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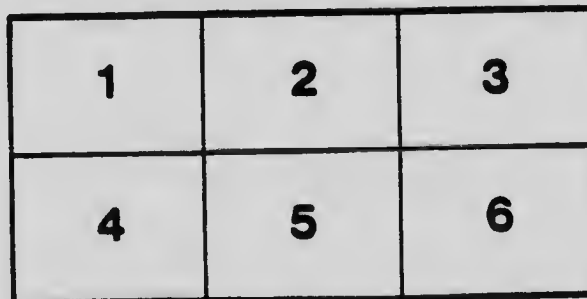
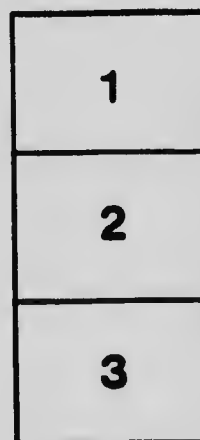
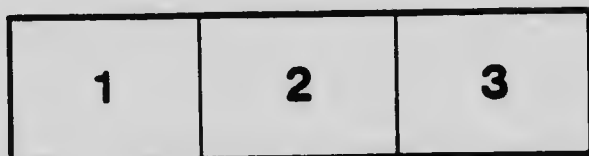
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6.

FISHERY CONCESSIONS

TO THE UNITED STATES

IN

CANADA AND NEWFOUNDLAND.

BY

THOMAS HODGINS, LL.D.

JUDGE OF THE ADMIRALTY COURT.

“In our opinion the inhabitants of the United States fishing within waters of the territorial jurisdiction of the Legislature of Newfoundland, or of any other of the British Colonies, are bound to obey, and are legally punishable for disregarding, the Laws and Regulations for the conduct of the Fisheries enacted by, or under the authority of, their respective Legislatures.”— *Opinion of Sir William Atherton and Sir Roundell Palmer, Law Officers of the Crown, to the Colonial Office, 1863.*

“I hardly believe that Mr. Evarts would, in discussion, adhere to the broad doctrine—which some portion of his language would appear to convey—that no British Authority has a right to pass any kind of laws binding on Americans who are fishing in British waters; for if that contention be just, the same disability applies, *a fortiori*, to any other power and the Treaty waters must be delivered over to anarchy.” *Marquess of Salisbury to the American Minister, 7th November, 1878.*

(From the Contemporary Review.)

SECOND EDITION.

TORONTO:

WM. BRIGGS, 29 RICHMOND ST. WEST.

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The Fishery Concessions to French Fisherman extend from Cape St. John, north of Notre Dame Bay on the east coast, round the north to Cape Ray near Point Aux Basques on the south east coast.



FISHERY CONCESSIONS

TO THE

UNITED STATES IN CANADA AND NEWFOUNDLAND.

Great Britain is the only great modern colonizing power which has, by several treaties with Foreign Nations, conceded to their alien citizens the free privilege of sharing in competition with her own Colonial subjects, the national and productive fishery wealth of the marine belt of territorial coast waters of Canada and Newfoundland, without requiring any financial recompense, or reciprocal privilege. These colonial fisheries are part of the national assets of the local Governments; and if this national asset of fish can be so conceded to alien fishermen, so may their colonial mineral, or timber, assets be conceded, on similar terms, to the alien traders of foreign nations.

These exceptional privileges must be classed as derogations from the universally recognized principle of International Law, which assures to every independent nation the right of territorial inviolability and sovereignty, exclusive, and free of all interference by the alien subjects of other nations. Being exceptional, and in derogation of the territorial sovereignty of the ceding nation, they are classed as *Servitutæ Voluntariæ*, or voluntary national easements to aliens; and are therefore to be construed strictly, both as to property and territorial conditions of user; so that the privilege-ceding nation shall not be held to have conceded to the privileged alien citizens of the other nation more than the strictest construction of the treaty will warrant; for sovereignty over its own national property cannot be impaired upon implication; and also that the concession, or easement, shall not be held to have relieved such privileged alien citizens from their subordination to such public laws, or municipal or police regulations, as bind the home or colonial subjects of the privilege-ceding nation, and which are not ex-

pressly annulled by the treaty and are sanctioned by, or reasonably deducible from, International Law.

The doctrine of International Law defining the construction of treaties of cession between nations, was considered by the Supreme Court of the United States, when Chief Justice Marshall and Mr. Justice Story were among its members; and it was held that even where the expressions used in any such treaty were capable of two constructions, the construction which was most favourable to the ceding nation, should govern; and it was further held that public grants were to be construed strictly, and in favour of the sovereign power, and to be held to convey nothing by implication to the grantee; and that, in all cases, a King's grant should never be construed to deprive him of a greater source of revenue than he intended to grant, nor be deemed to be prejudicial to the Commonwealth.¹ And British law concurs as to home rights, that if the Crown's grant, when reasonably construed, would be injurious to the vested interests of other subjects, the grant should be restrained according to circumstances.²

International Law summarises the doctrine thus: "Whenever or in so far as a State does not contract itself out of its fundamental sovereign rights by express language, a treaty must be construed so as to give effect to these rights. Thus, for example no treaty can be taken to restrict, by implication, the rights of sovereignty, or property, or self preservation."³

The earliest British treaty-concession in the nature of *Servitutes Voluntariæ*, will be found in the fishery article (13) of the Treaty of Utrecht of 1713, between Great Britain and France, by which Great Britain "allowed" fishery privileges to French fishermen on certain coasts of Newfoundland, afterwards changed to other coasts by the treaty of 1783.

By the Anglo-French Treaty of 1904, which forms the basis

¹*United States v. Arredondo*, 7 Peters (U.S.) 691.

²*Rea v. Butler*, 3 Levinz, 220.

³Hall's International Law (5th ed.), p. 330.

of the present entente cordiale between France and Great Britain, France renounced "the privileges established to her advantage by article 13 of the Treaty of Utrecht, and confirmed or modified by subsequent provisions." But Article 2 declares that "France retains for her citizens, on the footing of equality with British subjects, the right of fishing in the territorial waters," along certain described portions of the coast of Newfoundland, subject to the laws and regulations now in force, or which may hereafter be passed, for the establishment of a close time in regard to any particular kind of fish, or for the improvement of the fisheries.⁴

The wording of the second article that "France retains for her citizens, on the footing of equality with British subjects, the right of fishing in the territorial waters" of Newfoundland, would seem to be a diplomatic mis-script of the expression "allowed" in the treaty of 1713.

