally, in order to furnish a basis for negotiation, and without definitively pledging our Governments,* . . . . "(O. I.) p. 92.

From all this, it is clear that the negotiations of '88 never passed beyond the most initial steps; a basis for something beyond and still to be done. If a draft of regulations was submitted by us, as Mr. Phelps says it was (p. 767 H. M.) it has not been published, and the correspondence published does not show its submittance, nor does it, after 8 Feb'y '88, refer to such a draft as even existing. Mr. Phelps says: "But *after a considerable delay it transpired* that an *unexpected* obstacle had arisen. *It came to be understood* that Canada . . . . declined to assent to . . . . the proposed restrictions . . . ." (p. 767). Mr. Blaine, in his letter of 29 May, '90, makes a somewhat similar assertion, as we have just seen, and then, 4 June, '90, charges that *England "abruptly closed the negotiations"* (p. 72 H. E. D. 450 51 C. 1 S.). In reply to the British quotation of Mr. Phelps's own remark on April 3, '88, that: " . . . with a general election impending, it would be of little use and indeed hardly practicable to conduct any negotiation to its issue before the general election has taken place.", Mr. Blaine swallows his own words with the greatest alacrity by saying: "I am quite ready to admit that such a statement made by Mr. Phelps might now be adduced as one of the reasons for breaking off the negotiation, *if in fact the negotiation had been broken off, but Lord Salisbury immediately proceeded with the negotiation.*" (July 19, '90 p. 95.) The British despatch of 20, June '90, asserts that Mr. White's version of what Mr. Blaine calls the pointed assurance of 23 April, '88, was a mistake, and shows how it was cleared up by two English notes of 27 and 28, April, '88, explaining the legislative measures necessary to be taken by the British administration, and stating clearly. "But neither convention nor bill is drafted yet, because we have not got the

opinions from Canada which are necessary to enable us to proceed." (p. 91.) Already, on May 16, '88, our chargé had learned that Canada wanted to be heard from before anything was concluded, so there was no "considerable delay," nor did this "transpire" or, "become understood," but was all officially communicated, plainly and straightforwardly. Negotiators in international affairs must be supposed to possess, and to be guided in all their doings by, the necessary elementary knowledge of such affairs; to be conversant with the constitutional powers of their respective governments, their methods of legislation, and their relations with subordinate branches (States or Colonies). Neither British consultation of Canada, nor the latter's opposition ought to have been an "*unexpected* obstacle" for our diplomatists. The former was in strict conformance to British practice, demonstrated to us *ad nauseam*, during the many previous negotiations on Canadian questions, and the latter was the inevitable result of our high-handed and illegal interference with a profitable and lawful business. An American statesman of any experience could not have expected anything else, and would have been astonished if he had found a British minister so negligent of his duty as not to consult the colony primarily affected, and a colony so blind to its rights and interests as not to object.

But Mr. Phelps misses another and still more essential point. Such assent, to enter into some sort of agreement for protection of the seals, as may have been given by Great Britain, was given in reliance upon the truth of our representation that under continuance of pelagic sealing, speedy extermination of the seals was inevitable. The published correspondence does not show *when Canada* FIRST *denied this theory*. She may, or she may not, have used due diligence to collect data and to present counter-evidence; at all events, a Canadian memorandum was officially communicated, 9 March, '90, to Secretary Blaine (p. 26-51) in rebuttal of the extermination theory. This memorandum demonstrates the absurdity of one of our arguments; the one that, as unrestricted sealing had exterminated the seal in the Southern Oceans, it could only have the same result in Bering Sea, by showing that the methods of sealing in these respective seas were entirely different, namely: In the south, no sealing at sea, no protection of rookeries, but persistent pursuit on the rookeries and the slaughter of every seal found on them; in the north, unrestricted sealing only at sea, with protection for the rookeries, as inadequte or as perfect as our Government chooses to make it. The testimony appears to be very strong, and consists, in part, of the statements of our own officials.

All this, Mr. Phelps does not even allude to. As far as his article is concerned, one would fancy that our extermination theory was an established fact, which nobody had ventured to question. In support of the theory, he quotes Mr. Blaine's statement that our rookeries, "carefully guarded and preserved," yielded from '79 to '90, 100,000 skins per year; that "Canadian intrusion began in '86, and so great has been the damage resulting from their destruction of seal life in the open sea surrounding the Pribyloff Islands, that in 1890 the Government of the United States limited the Alaska Company"—in reality the new or North American Company—"to sixty thousand seals. But the company *was* ABLE TO SECURE *only twenty-one thousand seals*." Even if true, this argumentation would have no other foundation than that old fallacy in logic, *post hoc, ergo propter hoc*, according to which, a certain state of things is