National and civil rights within a sovereignty are the birth-right privileges of its subjects. And as every sovereign may forbid the entrance into his territory either of foreigners in general, or of certain classes of foreigners, he can annex to the permission to enter, whatever conditions he considers to be advantageous to the state: and therefore the permission to enter cannot be construed as conferring upon the admitted foreigners a "right," but only a "liberty" or "privilege." The words "retain the right" used in the treaty must be construed as diplomatically condoning the assertion of a foreign trespass on the sovereign prerogatives and territorial inviolability inherent in national sovereignty.⁵

⁴The treaty of 1904 provided that the British Government should pay a pecuniary indemnity to the French citizens who had to abandon their establishments, or give up their occupation, in consequence of the modifications introduced by the treaty,—which indemnity amounted to £54,683, or \$273,415,

⁵In 1888, France formulated a claim that: "The right of France to the coast of Newfoundland reserved to her fishermen, is only a part of her ancient sovereignty over the island, which she retained in ceding the soil to England, and which she has never weakened or alienated." Prowse's *History of Newfoundland*, page 521. But the Treaty of Utrecht—which ceded Newfoundland with the adjacent islands "to belong of right wholly

The second of these *Servitutes Voluntariæ* was conceded to the United States by the Treaty of Independence of 1783; but as its fishery article was abrogated by the War of 1812; it will only be necessary to quote the construction given to it by Lord Bathurst, the British Foreign Secretary, in a despatch dated 30th October, 1815, addressed to Mr. J.Q. Adams, then American Minister in London; in which, after enforcing the British declaration that the War of 1812 had abrogated the fishery article of the Treaty of 1783, he said: "The undersigned begs to call the attention of the American Minister to the wording of the third article.....In the third article Great Britain acknowledges the right of the United States to take fish on the banks of New foundland, and other places in the Sea, from which Great Britain had no right to exclude any independent nation. But they were to have the liberty to cure and dry fish on certain unsettled places within His Majesty's territory, dependent on the will of British subjects in their character of inhabitants, proprietors, or possessors of the soil, to prohibit its exercise altogether."

Mr. Adams while conceding this latter right, argued that the War of 1812 had not abrogated the fishery article, claiming that, "The treaty was not simply a treaty of peace; it was a treaty of partition between two parts of one nation agreeing thenceforth to be separated into two distinct sovereignties;" and was a partition of "rights and liberties enjoyed before the separation of the two countries;"* and which he claimed, "were in no respect grants from the King of Great Britain to the United States," and, therefore, "the Government of the United

to Britain,"—contained the following renunciation of French sovereignty: "Nor shall the Most Christian King, His Heirs and Successors, or any of their subjects, at any time hereafter, lay claim to any right to the said island or islands, or to any part of it, or them." Hertslet's Treatise, vol. 1, p. 237.

*"The analogy suggested between the treaty of 1783 and a partition among co-owners of their lands, and the rights issuing therefrom, is more fanciful than sound. That treaty created and conferred a liberty, and did not merely recognize a subsisting right to fish in the Canadian territorial waters." American Law Review, 1870-1, vol. 5, page 421.

States consider the people thereof as fully entitled, of right, to all the liberties in the North American fisheries which have always belonged to them, and which they never have, by any act of theirs, consented to renounce."⁷

Lord Bathurst's answer was that: "As to the origin of these privileges, the undersigned is ready to admit that so long as the United States constituted a part of the dominions of His Majesty, their inhabitants had the enjoyment of them, as they had of other political and commercial advantages, in common with His Majesty's subjects. But they had, at the same time, in common with His Majesty's other subjects, duties to perform; and when the United States, by their separation from Great Britain, became released from these duties, they became excluded from the advantages of British subjects." And he summarised the Minister's contention thus: "The United States conceive themselves, at the present time, to be entitled to prosecute their fisheries within the limits of the British sovereignty, and to use British colonial territories for the purposes connected with their fisheries;"—"a claim by an independent State to occupy and use, at its discretion, any portion of the territory of another State, without compensation, or some corresponding indulgence."⁸

And, in stating the colonial experience of how the American fishermen had misused the fishery privileges conceded to them, he added: "It was not of fair competition that His Majesty's Government had reason to complain; but of the pre-occupation of British harbours and creeks in North America by the fishing vessels of the United States; and the forcible expulsion of British vessels from places where their fisheries might be advantageously conducted. They had likewise reason to complain

⁷American State Papers, Foreign Relations, vol. 4, pages 351, 352, 353 and 355. While American writers on International Law still cling to the view that the War of 1812 did not abrogate the fishery article of 1783, President Polk in his message to Congress in 1847, declared that "a state of war abrogated treaties previously existing between the belligerents." Spain in 1898 took the same ground: See Foreign Relations (U.S.), 1898, page 973.

⁸American State Papers, Foreign Relations, vol. 4, pages 354, 356.

of the clandestine introduction of prohibited goods into the British Colonies, by American vessels ostensibly engaged in the fishing trade to the great injury of the British revenue." And in suggesting a "modified renewal" of the fishery privileges, he added: "But Great Britain can only offer the concession in a way which shall effectually protect her own subjects from such obstructions to their lawful enterprises, as they too frequently experienced immediately previous to the late war, and which are, from their very nature, calculated to produce collision and disunion between the two states."

Another contention of the Minister was that fishermen had, by common and universal usage, been "entitled to a more than ordinary share of protection, and that it was usual to spare and exempt them even from the most exasperated conflicts of national hostility." And he objected that the original grant should be ascribed to "the improvident grant of an unrequited privilege, or to a concession extorted from the humiliating compliance of necessity."

Lord Bathurst declined to admit that the claim of the American fishermen to fish within British waters, and to use British territory for purposes connected with their fishery, "was analogous to the indulgence which had been granted to an enemy's subjects engaged in fishing on the high seas."¹⁰

Lord Stowell, in a judgment delivered by him in 1798, had declared what was the law of Great Britain on this question: "In former wars it had not been usual to make captures of those small fishing vessels. But this rule was a rule of comity only, and not of legal decision. In the present war there has, I presume, been sufficient reason for changing this mode of treatment. They fall under the character and description of ships constantly, and exclusively, employed in the enemy's trade."¹¹

¹⁰Ibid., page 353. Congress had originally made the fisheries one of the points in its ultimatum for peace; but in June, 1781, it directed its Commissioners that "a desire of terminating the war has induced us not to make the acquisition of the North American fisheries an ultimatum on the present occasion:" Secret Journals of Congress, vol. 2, page 228.

¹¹American State Papers, Foreign Relations, vol. 4, page 356.

¹²The Young Jacob and Johanna, 1 C. Robinson, 20.

This decision of Lord Stowell's gave legal ground for Lord Bathurst's declaration that "Great Britain knows of no exception to the rule that all treaties are put an end to by a subsequent war between the same powers;" for Lord Stowell, in the case referred to, defined fishing as a "trade," and therefore any exercise during the war, of the special privileges conceded to American fishermen to make "agreements" with British proprietors for places to dry and cure fish, for the repair of damages, and for the purchase of wood, and to obtain water, within the bays and harbours of the British Colonies, would necessarily bring the American fishermen within the prohibition of "trading with the enemy," and make them, and their vessels, liable to the penalties prescribed by the municipal laws of the United States and Great Britain.

And the Supreme Court of the United States also declared that "No principle of international, or municipal, law is better settled than that all contracts and commercial intercourse, between the citizens of hostile states, during a state of hostility, are utterly void; and that this doctrine could not at that date (1833) be questioned, for it had been the acknowledged and settled doctrine of the Supreme Court for nearly twenty years; that shipments made by citizens of the United States from an enemy's country during the war, were subject to condemnation as quasi enemy's property; and that if, after a knowledge of the war, an American vessel should go to an enemy's port and take in a cargo there, the vessel and cargo were liable to confiscation as prize of war, for trading with the enemy."¹² To which may be added the doctrine of the United States that: "Property on an enemy's territorial waters rests, on principle, on the same basis as property on his land."¹³

Lord Castlereagh succeeded Lord Bathurst as Foreign Secretary in 1816, and under his instructions, Mr. Bagot, then

¹²*Scholfield v. Eichelberger*, 7 Peters (U.S.) 586; and 3 Condensed Reports of the U.S. Supreme Court, 147.

¹³Wharton's Digest of the International Law of the United States, vol. 3, s. 311.

British Minister at Washington, offered to the United States the coast fisheries "on the Labrador shore between Mount Joli, on the Esquimaux shore, near the Straits of Belle Isle," but these were declined by the United States on the ground that, "it would be more for our advantage to commence at the last mentioned point, and to extend the right eastward through the Strait of Belle Isle as far along the Labrador coast as possible."¹⁴

Mr. Bagot then offered, as an alternative, "the shore of Newfoundland to commence at Cape Ray, and to extend east to the Rameau Islands," adding that "in estimating the value of the proposal, the American Government will not fail to recollect that it is offered without any equivalent,"¹⁵ an offer intimating an abandonment of the British protocol in the negotiations for the Treaty of Ghent of 1814, that "the privileges formerly granted to the United States of fishing within the limits of British sovereignty, and of landing and drying fish on the shores of the British colonial territories, would not be renewed gratuitously, or without an equivalent."¹⁶

Mr. Secretary Munroe's reply sustained the historic policy of the United States: "I have made every inquiry that circumstances permitted respecting both these coasts, and find that neither would afford to the citizens of the United States the essential accommodation which is desired, neither having been much frequented by them heretofore, nor likely to be in future. I am compelled therefore to decline both propositions."¹⁷

The British Government, submitting to this uncomplaisant rebuff, intimated that it was "willing that the citizens of the United States should have the full benefit of both of them, and that, under the conditions already stated, they should be also admitted to each of the shores."

But Mr. Secretary Munroe's appetite for Canadian fish being still unsatisfied, he "asked for more:" "Having stated in

¹⁴American State Papers, Foreign Relations, vol. 4, page 361.

¹⁵Ibid., page 365.

¹⁶American State Papers, Foreign Relations, vol. 3, pages 705 and 708.

¹⁷Ibid., vol. 4, page 361.

my former letter that according to the best information which I have been able to obtain, neither of those coasts have been much frequented by our fishermen, or were likely to be so in future; I am led to believe that they would not, when taken conjointly, as proposed in your last letter, afford the accommodation which is so important to them." And he thereupon added the hope that "an arrangement on a scale more accommodating to the expectations of the United States, would not be inconsistent with the interests of Great Britain."¹⁸

Ultimately Great Britain, not forecasting the future, and presumably influenced by the persistently aggressive attitude of the United States, agreed that American fishermen should have the right to share in the local fishery asset of its colonial subjects in their territorial coast-waters without any financial compensation, or reciprocal equivalent; and the American Plenipotentiaries had the satisfaction of reporting to their Government the fullest extension of the free fishing area desired by their instructions. "We have succeeded in securing, besides the right of taking and curing fish within the limits designated by our instructions, as a *sine qua non*, the liberty of fishing on the coasts of the Magdalen Islands, and on the western coast of Newfoundland, and the privilege of entering for shelter, wood and water in all the British harbours of North America."¹⁹ These gratuitous concessions of valuable colonial fisheries to the alien-citizens of another nation may test whether as asserted by a British authority: "Great Britain has never been remiss in maintaining the rights of the fisheries."²⁰

The first article of the treaty, and the third *Servitutes Voluntariæ*, apparently ignoring Lord Bathurst's declaration that the fishery article in the Treaty of 1783, had been abrogated by the War of 1812, and supporting the contention of the United States that "the fisheries secured by us were not a new grant," provided:

¹⁸Ibid., page 366.

¹⁹Ibid., page 380.

²⁰Phillimore's International Law (3rd ed.), vol. 1, page 270.

“Whereas differences having arisen respecting the liberty claimed by the United States for the inhabitants thereof, to take, dry, and cure fish on certain coasts, bays, 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, forever, in common with the subjects of His Britannic Majesty, the liberty to take fish of every kind on that part of the southern coast of Newfoundland, which extends from Cape Ray to the Rameau Islands; on the western and northern coast of Newfoundland from the said Cape Ray to the Quirpon Islands; on the shores of the Magdalen Islands; and also on the coasts, bays, harbours and creeks, from Mount Joli, on the southern coast of Labrador, to and through the Straits of Belle Isle, and thence northwardly indefinitely along the coast, without prejudice, however, to any of the exclusive rights of the Hudson’s Bay Company. And that the American fishermen shall also have the liberty forever, to dry and cure fish in any of the unsettled bays, harbours, and creeks, on the southern part of the Coast of Newfoundland hereabove described;²¹ and of the coast of Labrador; but, so soon as the same or any portion thereof shall be settled, it shall not be lawful for the said fishermen to dry, or cure, fish at such portions so settled, without previous agreement for such purpose with the inhabitants, proprietors or possessors of the ground. And the United States hereby renounce, forever, any liberty, heretofore 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 harbours of His Britannic Majesty’s dominions in America, not included within the above mentioned limits.²²

“Provided, however, that the American fishermen shall be at liberty to enter such bays, or harbours, for the purpose of 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

²¹By the treaty of 1783, American fishermen had been expressly prohibited from drying or curing fish on the coasts of Newfoundland.

²²This renunciation excludes American fishermen from fishing within the three marine mile belt of territorial waters along the eastern and southern coasts of Newfoundland and along the coasts of Nova Scotia, New Brunswick, Prince Edward Island, Quebec, west of Mount Joli, and also British Columbia; subject to the treaty proviso as to shelter, repairing damages, and obtaining wood and water, within their bays and harbours.

to prevent their taking, drying, or curing, fish therein, or, in any other manner whatever abusing the privileges hereby reserved to them."

The British Act of 1819, 59 Geo. III. chapter 38, giving effect to the treaty, authorized the Crown "to make such Regulations, and to give such Directions, Orders and Instructions to the Governor of Newfoundland, or to any officer or officers on that station, or to any other person or persons whomsoever, as shall or may be deemed proper and necessary for the carrying into effect the purposes of the said Convention, with relation to the taking, drying, or curing, of fish by the inhabitants of the United States of America, in common with the British subjects within the limits set forth in the said Article of the said Convention hereinbefore recited."