ascribed solely to some one circumstance or condition; as if none of the other circumstances or conditions, however inevitably connected with said state of things, had or could have had any influence whatever. Assuming that the number of seals resorting to our islands has decreased, this does not prove that the number of seals resorting to Bering Sea, in general, has decreased. Such decrease, even if general throughout that sea, may be due to other causes besides excessive marine sealing. And, least of all, is the number of seals actually killed on the islands by the lessees, any criterion of the number of seals resorting to the islands, and that consequently might be killed during any given season. On all these points, our official publications furnish very interesting testimony. In his evidence before the House Committee investigating, during the summer of'88, the fur seal fisheries, Mr. C. A. Williams, one of the founders of the old Alaska Commercial Co., speaking of the Russian management of the islands, remarked, "It was supposed at that time that the commencement of seal life on the islands of Bering and Copper"—the rookeries in the western part of Bering Sea which still belong to Russia—"probably took place by reason of the indiscriminate killing on those"—the Pribyloff—"islands, diverting the seals from their usual haunts and making them seek some other localities. *Q.* Was there a large number of seals which left the Pribylov group and went over to the Russian islands? *A.* You could hardly expect them to go in a body. There had hardly been any sealing or seal life to any extent on the Commander Islands or Copper and Bering. It had not attracted the attention of the Russians, but after the indiscriminate killing on the islands of St. Paul and St. George, it was noticed that seal life increased rapidly on the other islands, and the supposition is a natural one that they were diverted from the islands on which they had before been undisturbed and sought other places." (p. 77, 78 H. R. 3883 50 C. 2 S.) "Indeed, it was predicted by Russian authorities, conversant with seal life, at the time of the cession of the Territory that the reckless and indiscriminate killing of seal by the Americans would soon drive the Pribylov herd to the Russian islands, and thus they (the Russians) would regain and retain all that was most valuable in the ceded territory." (p. 112) Professor Elliott in his monograph on the seal islands in Vol. 8 of the Census of 1880, expresses the same idea. "If the Russian islands are suitable for rookeries what guaranties have we that the seal life on Copper and Bering islands, at some future time may not be greatly augmented, by a corresponding diminution of our own, with no other than natural causes operating."(p. 69.) He also says that the seals "are not particularly attached to the respective places of their birth" that they require for their food very large quantities of fish, and that the wanderings of these latter determine the wanderings of the former. It is not impossible, nor improbable, that the fishes of the Pacific are given to migrations similar to those of the fishes of the Atlantic, where we know that different kinds have deserted old haunts *en masse* and for years, perhaps to reappear by and by, for some equally inscrutable reason. Or, the killing on the islands, considered proper and legitimate by the government and lessees may strike the seals as "indiscriminate slaughter," to be escaped from at any sacrifice, even that of their homes.

Then, again, seals are subject to "immense mortality" in consequence of unfavorable weather, or, of epidemics even. Professor Elliott, in his said

monograph, (p. 333) speaks of the excessively cold winter of 1835-36, and the continuance of the cold far into the summer of '36, which caused such an "immense mortality" of seals in Bering Sea, and Mr. A. Howard Clark, in his article on "The Antarctic Fur Seal," etc., mentions Captain Morrell's report of the evidence of the death by disease of half a million on Possession Island (Lat. 26° 51′ S., 15° 12′ E.) and of "immense numbers" on two small islands near by. (The Fisheries and Fish Industries of the United States by the United States Commissioner of Fish and Fisheries, published 1887, Sec. V, Vol. 2, pp. 333 and 416) see also Elliott's Monograph, Vol. 8, U. S. Census, 1880, p. 62.)

Just so little as a decrease in the number of seals resorting to our islands—if such decrease be a fact—proves that it is CAUSED by sealing beyond the three-mile belt, just as little is the action of our government in reducing the number to be lawfully killed on these islands by the lessees, any such proof! True, this reduction amounts to 40 per cent., but the indications are that it is nothing more than a political move, the throwing of a sprat to catch a whale. If the British Government could be induced by any such move to withdraw from its position, and thus to give us the practical monopoly of the seal industry, the sacrifice of the entire island catch for several years would be only a trifle! The lessees, on the other hand, know that if all other conditions remain as before, a reduced supply of seal skins in the selling market would cause a corresponding rise in price. The old Alaska Company's witnesses testified how that company used to "nurse" the market. One of their employees, Dr. McIntire, stated: " . . . . . , and we took the full quota, except during two years. During these years we failed, not because we could not get enough seals, but because the market did not demand them. There were plenty of seals." (H. R. 3883. 50 C. 2 S. p. 121; see also p. 101.)

" . . . but the Company was able to secure only 21,000 seals" says Mr. Phelps (H. M. 767.) Certainly, but the Company's agent on the Islands says, only because the Treasury Agent there prevented them. The latter forbade killing after the 20th, July '90, eleven days earlier than usual, giving as his reason, an alarming falling off in numbers, and suggesting a stoppage of killing for an "indefinite number of years." Per contra, the Company's agent protested, stating "We have every reason to believe from the *marked increase* of *new arrivals* of *fine seals*, that, if we were allowed by you to continue our killing under the law, we could fill our quota of 60,000 seals." (O.I. S. E. D. 49, 51 C. 2 S. pp. 4, 6 and 27.) The Treasury Agent refers to the presence of Professor H. W. Elliott on the Islands in July '90, as "Treasury Agent" and to a "forthcoming report" of Prof. Elliott's. (pp. 3 and 32.) The public has not been allowed to see it as yet.