Another section provided that such Restrictions or Regulations as may be necessary to prevent American fishermen from taking, drying, or curing, fish in the renounced bays and harbours; or, in any other manner whatever, abusing the said privileges conceded to them by the said Treaty, and the Act, should be made by Order-in-Council, or by the Governor of such parts of His Majesty's dominions. And the last section provided that any person, or persons, refusing to depart from such bays, or harbours, or refusing or neglecting to conform to any such Regulations or Directions, were to be liable to a penalty of £200.

By the latter proviso of the Fishery Article, the United States expressly acknowledged the sovereignty of Great Britain in the words that American fishermen "shall be under such Restrictions as may be necessary" to regulate the concession, and to prevent the abuse, of the fishery privileges conceded to them within the British territorial coast-waters described in the Article. And the British Act, as the exercise of that sovereignty, authorized the Crown, by Order-in-Council, to prescribe, or to vest authority in Newfoundland to prescribe, such Restrictions or Regulations as should be deemed proper and necessary for carrying into effect the purposes of the treaty; which authority

was subsequently vested in Newfoundland by the grant from the Crown of a Constitution conferring upon the British subjects within the Colony, legislative and executive powers of Government.

The Reciprocity Treaty of 1854, and the Washington Treaty of 1871, conceded further fishery privileges to American fishermen within the territorial coast-waters of Canada and Newfoundland, with reciprocal fishery privileges to British colonial fishermen within the territorial coast-waters of the United States on the Atlantic coast; but as the former treaty was terminated by the United States in 1866, and as the fishery articles in the latter were revoked by the United States in 1885, it will only be necessary to refer to the diplomatic discussions between the two Governments respecting their provisions.

Owing to the diplomatic controversy over the Fortune Bay disturbances of 1878, the British Government appointed Captain Sullivan, R.N., senior naval officer at Newfoundland, to investigate the facts of the disturbances; and his report was furnished to the Government of the United States with the following observations by Lord Salisbury:

"You will perceive that the report in question appears to demonstrate conclusively that the United States fishermen on this occasion, had committed three distinct breaches of the law; and that no violence was used by the Newfoundland fishermen, except in the case of a vessel whose master refused to comply with the request which was made to him that he should desist from fishing on Sunday, in violation of the law of the colony, and of the local custom, and who threatened the Newfoundland fisherman with a revolver."²³

The three distinct breaches of law, so found by the investigating British Naval Officer were: (1) Fishing on Sunday—*forbidden by an Act of 1876.* (2) Fishing during the close season for fish—*forbidden by an Act of 1862;* (3) Fishing by seines—*forbidden by an Act of 1862.* The Naval Officer fur-

²³Foreign Relations (U.S.), 1878-9, page 284.

ther reported that, contrary to the terms of the treaty, the American fishermen were fishing illegally, interfering with the rights of British fishermen and their peaceful use of that part of the coast then occupied by them, and of which they were in actual possession by their seines and boats, their huts and gardens and lands granted by Government."²⁴

This report of the illegal proceedings of American fishermen under the Treaty of 1818, and Lord Bathurst's statement of the colonial experience of Canada and Newfoundland under the Treaty of 1783, shew how the concessions of free fishery privileges in the colonial territorial coast-waters under both treaties, had been aggressively abused by American fishermen.

Mr. Secretary Evarts, in discussing these Fortune Bay disturbances, maintained the "broad doctrine" that no British authority had a right to pass any kind of laws binding on American fishermen while fishing in British waters, saying: "If our fishing fleet is subject to the Sunday Laws of Newfoundland, made for the coast population; if it is excluded from the fishing grounds from October to April (by the close season law), if our seines and other contrivances for catching fish are subject to the Regulations of the Legislature of Newfoundland, it is not easy to see what firm or valuable measure for the privilege of Article 18 of the Treaty of 1871, as conceded to the United States, this Government can promise to its citizens under the guaranty of the treaty." And as a corollary he claimed: "If there are to be Regulations of a common enjoyment, they must be authenticated by a common or joint authority;"²⁵ a doctrine of joint sovereignty over British territorial waters and coasts, which must have given a startling surprise to both British and International Law.

And Mr. Evarts further argued: "Manifestly the subject of the Regulation of the enjoyment of the in-shore fishery by the resident Provincial population, and of the in-shore fishery by our fleet of fishing cruisers, does not tolerate the control of

²⁴Ibid., page 285.

²⁵Ibid., page 310.

so divergent, and competing, interest by the domestic legislation of the Provinces. Protecting and nursing the domestic interest, at the expence of the foreign interest, on the ordinary motives of human conduct, necessarily shape and animate the local legislation." And he asked from Her Majesty's Government "a frank avowal, or disavowal, of the paramount authority of Provincial legislation to regulate the enjoyment by our people of the in-shore fishery."²⁶

Lord Salisbury's reply was "that if Mr. Evarts' contention that no British Authority has a right to pass any kind of laws binding on Americans while fishing in British waters, be just, the same disability would apply a fortiori to any other power; and "the treaty waters must be delivered over to a *trichy*."²⁷ He subsequently shewed that the Newfoundland regulations, then complained of, were in force at the date of the Treaty of Washington, and were not abolished, but were confirmed by subsequent statutes, and were therefore "binding under the Treaty upon the citizens of the United States, in common with British subjects." And he added that "Her Majesty's Government feel bound to point to the fact that the United States fishermen were the first and real cause of the mischief by overstepping the limits of the privileges secured to them, in a manner gravely prejudicial to the rights of the British fishermen," and he closed by refusing on behalf of the British Government, to acknowledge any liability for the claims of the American fishermen.²⁸

Hall's International Law, commenting on this Fortune Bay incident, says: "It was argued by the United States that the fishery rights conceded by the treaty were absolute, and were to be 'exercised wholly free from the regulations of the Statutes of Newfoundland, set up as an authority over our fishermen, and from any other Regulations of fishing now in force, or that may hereafter be enacted by that Government.' In other

²⁶Ibid., pages 310-11.

²⁷Ibid., page 323.

²⁸Ibid, 1880-1, page 572.

words, it was contended that the simple grant to foreign subjects of a right to enjoy certain national property, in common with subjects of the State, carried with it, by implication, an entire surrender, in so far as such national property was concerned, of one of the highest rights of sovereignty, viz.: the right of legislation. That the American Government should have put forward such a claim is scarcely intelligible.²⁹

The damages claimed by the United States Government amounted to \$105,305. But the succeeding Government, through Lord Granville, while insisting that the Treaty of 1871 meant that "the American and British fishermen shall fish in the Newfoundland waters within the limits of British sovereignty upon terms of equality, and not that there shall be an exemption of American fishermen from any reasonable regulations to which British fishermen are subject,"³⁰ and rejecting claims for fish caught "by means of strand fishing, a mode of fishing to which under the Treaty of Washington, they were not entitled to resort," agreed, contrary to Lord Salisbury's decision, to pay \$75,000 to the United States in June 1881.