Mr. Phelps tells us in the beginning of his paper, that: "The Alaska fur seal fishery . . . . was a material element in the value of that province . . . and one of the principal inducements upon which the purchase was made." Two American witnesses, both particularly familiar with the subject matter, Prof. Elliott in his monograph already cited, and Mr. C. A. Williams of the old Alaska Company testify to the extraordinary ignorance of the value of these fisheries prevailing everywhere, until the Alaska Company demonstrated it. Elliott in Vol 8, U. S. Census of 1880, p. 68, and Williams in H. Rep. 3883, 50 C. 2 S. p. 88.) Prof. Elliott points out that Senator Sumner

was the chief spokesman in advocacy of the treaty of 1867, that his speech, (9 April '67) "is the embodiment of everything that could be scraped together, having the faintest shadow of authenticity, by all the eager friends of the purchase, which gave the least idea of any valuable natural resources in Alaska; therefore, when in summing up all this, Sumner makes no reference whatever to the seal islands or the fur-seal itself, the extraordinary ignorance at home and abroad, relative to the Pribyloff Islands can be well appreciated."

And it is a fact that Mr. Sumner does not even mention the seal rookeries. He speaks of "the seal" as having "always supplied the largest multitude of furs to the Russian Company," but he seems to have thought that these furs were those of the "common seal," for he goes on to say: "Besides the common seal, there are various species" some of which he names, and then winds up: "There is also the sea bear, or, *Ursine Seal*, (O. I.) very numerous in these waters, whose skin, especially if young, is prized for clothing." (p. 317, vol. 11, Sumner's Works.) He ascribed a far greater value, present and prospective, to the fish fisheries of Alaska, than to its entire catch or trade in furs. (p.321-2). He did not share Mr. Blaine's delusion of the "enormous and inordinate" profits of the Russian American Company. He speaks of the territory to be ceded as: " . . . . outlying possesions from which, thus far, she has obtained no income commensurate with the possible expense for this protection." "Its settlements are only encampments or lodges. Its fisheries are only a petty perquisite, belonging to local or personal adventurers, rather than to the commerce of nations." (p. 202.) He gives a statement of the receipts and expenditures of the Russian American Company from 1850-59 inclusive (p. 252-3) according to which, the Company's dividends for that period were at the rate of only $101,595.30 per annum. (which agrees pretty nearly with H. H. Bancroft's figures of $102,000 per annum for the period 1842-61), but Mr. Sumner's statement also shows that only 20-21 per cent. of the receipts were derived from the "sale of furs" — that is, *all* the furs collected from *all* the Company's stations, not from the Pribyloffs alone — whilst 48-50 per cent. was derived from "tea traffic". This latter source of profit was due to the Company's monopoly of the importation of tea into Russia by sea. This "tea traffic" profit was not a "natural resource" of Alaska, nor available for the United States as a source of income. Taking out of the account, therefore, this profit of roubles 4,145,869.79, less charges, namely: duty, transportation and packing, and R. 200,000 for insurance, 2,551,461.57; say net rubles 1,594,408.22; not only is the whole dividend of R. 1,354,604 swallowed up, but *an actual deficit of 239.804.22 is left.*

Nor is it difficult to understand that the fur trade, as managed by the Russian American Company, should not have yielded a better result, because such management was in no sense that of capable and careful merchants, and besides the price of their main staple has risen enormously since those times, and the quantity has about quintupled. Mr. Williams states that up to the "fifties" the Russian American Company sent some 15,000—20,000 sealskins to London, dried, after that, salted; and that the Company had a contract for their sale delivered in London, at 14 shillings sterling, say $3.50, which remained in force until the cessation of the Russian American Company. (p. 78, H. R. 3883. 50 C. 2 S.) At the time of the cession of Alaska, nobody dreamed of the possibility of such a business in fur seals as the Alaska Com-

pany built up during the term of its lease, and though fashion may have been a powerful aid to this Company, its success has been mainly due to the excellent management and tact of the very capable men who had its direction.

Mr. Phelp's statements, considered so far, are those which concern alleged facts, having nothing to do with law, and susceptible of refutation by the counter proofs submitted. We now come to his assertions regarding facts in their legal bearing, and his dicta concerning law. He makes several arguments, the first of which is that: the seals, "making their home on American soil, ... belong to the proprietors of the soil, and *are a part of their property*, and do not lose this quality by passing from one part of the territory to another, in a regular and periodical migration necessary to their life, even though in making it, they pass temporarily through water that is more than three miles from land." (p. 769, H. M.) "The simple question presented is whether the 'United States' government has a right to protect *its property* and the business of its people from this wanton and barbarous destruction by foreigners, which it has made criminal by Act of Congress; or whether the fact that it takes place upon waters that are claimed to be a part of the open sea affords an immunity to the parties engaged in it which the government is bound to respect." (p. 767.)

Mr. Phelps thinks that to the "ordinary mind" this question would not be a difficult one. Probably not, because the falseness of the premises on which the alternative is based would escape detection by such a mind, but any mind with a grain of logic sees at once that Mr. Phelps is merely begging the real question; the primary one, which must be settled in his favor before his proposition can be considered, and that is: *can we or any nation have any property whatever in seals or any wild animals*, found *beyond the national territorial jurisdiction?* Of course Mr. Phelps, a passed-master in law, knows that in law there is no property right in wild animals, whether fish, mammal or bird, outside of territorial limits; that any and everybody is free to appropriate or kill them, so long as in doing this no right of territory is violated. To enable us to exercise lawfully any right of proprietorship in wild animals like seals, we must confine them within our territorial jurisdiction. To allow them to leave our territory, to escape into the "high seas" is to deliver them up to the tender mercies of mankind in general. And to pretend to prevent Non-Americans from doing what they like with seals found in the "high seas" is to fly in the face of all international law, and consequently to make ourselves ridiculous. Nor is the case altered one bit by the fact that the seals, or rather the mere majority of them, are born on our soil, nor by the unproved assertion that marine sealing is inhuman and wasteful, nor by the disingenuous implication through cunning wording, that the seals migrate from one part of our territory to some other part of the same territory, and merely "pass temporarily through water that is more than three miles from land." As a matter of fact, marine sealing is no more wasteful or inhuman than seine-fishing of mackerel, etc. If Mr. Phelps's theory, that the seal belongs to the territory, rests on the reasons which he gives, namely: that the seal is not a "wanderer of the sea," but has "a fixed habitation on the Alaskan shore, from which it never long departs, and to which it constantly returns" (766 H. M.), then this theory is exploded by the following facts: The seals do not, on an average, stay more than 4 1-2 months on our territory, after