And while willing to confer respecting Regulations for the reciprocal fishery privileges of each nation in the territorial coast-waters of either country, under the then existing Treaty of Washington, Lord Granville expressly indicated the legislative authority to prescribe such Regulations: "The duty of enacting and enforcing such Regulations when agreed upon, would, of course, rest with the Power having the sovereignty of the shore and waters in each case."

But in the present diplomatic complaints against the fishery regulations of Newfoundland, Mr. Secretary Root, in his despatch dated the 19th October, 1905, to the British Minister at Washington, revives Mr. Evarts' contentions against the subordination of American fishermen to the laws of Great Britain or Newfoundland, and which contentions were negatived by the British Government in 1863, 1878, 1880, 1886 and 1887.

²⁹ Ed., page 340.

³⁰Foreign Relations (U.S.), 1880-1, page 589.

Mr. Secretary Root makes the admission that there are two classes of American vessels (1) "vessels which are registered and (2) vessels which are licensed to fish and not registered." "The vessels with a license can fish but cannot trade; the registered vessels can lawfully both fish and trade;" which latter class includes the whole mercantile marine of the United States. And he claims that: "Any American vessel is entitled to go into the waters of the treaty coast and take fish of any kind." "She derives this right from the treaty, and not from any permission or authority proceeding from the Government of Newfoundland."³¹

A Foreign Office Memorandum published by the Imperial Parliament in 1906, affectively answers this contention by shewing that Mr. Root misquotes the treaty: "The privilege of fishing, conceded by Article 1, of the Convention of 1818, is conceded—not to American vessels, but—to the 'inhabitants of the United States' and to 'American fishermen.' His Majesty's Government are unable to agree to this contention or any of the subsequent propositions, if they are meant to assert any right of American vessels to prosecute the fishery under the Convention of 1818, except when the fishery is carried on by the inhabitants of the United States. The Convention confers no right on American vessels as such."³²

As supplementary to the answer given above, it may be added that the treaty, by the use of the expression "American fishermen," and of the trade-work terms "take, dry, and cure, fish," has designated the special trade-class of the privileged "inhabitants of the United States," and their special marine class of vessels employed therefor, and to whom the treaty privileges of fishing in the British territorial coast-waters of Canada and Newfoundland, and of using their unsettled coasts for the trade-work purposes of drying and curing their fish, are conceded; and assuming that the maxim *expressio unius est exclusio alterius*, and that the doctrine as to strict treaty-cession

³¹Correspondence respecting the Newfoundland Fisheries, 1906, page 2.

³²*Ibid.*, page 6.

construction, apply, it would follow that the treaty privileges are conceded only to those crews on American vessels who are American fishermen, and experts in the trade-business of fishing, and in the trade-work of drying and curing fish.

Another contention of the Secretary is that "When a vessel had produced papers shewing that she is an American vessel, the officials of Newfoundland have no concern with the character or extent of the privileges accorded to such vessel by the Government of the United States. No question, as between a registry and a license, is a proper subject for their consideration. They are not charged with enforcing any laws or regulations of the United States. As to them if the vessel is American, she has the treaty right, and they are not at liberty to deny it."³³

This contention is also fully answered by the Foreign Office Memorandum, which—in entire harmony with the previous decisions of Lord Salisbury in 1878, 1880 and 1881, Lord Granville, in 1880, Lord Rosebery and Lord Iddesleigh in 1886.—says:³⁴ "In the opinion of His Majesty's Government, American fishermen are bound to comply with all Colonial Laws and Regulations, including any touching the conduct of the Fishery, so long as these are not in their nature unreasonable, and are applicable to all fishermen alike."³⁵

The Foreign Office Memorandum is sustained by the following opinion given by the Law Officers of the Crown, Sir W. Atherton and Sir Roundell Palmer, on the 6th January, 1863, on the fishery clauses in the Treaties of 1818 and 1854:

³³An American law writer says: "There seem to be special reasons why the Dominion authorities may inhibit general commerce by Americans engaged in fishing. Their vessels clear for no particular port; they are accustomed to enter one bay or harbour after another as their needs demand, they might thus carry on a coasting trade; they would certainly have every opportunity for successful smuggling. Indeed this whole subject legitimately belongs to a local customs and revenue system, and not to the fisheries." *American Law Review*, 1870-1, vol. 5, page 414.

³⁴*Foreign Relations (U.S.)*, 1878-9, pages 284 and 323; 1880-1, pages 572 and 589; 1886, page 398; 1887, pages 447 and 469.

³⁵Correspondence, page 7.

“That in our opinion, the inhabitants of the United States fishing within waters in the territorial jurisdiction of the Legislature of Newfoundland, or of any other of the British Colonies, are bound to obey, and are legally punishable for disregarding, the laws and regulations of the fisheries enacted by or under the authority of the respective Provincial Legislatures. The plain object of the treaties was to put the inhabitants of the United States as regards the ‘liberty to take fish’ within the parts of the British Dominions described, on the same footing as ‘subjects of His Britannic Majesty,’ ‘in common with’ whom, under the terms of the treaty, such liberty was to be enjoyed. The enactments subsequently passed did but confirm the treaties, and provide for the suspension, during the operation of those treaties, of such laws, etc., as were or would be inconsistent with the terms and spirit of the treaties, which ‘terms and spirit’ are, it appears to us, in no respect violated by the Regulations *bona fide* made for the government of those engaged in the fishery, and equally applicable to British subjects so employed.”

This opinion was sent by the Colonial Secretary to the Governor of Newfoundland in a despatch dated the 2nd February, 1863, in which he said: I have only to add my desire that, while asserting the authority of Colonial Law in colonial waters within the limits of existing treaties, you will take care to do so in the manner which is likely to be least offensive to the foreigners who may fall within its scope.” And in a despatch dated the 3rd August, 1863, in commenting on a Draft Colonial Bill for regulating the fisheries of Newfoundland, he said: “I apprehend that it is not your expectation that I should express an opinion respecting the practical modes of conducting these fisheries; it being plain that the inhabitants of Newfoundland are, or ought to be, best capable of judging what regulations are calculated to increase the productiveness of their own seas. And with respect to Imperial interests, I do not think it desirable to anticipate that close inquiry to which any Act passed upon this matter must be subjected to in order to ascertain that it does not

infringe upon the right guaranteed to foreigners, or run counter to any principle of Imperial policy."³⁶

But Mr. Secretary Root further contends that: "The Government fails to find in the treaty any grant of right to the makers of colonial law, to interfere at all, whether reasonably, or unreasonably, with the exercise of the American rights of fishery, or any right to determine what would be a reasonable interference with the exercise of that American right." "The treaty of 1818 either declared or granted, a perpetual right to the inhabitants of the United States, which is beyond the sovereign power of England to destroy, or change. It is considered that this right is, and forever must be, superior to any inconsistent exercise of sovereignty within the territory." "This Government cannot permit the exercise of these rights to be subject to the will of the Colony of Newfoundland. The Government of the United States cannot recognize the authority of Great Britain to determine whether American citizens shall fish on Sunday." And he adds: "An appeal to the general jurisdiction of Great Britain over the territory is, therefore, a complete begging the question."³⁷ Surely Lord Salisbury was justified in saying that "if such contentions were just, the Newfoundland territorial waters must be delivered over to anarchy."