which they leave Bering Sea to become for 7 1-2 months, "denizens and wanderers of the sea" in the Pacific. (H. Rep. 3883,50 C. 2 S. p. 89.) There is no evidence of their "constantly returning" to their former habitation, which they are known to have abandoned in great numbers more than once. (p. 77 and 78 and U. S. Census of '80, Vol. 8, p. 69 and 109).

Mr. Phelp's reference to national game laws protecting wild animals has, of course, no bearing on the question at issue; for any nation's game and fishery laws are limited in their scope to that nation's territorial jurisdiction, outside of which these, or other municipal laws, can be applied by such nation against foreigners, only with the consent of their governments. He knows this so well that he admits expressly: "This general proposition will not be questioned" (768 H. M.) Nevertheless, he imagines that he can evade the consequences of this axiomatic truth by giving a novel definition of "the freedom of the sea" and invoking fictitious rights of property.

"In what does the freedom of the sea consist? What is the use of it that individual enterprise is authorised to make, under that international law which is only the common consent of civilization? Is it the legitimate pursuit of its own business, or the wanton destruction of the valuable interests of nations?" He tells us that the proposition " . . . that these acts, prohibited by American law, unlawful to Canadians wherever territorial jurisdiction exists, . . . and which are wanton and destructive everywhere, become lawful and right if done in the open sea, and are therefore a proper incident to the freedom of the sea" (p. 768) that this proposition is refuted by its mere "clear statement" "in the minds of all who are capable of a sense of justice and able to discriminate between right and wrong." (p.768 H. M.) Now let us present Mr. Phelps' contention in the most forcible way possible, by assuming, for argument's sake, that sealing in the open sea is morally a crime, more heinous than the slave trade or even murder, and even then, every sound jurist must admit, that such moral criminality gives us no legal right to interfere, in however slight a manner, with this pursuit by foreigners outside of our jurisdiction! Every textbook declares that even murder committed on the high sea is not justiciable in any court, except in one of the nation under whose flag the crime was perpetrated! And that was precisely the position which our government has always maintained with regard to the slave trade. We were the first to declare that trade a crime, and to enact the death penalty for it, and yet we successfully denied the right of any foreign authority to call an American to account for it, whilst, as a corollary, we disclaimed for ourselves any such right against foreigners. England, did for a time, arrogate to herself a right to try in her courts slavers of nations whose own statutes forbade that trade, and her courts condemned some foreign vessels on that express ground. Such pretensions have long since been abandoned by her, and even at the time when they were still upheld, her judges declared emphatically the immunity from British interference of all those foreign slavers, whose own national laws did not forbid the trade. (May 1813, the Diana, 1 Dodson, p. 95). Even if revived, these exploded British pretensions could not serve as a precedent against British vessels for sealing in the open sea, because no provision of international or of British law makes that pursuit criminal or punishable.

Mr. Phelps speaks of " . . . . these acts" (sealing) "prohibited by American law," as if such a prohibition were by that law extended to the open

sea, and as if, in that case, the prohibition were of any validity against foreigners. All American law that bears upon that point is contained in Sec. 1956, Revised Statutes, the scope of which is confined to "the territory of Alaska or the waters thereof," and in the act of 3 March, 1889, which makes Sec. 1956 applicable to " . . . all the dominion of the United States in the waters of Bering Sea." The Professor cannot have had the text of these enactments in mind when he wrote, nor the history of the abortive attempt in the House to stretch beyond legal warrant our jurisdiction in Bering Sea, which found such a ludicrous end in the said act of 1889. He could not, otherwise, have been blind to the moral certainty, that our Supreme Court, (however much a solitary judge of an inferior court has been led astray) would construe such ordinary and customary phrases as "the waters thereof" and "the dominion of the United States in Bering Sea" in their ordinary and customary legal sense, that is: limited to three miles from low water mark, and this even without the very significant evidence that the House had, on second thoughts, refused to be lured into claiming the slightest unusual extent of jurisdiction, and that, consequently, this court could not find any vessel, American or foreign, guilty of a violation of any existing American law, for sealing in Bering Sea, outside of the usual three-mile limit. Congress could forbid marine sealing by Americans anywhere, but it has seen fit so far, to limit the prohibition to three miles seaward from our shores. In the present state of our statutes it would be simply an academic discussion, whether or not, said section 1956, if it had been, or should be, extended by Congress to any part of Bering Sea beyond the three-mile belt, could be enforced against foreigners, on the strength of our alleged "property" in the seals, without violating the law of nations. The recognized legal authorities who are men pre-eminently "capable of a sense of justice and able to discriminate between right and wrong," are unanimous in declaring against such a hypothesis, and that will suffice for the present.

Mr. Phelps declines to restate Mr. Blaine's argument, that Bering Sea is not, as between ourselves and Great Britain, a part of the open sea in consequence of the treaties of 1824, '25, and '67, but he finds that "It is presented with great ability, fulness and clearness, and there seems to be nothing left to be added in either particular. It depends principally upon historical evidence, which must be closely examined to be understood; and that evidence certainly tends very strongly to support the result that is claimed by the Secretary." (H. M. 768.) Deference to Mr. Phelps's standing as a jurist makes it impossible to suppose. that he has done more than glance hurriedly over such "historical evidence" as Mr. Blaine has seen fit to manufacture and submit, and that Mr. Phelps has not given a moment's thought to what has been advanced on the other side. An *examination* of the *real* and *complete evidence*, geographical, historical and legal, would have convinced a man of the Professor's acquirements that Mr. Blaine's argument lacks every one of the qualifications ascribed to it above; that it is: not able, for it fails to refute or even meet the adversary's chief points, a mere evasion of which is attempted by the introduction of irrelevant side-issues, of misstatements, and of extracts falsified by being wrenched from their context; by conclusions in part inconsistent even with such premises as are presented; subterfuges all, so transparent as not to stand a moment's investigation.

Not full: because it simply ignores, where it does not pervert, the most important geographical and documentary facts, and the most elementary legal axioms.

Not clear: because it is wordy to tediousness, often illogical, and sometimes faulty in construction and grammar.

The Professor in his next sentence is quite as obscure and puzzling as Mr. Blaine at his worst. "If in this position he" Mr, Blaine "is right, it is the end of the case. Because it brings these waters, as against Great Britain at least, within the territorial jurisdiction of the United States, *not by their geographical situation alone*" but by the treaties (H. M. 768). This is an intimation that there is something about the geographical conditions of Bering Sea which of itself would or should give us the jurisdiction over it. "The situation "of that sea is between shores belonging to two different nations. In configuration it is not separated from the Pacific Ocean by a barrier of land pierced only by channels narrow enough for defence from on shore, but this sea forms an integral part of said ocean, with which it is connected by numerous very wide channels through the chain of the Aleutian Islands, and west of these by an uninterrupted expanse of open sea of more than 500 nautical miles in width. In situation and in configuration, then, Bering Sea does not possess those qualities which in international law are the conditions *sine qua non* of a closed sea, and which alone give a title to national jurisdiction over such waters. If Mr. Phelps knows of any other geographical characteristics, even aside from "situation", which have such an effect in law, he ought in fairness to enlighten an ignorant world by a full explanation, and not to slur over so important a matter with a mere implication. Mr. Blaine would be very thankful for such information, as it might ensure a "diplomatic success." The want of this information has forced him to disavow fervently all thoughts of claiming Bering Sea as one closed from shore to shore, and to content himself with the make-shift of its partial closing, over a belt of one hundred, or even sixty miles only from the shores. If the old hard and fast rules, uniform for all nations, concerning closed seas, the freedom of the seas, and the pursuit on these of wild animals, have been outgrown by the world, there ought to be substituted for these rules, new ones, somewhat on the plan of the old, "sliding scale", establishing the precise territorial shore belts in conformity with the varying width of channels between seas and oceans, the varying value of a nation's "interest" or "property" in the different kinds of wild animals, and the varying degree of domesticity or vagrancy of the different kinds of such creatures. The successful working out of such a problem might not be less difficult than the squaring of the circle, but it would probably have the same fascination for certain "minds". It would be interesting to know whether this part of Mr. Blaine's argument recommends itself as much to the Professor as that part relating to the effects of the treaties, and if so, on what juristical grounds.

The examples which Mr. Phelps cites, in illustration of an alleged limitation of the rights of individuals on the open sea, are not to the point.

The sea has never been closed to the slave trade in any such sense as he suggests. (770 H. M.) This trade is no crime against international law now, any more than it was formerly; it is only a violation of the municipal law of certain individual nations, and this law is applicable solely by each one of

them individually, and to its own citizens exclusively. But there is a striking difference between the procedure of our humanitarians who legislated against the slave trade, and that of our modern seal champions. The former guarded scrupulously against infringing upon the international rights of other States, but voluntarily gave up a lucrative traffic, because they thought it wrong, and they were not deterred by the fact that the rest of the world still continued it freely. The latter deliberately violate the rights of all others, on the plea of morality, but with the avowed object that our Government may not lose even a modicum of its revenue, and that a very few of our fellow citizens may make a greater profit out of their monopoly. The morality involved is so transcendant that it becomes our duty to trample upon the rights of all other nations. *if we can*, but if we cannot, then that morality vanishes instantly! Mr. Blaine stated, officially, that if Canadians must be allowed to seal within ten miles of our islands the same privilege "must, of course, be at once conceded to American vessels." (72 H. E. D. 450. 51 C. 1 S.) This way of arguing does not impress one with the genuineness of Mr. Blaine's zeal for the morality doctrine, and unfortunately Mr. Phelps does not tell us how it strikes him.

What limitations on the freedom of the sea belligerents may impose in time of war, has nothing to do with the present controversy, for we do not claim to act as belligerents.

If Mr. Phelps had investigated the instances, cited by Mr. Blaine, of alleged violation of the freedom of the sea by Great Britain in time of peace, Mr. Phelps would have found out that they are nothing more than fictions of the Secretary's "riotous imagination", or else bad fits of "journalism" of the Ex-Editor.