As negating the diplomatic contentions of Secretaries Evarts and Root, may be cited the instructions given by Mr. Secretary Marcy in 1856, for the guidance of American fishermen under the extended fishery privileges conceded to them by the Reciprocity Treaty of 1854: "It is understood that there are certain Acts of the British North American Colonial Legislatures, and also, perhaps, Executive Regulations, intended to prevent the wanton destruction of the fish which frequent the coasts of the colonies, and injuries to the fishing therein. It is deemed reasonable and desirable that both the United States and

³⁶U.S. Ex. Doc., No. 84 (1880), page 110; and U.S. Ex. Doc. No. 113 (1888), page 251. The Law Officers' opinion was also published, in the Newfoundland Legislative proceedings, 1863-4.

³⁷Correspondence, pages 12, 13, and 14.

British fishermen should pay a like respect to such laws and regulations, which are designed to preserve and increase the productiveness of the fisheries on these coasts. Such being the object of these laws and regulations, the observance of them is enforced upon the citizens of the United States, in the like manner as they are observed by British subjects." And as to reciprocal fishery privileges in the respective British and United States territorial coast waters, he added: "By granting the mutual use of their in-shore fisheries, neither party has yielded its rights to eivie jurisdiction over a marine league along its coasts. Its laws are as obligatory upon the citizens or subjects of the other, as upon its own."³⁸

And in 1870, after the Government of the United States had been notified that "the Canadian Government with the concurrence of Her Majesty's Ministers, had determined to increase the stringency of the existing practice of dispensing with warnings hitherto given" to American fishermen; and after the Parliament of Canada had passed the Foreign Fishing Acts of 1868 and 1870, authorizing certain Imperial and Colonial officers to go on board any foreign vessel within any Canadian harbour, or hovering in British waters, and examine the master on oath, etc., Mr. Secretary Boutwell, of the Treasury, issued a circular instructing his officers to notify all masters of American fishing vessels of the provisions of the Canadian Statutes.³⁹ And on the 9th June, he issued another circular advising that "fishermen of the United States are bound to respect the British laws for the regulation and preservation of the fisheries to the same extent to which they are applicable to British and Canadian fishermen."

These instructions are supported by the just position taken by Mr. Secretary Bayard in 1886, during the embittered diplomatic disussions consequent upon the seizure of American vessels after the abrogation by the United States in 1885, of the fishery articles in the Washington Treaty of 1871, in which,

³⁸Foreign Relations (U.S.), 1880-1, page 572.

³⁹Ibid., 1870, page 411.

after disclaiming "any desire to shield any American vessel from the consequences of a violation of international obligations," he assured the British Government that: "Everything will be done by the United States to cause their citizens, engaged in fishing, to conform to the obligations of the treaty (of 1818) and to prevent an infraction of the fishery laws of the British Provinces."⁴⁰ And he also warned a complainant that "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."⁴¹ And these executive instructions furnish a complete and effective answer to Mr. Secretary Root's novel contentions.

A learned American law writer, while advocating the claims of the United States, has also admitted that: "The provision of the Canadian Statute⁴² that an officer may board an American vessel as soon as she comes into a bay, or harbour, and may remain during her stay therein, is plainly reasonable and proper; it would only be a 'restriction necessary' to prevent the crew taking, curing or drying fish in the territorial waters 'or from in any other manner abusing the privileges reserved to them.' To this extent the Canadian Parliament had a right to go. The claim to lie at anchor in the bays and harbours, and other territorial waters, for the purpose of cleaning and packing fish, or to procure bait therein, by purchase or barter, or to prepare to fish while therein, or to land and tranship cargoes of fish; all of these acts are plainly unlawful, and would be good grounds for the confiscation of the offending vessel, or the infliction of pecuniary penalties."

"Where, from considerations of public policy, statutes are made to declare some final result illegal, the legislature uniformly forbids the preliminary steps which are directly connected with that result and lead up to it, and facilitate its accomplishment."⁴³

⁴⁰Ibid., 1886, page 377.

The Fisheries Question, U.S. Ex. Doc., 1887-8, vol. 9, page 467.

Revised Statutes of Canada (1886), c. 93; now (1906), c. 47.

⁴³American Law Review, 1870-1, vol. 5, pages 408 and 410.

The true doctrine on this question is fairly stated in Philimore's International Law: "With respect to merchant and private vessels, the general rule of law is that, except under the provisions of an express stipulation, such vessels have no exemption from the territorial jurisdiction of the harbour or port, or, so to speak, territorial waters (*mer litorale*) in which they lie."⁴⁴ And he supports this by citing the doctrine so clearly expounded by Chief Justice Marshall in the following judgment: "When private individuals of one nation spread themselves through another, as business or caprice may direct, mingling indiscriminately with the inhabitants of that other; or when merchant vessels enter for the purposes of trade, it would be obviously inconvenient and dangerous to society; and would subject the laws to continued infraction, and the Government to degradation, if such individuals or merchants, did not owe temporary and local allegiance, and were not amenable, to the jurisdiction of the country. Nor can any foreign sovereign have any motive for wishing such exemption. His subjects thus passing into foreign countries, are not employed by him; nor are they engaged in national pursuits. Consequently there are powerful motives for not exempting persons of this description from the jurisdiction of the country in which they are found, and no one motive for requiring it. The implied license, therefore, under which they enter, can never be construed to grant such exemption." "One sovereign being in no respect amenable to another, is bound by obligations of the highest character not to degrade the dignity of his nation, by placing himself, or its sovereign territorial rights, within the jurisdiction of another."⁴⁵

British law is to the same effect. In the *Franconia* case, the judges generally concurred with Mr. Justice Lindley, when he said: "It is conceded that even in time of peace, the territoriality of a foreign merchant-ship within three miles of the coast of any state, does not exempt that ship, or its crew, from

⁴⁴Vol. 1, page 483.

⁴⁵*Schooner Exchange v. McFadden*, 7 Cranch (U.S.) 144.

the operation of those laws which relate to its revenues, or fisheries."⁴⁶ And Sir Travers Twiss tersely states that "Treaty engagements in such matters (fisheries in common) do not give any other right than that which is expressed in the specific terms."⁴⁷

The ancient Anglo-Danish Treaty of 1670-1 (renewed after the War of 1814) early affirmed the doctrine of the subordination of foreign subjects to local laws, while availing themselves of the reciprocal privileges of fishing and trading within the territory of the other sovereign. It provided that the people and subjects of either sovereign "as well in going, returning and staying, as also in fishing and trading," should enjoy the same liberties, immunities, and privileges, which the people of any foreign nation whatsoever, abiding and trading thither, do or shall enjoy. "But so that the sovereign power of both Kings in their Kingdoms and ports, respectively to appoint and change customs, or any other matters, according to occasion, be preserved, and remain inviolate."⁴⁸ And by an Anglo-French Treaty of 1814, French subjects were permitted "to continue their residence and commerce in India, so long as they shall conduct themselves peaceable, and shall do nothing contrary to the laws and regulations of the Government."⁴⁹

Another view may also be suggested. The treaty, by granting to American fishermen the liberty of fishing in the Canada and Newfoundland territorial coast-waters, "in common with the subjects of His Britannic Majesty"—which subjects had a national title to the fishery within the marine belt of their territorial coast-waters—granted that which had some incidents of a tenancy-in-common; and therefore both such tenants-in-common,—subjects and aliens,—deriving their "common" titles from the same sovereignty, must logically be held to take and

⁴⁶*Regina v. Keyn*, 2 Exch. Div. 93.

⁴⁷Twiss on the Law of Nations in Time of Peace, page 265.

⁴⁸Hertslet's Treaties, vol. 1, page 181.

⁴⁹*Ibid.*, page 271.

enjoy them subject to the laws of the sovereignty, within which such tenancy-in-common had been granted.

The Anglo-American Treaties of 1854 and 1871, and the signed, though unratified, Treaties of 1874 and 1888, furnish another effective argument. None of them required the assent of any of the State Legislatures of the United States; while in each of them there is an acknowledgement by the United States that the British Colonies had a co-ordinate legislative sovereignty with Great Britain in assenting to the fishery articles, in the words that the fishery articles "shall take effect so soon as the laws to carry them into operation shall have been passed by the Imperial Parliament of Great Britain, by the Parliament of Canada, and by the Legislature of Newfoundland."

But these Anglo-American treaties are also unchallengable authorities supporting the Foreign Office Memorandum of 1906, for they conceded to colonial fishermen the reciprocal privilege of free fishing in certain "bays, harbours, and creeks, on the sea-coasts and shores of the United States, and of its said islands, without being restricted to any distance from the shore, with permission to land upon the said coasts of the United States, and of the islands aforesaid, for the purpose of drying their nets, and curing their fish." If the recent diplomatic repudiation of the obligatory force of British and colonial laws on American fishermen within British territorial coast-waters, as formulated by Secretaries Evarts and Root, is part of the Law of Nations, then it logically follows that, while such reciprocal fishery privileges were in force, colonial fishermen, exercising their treaty-privileges of fishing within the marine belt of territorial coast-waters of the several States of the Union, along the Atlantic, and of landing on the State coasts for their trade purposes, were not subject to any of the Federal or State Fishery Laws. And the Government of Great Britain might have similarly contended that it could not recognize the authority of the United States to determine under what laws, or on what days, Canadian fishermen could fish; nor permit their treaty fishery rights, in the territorial

coast-waters of the several States, to be "subject to the authority or will" of the United States or of any of the States of the Union, or "to be interfered with at all, whether reasonably or unreasonably."

And if the argument of "long-continued acquiescence," so strenuously claimed against Great Britain by the United States in the Alaska boundary case, and sustained by the American jurists on that tribunal, is a doctrine of International Law affecting national sovereignties, it must be held to be more forceful when claimed against the United States in these fishery disputes. In the Alaska case "the long-continued acquiescence of Great Britain" consisted chiefly of boundary lines on maps, published by subjects, and some officials, not representatives of the British Government in its relations with foreign powers. In these fishery cases, however, "the long-continued acquiescence of the United States" is evidenced by the executive actions of its Government, in agreeing to a succession of treaties conceding fishery privileges to American fishermen within the territorial coast-waters of Canada and Newfoundland, from 1818 to the signed, but Senate-unratified, Treaty of 1888,—the later ones recognizing the Colonial Sovereignty of legislative ratification,—and to the *modus vivendi* of 1888, operative in Newfoundland until lately, and still operative in Canada.⁵⁰ The fishery laws of Newfoundland, now objected to, had been passed prior to the Washington Treaty, as stated by Lord Salisbury; and as there is nothing in any of the protocols, or treaties, nor in the *modus vivendi* of 1888, objecting to the now impeached fishery laws, it is therefore reasonable to claim that by the legislative ratification clauses in these treaties, and the *modus vivendi*, and the official admissions of Secretaries Marcy, Bayard and Boutwell, quoted above, there has been "a long continued acquiescence" by the United

⁵⁰The *modus vivendi* provides in clause 4: "Forfeiture to be exacted only for the offences of fishing, or preparing to fish, in territorial waters," which imports into the *modus vivendi* the statutory penalties for such offences. See Statutes of Canada, 1888, 51 Vict. c. 30. The previous Canadian Fishing Acts are recited in 31 Vict. c. 60, s. 20.

States in those colonial fishery laws; and that they are therefore binding on American fisherman, as they are on British fishermen, when fishing within such territorial coast-waters, even should "one of the highest rights of sovereignty, viz., the right of legislation," over such waters "further arraigned under any possible doctrine of International Law.

It is regrettable that Mr. Secretary Root, should have violated international comity when he urged Great Britain to discipline one of her sovereign self-governing colonies, and to control colonial ministerial responsibility to its legislature—using the following language: "I feel bound to urge that the Government of Great Britain shall advise the Government of Newfoundland that the provisions of the law, which I have quoted, are inconsistent with the rights of the United States under the Treaty of 1818, and ought to be repealed. And, that, in the meantime, and without any unavoidable delay, the Governor-in-Council shall be requested, by a proclamation which he is authorized to issue under the Act respecting Foreign Fishing vessels, to suspend the operation of the Act."⁵¹

Lord Clarendon once commented in the House of Lords on "the extraordinary tone of the President's message, and the apparently studied neglect of that courtesy and deferential language which the Governments of different countries are wont to observe when publicly treating of international questions;" adding, "that if the British Government accordingly did negotiate it would seem that it could only be upon the basis that England was unconditionally to surrender her pretensions to whatever might be claimed by the United States."⁵²

The Secretary apparently has not studied the home-rule system of Responsible Government conceded to the self-governing colonies of the British Crown, or he would not have thus urged an unconstitutional interference with that home-rule government, and the resulting Parliamentary responsibility of

⁵¹Foreign Relations (U.S.), 1905, page 493; Correspondence, page 4.