The Ceylon Pearl banks are outside of the 3-mile belt, but though the shells are obtained there, the pearls can only be extracted from them after the shells have been exposed for quite a while on the land, which is British, and this fact is Great Britain's warrant for taxing and regulating the business.

All existing Australasian and Australian legislation concerning pearl fisheries is limited in express terms, either to British vessels or to waters within three miles from shore. It is the same with Mr. Blaine's latest "instance": the alleged British usurpation off the east coast of Scotland. The act there cited by him refers expressly to previous acts which impose exactly the same limitations.

The St. Helena Act was the outcome of the policy adopted at the Vienna Congress by all the European Powers against Napoleon as an enemy, not of Great Britain alone, but of all mankind. Great Britain having been by that Congress charged with his custody, and authorized to take what measures she might think necessary to ensure it, passed the said Act. That provision of it which makes punishable, by Great Britain, the hovering of even non-British vessels within eight leagues of the coast of St. Helena, is, of course, a violation of the rights of all other nations, except of those who, by their authorization at Vienna, had sanctioned beforehand Britain's measures, and the nations represented at Vienna constituted practically the whole civilized world. The United States was the only member of the family of civilized peoples which took no part in that Congress, and the passive indifference with which our Government treated the St. Helena Act is very significant. Already, on

the 16th Aug., 1815, our minister at London was warned of one of the consequences, for us, of Napoleon's captivity on the island, by the official intimation of an impending modification of the still unratified treaty of 3 July, 1815. (Adam's Diary vol. 3, p.252) Nothing was said at the time about "hovering" but neither Mr. Adams's diary, nor our diplomatic correspondence, as far as published, has any reference to the Act itself. The inference is, that either in consequence of explanations from the British Government, or in reliance upon our indisputable immunity, by international law, from any mere British statute, (and perhaps somewhat in view of the decisions of the highest British court) our Government deemed it superfluous to take any notice of the British Act. At all events, it is a fact that the Act was never enforced against any American vessel, and the recorded decisions of the British courts make it certain, that any attempt to do so would have been defeated by those courts. Already in May, 1813, Sir William Scott (afterwards Lord Stowell) had ruled that foreigners, whose own laws tolerated the slave trade, could not be interfered with by British authorities outside of British jurisdiction. (The Diana 1 Dodson p. 95) Not long after, March, 1816, the same judge rendered his celebrated decision in the case of "Le Louis," in which he broadened and emphasized his former declaration regarding the immunity of foreigners, outside of British jurisdiction, from all British legislation. (2 Dodson p. 240.)

Mr. Phelps argues (p. 771 H. M.) as if the precious concession by Great Britain—whatever it may have amounted to — of "the justice and expediency of *a* convention," made it morally obligatory upon her to agree at once to any and every convention which might suit us; as if she were precluded from withdrawing or even modifying such concession,—which, at the utmost, was for an "agreement" still to be made—*now* that she has good reason for disbelieving the testimony on which the concession of "justice and expediency" was made. She established, in accord with Norway, a close time for sealing in one region, ergo, she ought to agree with us in doing the same thing in an entirely different region!

The Professor hazards the opinion, that if the roles of the two nations in this controversy were reversed, "it is perfectly certain that . . . our government would be apprised, that if unable to restrain its citizens from an *outrage* upon British rights which it did not assume to defend, the necessary measures would be taken by the injured party to protect itself." (771 H. M.) On the other hand, Mr. Phelps tells us that it is not to be apprehended that the forcible prevention by us of marine sealing" would lead to any collision with Great Britain." (773 H. M.) It is a mystery on what precedent in British history these two suppositions are based, but it is plain that they cannot both be correct. If it "is certain" that Great Britain would resort to force to impose upon us such pretensions as Mr. Blaine's, it is even more certain that she would fight us to maintain rights sanctioned by every rule of international law. And Mr. Phelps has forgotten that there is a necessary complement to his suppositious case, to wit: what our own country would do! Does he feel equally certain that an enforcement by Great Britain against us of such theories, as he and Mr. Blaine now set up, would not lead to any collision? Would he or Mr. Blaine advocate our submission to such action by Great Britain?

If both Mr. Phelps's suppositions are based solely on the alleged non-assertion by Great Britain of the legality, the perfect rightfulness of marine seal-

ing as now conducted by the Canadians, both suppositions are untenable, as the premises have been disproved.

In his allusion to arbitration, Mr. Phelps gives an entirely wrong version of the facts. "But that has been already proposed by the United States, without success. The offer has been met by a counter proposal to arbitrate, not the matter in hand, but an incidental and collateral question." (773 H. M.) From this one can only infer that *we were the first* to propose arbitration, and that our proposal embraced the real "matter in hand," whilst *Great Britain tried to evade this.*

On April 30, '90, the British submitted a "Draft of a North American Seal Fishery Convention" providing for a commission of experts, and in Art. 3 for arbitration in case of disagreement between the two nations as to the regulations to be adopted. (H. E. D. 450. p. 54 etc. 51 C 1 S.) Rejected by us 29 May '90. (p. 70.) June 27, '90, Sir Julian Pauncefote wrote, that as one of the conditions for a request from the British government to British sealers to abstain from sealing, it would be necessary: "That the two governments agree forthwith to refer to arbitration the question of the legality of the United States Government in seizing or otherwise interfering with British vessels engaged in the Bering Sea, outside of territorial waters, during the years 1886, 1887 and 1889." (p. 77.)

Rejected by Mr. Blaine, 2 July '90, (p. 93.)

August 2, '90, Lord Salisbury wrote, if the United States "still differ from them" (the British government) "*as to the legality* of the recent captures in that sea, they" (the British government) "*are ready to agree that the questions, with the issues that depend upon it,* should be referred to impartial arbitration." (p. 11 H. E. D. 144. 51 C. 2 S.)

This unconditional offer was also rejected by Mr. Blaine on Dec. 17, '90, and it is only in his note of this date, that he made counter suggestions of arbitration which were the first ones coming from our side. The British, therefore, preceded us by six months in proposing arbitration. It was Mr. Blaine, and not the British, who made "counter proposals", and he tried to smuggle in passages which appear to attribute special and abnormal rights in the matter to the United States. These passages Lord Salisbury objected to, in his turn, but he accepted all the other proposals in his note of 21, Feb'y '91, (p. 4 N. Y. Ev'g. Post 11 March, '91.)

If the British offers to submit "*the question of the legality*" of our seizures, "*and the issues that depend upon it*" do not meet "the matter in hand but an incidental and collateral question", words must have lost their customary meaning. Mr. Phelps's whole contention is, that we have the legal right to prevent marine sealing, and yet when it is proposed to have this "legality" arbitrated upon, it becomes all at once a mere "incidental and collateral question." What other warrant but "legality" can there be for interference with the property of foreigners?

As arbitration is now arranged for, and as, nevertheless, nobody seems to be aware of any consequent injury to our "honor and dignity", Mr. Phelps's derogatory remarks on that method of settling international differences, may be passed in silence, as the simple expression of an individual opinion, in glaring contrast to that of the vast majority of our countrymen.

Speaking of the proceedings in *re* "W. P. Sayward" now pending in our Supreme Court, the Professor informs us that "the *only questions* that it

would seem can be brought before the Court are, whether there is any act of Congress which reaches the case . . . .", of its constitutionality, of the regularity of the proceedings under it, and of the correctness of the form of application for a writ of prohibition. (774 H. M.)

This must have been written shortly after the action was begun, and without knowledge of the nature of the pleadings. In the briefs filed, the petitioners take their stand entirely on the non-existence of American jurisdiction in the case; whilst the Attorney General argues,—aside from technicalities—that the matter of jurisdiction, depending as it does upon "extent of dominion", is a political question, which has already been decided by the Political Department of our Goverment, and that the Court is therefore precluded from considering this question.

The court virtually overuled all these objections, and issued an order to the judge of the Alaska court, to show cause why prohibition should not be granted. In his brief, in reply to this order, the Attorney General makes certain admissions which refute the last cited assertion of Mr. Phelps. "But *the only question* at issue in this case *is the territorial jurisdiction of the Alaska Court.*" (p. 96.) "The United States derived no power over the Bering Sea, except through the cession by Russia in the treaty of 1867." (p. 94.) Mr. Phelps's article, *in extenso*, is added to the brief (p. 354-373), but beyond this rather left-handed recognition of his great theory of our property right in the seals, the Attorney General did not venture.

As the Professor admits, "Nor is the effort to bring the case before the court a just subject of criticism" (p. 774 H. M.), it is a pity that he does not tell us,whether or not,the persistent endeavors of the Administration to balk said effort is open to criticism. The action was begun the 12th of Jan'y,1891, its entertainment by the court was violently opposed by our officials, and then, as a last resort, the hearing was staved off from April last till the October term! Our present government is so sure of its right in the premises, that it plunged at once into the extremest measures; during several years of contention, its official representative and his champions find not the least difficulty in demonstrating, to their own satisfaction, the invincibility of our Government's position and action, but when it comes to an investigation before a judicial court, where only genuine documents, bona fide law, and real facts are considered; then all this courage oozes out, and we — are not ready to proceed, but have the trial put off six months!

It is very strange; and all the more so, when one considers the character of the Court, and the inevitable effect of its decision in our Government's favor. Of all conceivable courts of law, is there a more competent one, or one less likely to be biased against our Government? Would not its justification of the seizures at once unite our whole nation in enthusiastic support of the Administration in this matter? Is there any other means of securing that unanimous popular sentiment in support, the absence of which is admitted, and the necessity of which is implied, by Mr. Phelps?

What other explanation can there be, then, for this procrastination than this, that the conviction which Mr. Blaine and his champions tell us they have, is a mere sham, and that in reality they have a very different, and a very well grounded one? That instead of being convinced tha they are absolutely right, and consequently sure of a triumphant issue from the action

at law, they are convinced of the inevitability of a hopeless defeat in that action, and consequently sure of the inevitability of an ignominious retreat in the face of the world?

The Professor's "rebuke" to those Americans who have written against the policy of the Administration in this question, is more in the nature of the old expedient of abusing your opponent's counsel when you have nothing else to advance, than in the nature of an argument, let alone a consistent argument. His experience with those whom he has tried to enlighten must have been exceptionally unfortunate, if it makes him think it possible that readers, however unlearned, are in danger of drawing such an inference as he imputes to them, namely: that because a writer charges that our Government has asserted something wrong, concerning *one* subject, it has therefore become a settled "proposition in international law" "that whatever is asserted by our own government is necessarily wrong." (p. 772 H. M.) Of course, we all argue from our own experience, even with regard to others. If the Professor's article under reply, is a fair specimen of his usual style of argumentation, it is no wonder that he has come to expect "unlearned" readers to draw startling conclusions, and he will find, moreover, that the learned are just as apt to do so. From his chief argument in this case, his theory of a property right in wild animals, whatever the unlearned may think of it, the learned are sure to infer only, that the Professor has forgotten, or has chosen to ignore, one of the most elementary axioms of international law. Every reader must be sorely puzzled to see a general rule squarely admitted, and yet to hear that in a given case, it is not the admissibility of an exception, but the applicability of the general rule which requires to be proved; to be assured that the sea is free to all (p. 768), and nevertheless to be told that if any one undertakes to avail himself of this, for catching seals there, "It is for those who set up such a right to sustain it." (p. 771.) It does look as if this would strike most readers as a sophism pure and simple, the analogue in argumentation, to intentional "revoking" at whist.

"If our government is demanding what is wrong, the demand should at once be abandoned." (p. 772 H. M.) Exactly! We, of the opposition, have convinced ourselves that our government's claim in this matter is utterly wrong, and that in making it the administration is perpetrating even a greater outrage upon the honor of our nation, than upon the rights of the rest of the world; we are therefore determined to do all we can to bring about the abandonment of the demand. We care very little for "diplomatic success," but a great deal for the good name of our country as an honest and fair dealing one! We refuse to connive at a diplomatic success, possible only at the cost of that good name, and we are quite confident that this is also the sentiment of the nation. It is not for the benefit of foreigners that we refute the wretched misstatements and absurd sophisms which the administration attempts to palm off for arguments, but to prevent our own people from being duped by them.

The British Government has already refuted every one of Mr. Blaine's pleas, but these refutations are seen, or even heard of, by comparatively few Americans. It is astonishing to find an ex-diplomatist assert that, in a diplomatic controversy over a question of pure law and documentary evidence, any government could possibly gain any advantage from suggestions in the press.

The writers of these derive all their knowledge in the premises from such fragmentary testimony as the governments choose to publish, and from text-books, and yet these writers are "to give points" to the very men who have the national archives at their disposal, and whose life-business it is to become and keep familiar with everything bearing on the case, down to its minutest detail!

Mr. Phelps implies that as "not a word has been uttered or printed in that country"—England—"so far as is known, against the Canadian contention, or in support of that of the United States" (p. 772.), this fact is due exclusively to patriotic reticence on the part of British writers! He has forgotten that British history is full of instances of the exact contrary of his assertion that "The suggestion that the government might be prejudiced in conducting the discussion silences at once the tongues and the pens of both parties," (p. 773), and he has forgotten that "Her Majesty's Opposition" in Parliament and press, is just as much a recognised institution in England as Her Majesty's Government. Nor are conspicuous examples of the sturdiest, most determined opposition of the same kind, by men of unimpeached patriotism and acknowledged capacity, any rarer in our own history.

The admission,(p. 772) that, very little has been published here in support of our pretension, or indicative of a sustaining public sentiment, whilst much "ability and learning" "have been devoted to answering the arguments, and disproving the facts upon which the government has relied," suggests the probability that the smallness of the number of the supporters of our pretension, may be due to the same cause as the "obstinacy" of which the one "reasonable" juryman complained in his eleven fellows. An endeavor to have a new precedent in international law established may be very praiseworthy, but the rules of that law having been once established by the general consent of mankind (p. 769), they can be changed, or even improved, only by the same general consent. Do all you can to obtain it, but remember that without it a single government's attempt to "establish a new precedent" is as futile, as the one juryman's attempt to dictate the verdict. Conviction, not force is the remedy.

"A nation divided against itself can never achieve a diplomatic success" (p. 772), nor can the Yale law faculty, even if it should be almost unanimously of Mr. Phelp's opinion (of which there has been no evidence), for it contains at least one very pronounced opponent of our claim. Mr. T. S. Woolsey, Professor of International Law at the Yale Law School, since 1879, in his new edition, (the 6th) of his celebrated father's (T. D. Woolsey) treatise on that science, characterizes on p. 73, our pretension in Bering Sea as being "as unwarranted as if England should warn fishermen of other nationalities off the Newfoundland banks."

It is hoped that the necessity of meeting with documentary disproof, all Mr. Phelp's allegations concerning facts, will be accepted as an excuse for the length of this paper. An examination will verify all my data, and will convince everyone, not excepting Mr. Phelps, that, in this respect, he has done grave injustice to his subject and to himself by his article.

As regards the law governing the case, the points at issue between Mr. Phelps and his opponents are, by his own admission, narrowed down to two:

Whether, in the legal sense, seals are wild animals or national property,

when found outside of territorial jurisdiction: and, whether a nation, professing to accept, as binding upon itself, the rules of international law, (which admit of no exceptions in time of peace), can legally deny the validity of any of these rules, and can claim an exception therefrom in its favor, on the mere plea of a prospective pecuniary loss, on the alleged inability otherwise to secure whatever such nation may consider its due share of an industry, in which the rule gives that nation only an undivided interest, to be exploited in common with all other nations.

The question whether on these points Mr. Phelps has done justice either to the subject or to himself, is one which may safely be left to the decision of the reader.

ROBERT RAYNER.

SALEM, MASS., June, 1891.

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