⁵²79 Hansard (3rd series), page 11.

the Colonial Ministers of the Crown, to the Legislature of Newfoundland. The Constitution it enjoys confers legislative power on the Governor, by and with the advice and consent of the Legislative Council and Assembly, to "make laws for the public peace, welfare and good government of the said Colony." And under similar grants of legislative powers to Canada, and its several provinces, the Judicial Committee of the Privy Council, as the final Court of Appeal, has held that these legislatures "are not in any sense, the agents, or delegates of the Imperial Parliament, but have, and were intended to have, plenary powers of legislation as large, and of the same nature as those of the Imperial Parliament itself."⁵³ They have therefore, the powers and attributes of national sovereignty in determining for what causes, or wrongful acts, life, liberty, or property, shall be forfeited, and what civil and political rights shall be enjoyed, by the British subjects within the Colony; and what wrongs shall be prohibited and punished;⁵⁴ subject to the limitations that their Legislative Acts shall not be repugnant to any Imperial Act extending to the Colony,⁵⁵ or to Imperial policy affecting foreign nations.

Finally, the treaty privileges to American Fishermen to purchase certain supplies in colonial bays and harbours, contains express restrictions—the negative words "and for no other purpose whatever," make imperative⁵⁶ the treaty prohibition against all other purchasing or trading; and therefore the purchase of "bait," and whatever is lawfully within the treaty pro-

⁵³*Russell v. Regina*, 7 Appeal Cases 329, *Hodge v. Regina*, 9 Appeal Cases 117.

⁵⁴Mr. Justice Story thus defined the political status of the British Colonies: "The Colonial Legislatures, with the restrictions necessarily arising from their dependency on Great Britain, were sovereign within the limits of their respective territories; possessing the general powers of government and rights of sovereignty, subject to the realm of England, but still exercising within their own territorial limits the general powers of legislation and taxation."

4th and 8th William III. c. 22, s. 9; 6 George IV. c. 114, s. 49; 28th and 29th Victoria c. 63 (Imp.).

⁵⁶*Hex v. Justices of Leicester*, 7 Barn. & Cress. 12.

hibition, is within the legislative discretion of Canada and Newfoundland to prohibit. This view of the Colonial legislative power was urged by the counsel for the United States before the Halifax Fisheries Commission in 1877.

There are English statutory precedents prohibiting British subjects selling fish to strangers (foreigners), and using certain nets in fishing, which may sustain the colonial legislative right to enact certain prohibitory laws regulating fishery rights within their territories.⁵⁷

Shortly after the Foreign Office Memorandum had been communicated to the United States, Lord Elgin—apparently waiving it as an authoritative exposition of Imperial policy, and the Foreign Office decisions on similar contentions by Lords Salisbury, Granville, Rosebery, and Iddesleigh, thereby breaking the “continuity of British foreign policy.”—intimated to the Government of Newfoundland that His Majesty’s Government were of opinion “that any attempt on the part of the Colonial Government to apply to the American fishermen the Regulations to which exception was taken by the United States, while the discussion was proceeding, might give rise to a highly undesirable and even dangerous situation;” and that “If Ministers should press for the prohibition both of seines and of Sunday fishing, some concessions other than exemption from light dues and customs laws will be expected.” And he intimated that the Government were informing the United States Government that they were prepared pending the discussion to negotiate a “provisional arrangement.”

The Ministers of Newfoundland replied that they deprecated “any provisional arrangement that would relieve American citizens from a proper recognition of the Statute laws;” and they submitted that the interests of the Empire, and not those of the colony alone, required that the rightful sovereignty within its own dominions, should remain inviolate; and that the yielding to the claims set up, would be a “virtual surrender

⁵⁷31 Edward III. Stat. 2; 2 Henry VI. c. 15, and others.

of sovereignty within certain territorial waters within the colony to a foreign power.”

To this the Colonial Secretary replied that the decision of the Ministers had caused “much disappointment;” and that they had “failed to appreciate the serious difficulty in which their policy had placed both them and His Majesty’s Government;” and he wished “to warn Ministers that some further concessions may be necessary if a *modus vivendi* is to be arranged.”⁵⁸

Subsequently a *modus vivendi* was agreed to between the British and American Governments; and against it the Colonial Ministers again protested as follows: “They have learned with profound regret that His Majesty’s Government has, without reference to this colony, proposed to the United States Ambassador, as one of the terms of a *modus vivendi*, the suspension of the Foreign Vessels Fishing Act of this year:” and that “they had hoped and expected that, before a *modus vivendi* was proposed to the United States Government the full text of the same would have been submitted to this Government, and thus have afforded them an opportunity for suggestion, or remonstrance.”⁵⁹

During the diplomatic correspondence respecting the fishing disputes of 1886, consequent upon the action of the United States in denouncing the reciprocal fishery articles of the Treaty of 1871, the United States Government proposed a *modus vivendi* on substantially similar terms, that in the meantime Her Majesty’s Government should “instruct the proper Colonial and other British officers to abstain from seizing or molesting fishery vessels of the United States,” unless they were found fishing in the then non-treaty waters. Lord Salisbury replied that, “this would suspend the operation of the statutes of Great Britain and of Canada, and of the Provinces now constituting Canada, not only as to the various offences connected with fishing, but as to

⁵⁸Correspondence, pages 20-28.

⁵⁹Correspondence, page 31.

customs, harbours, and shipping; and would give to the fishing vessels of the United States privileges, in Canadian ports, which are not enjoyed by vessels of any other class, or of any other nation; and would give greater privileges than are enjoyed at the present time by any vessels in any part of the world;" and he concluded by saying that the proposals were "quite inadmissible;" even though the American Government had proposed, as an article in the *modus vivendi*, that "the United States agrees to admonish its fishermen to comply with the Canadian customs Regulations, and to co-operate in securing their enforcements; and that obedience by American fishing vessels to Canadian laws, was believed and intended to be secured by this article."⁶⁰

And when the United States subsequently proposed in 1886 "That some ad interim construction of the terms of the existing treaty should, if possible, be reached," Lord Iddesleigh then Foreign Secretary, expressed his disappointment at the proposal "That Her Majesty's Government, in order to allay the differences which have arisen, should temporarily abandon the exercise of the treaty rights which they claim, and which they conceive to be indisputable. Her Majesty's Government are unable to perceive any ambiguity in the terms of article 1 of the Convention of 1818." And he added that whilst Her Majesty's Government were determined to uphold the rights of Her Majesty's North American subjects, they were no less anxious to maintain in their full integrity the facilities for fishing granted to the citizens of the United States.⁶¹

A *modus vivendi* cannot operate to dispense with, or suspend, or otherwise render inoperative, or unenforceable, any statute law of the Empire or of any Colony; for, as Lord Chancellor Cairns has held, that a Colonial Act is "an Act which is assented to on the part of the Crown, and to which the Crown therefore is a party."⁶² And it is trite knowledge that the Bill

⁶⁰Foreign Relations (U.S.), 1887, pages 484 and 487.

⁶¹Ibid., page 447.

⁶²*Theberge v. Landry*, 2 App. Cases, page 108. "A legal and confirmed Act of a Colonial Assembly has the same operation and force in the colony,

of Rights declares that "the pretended power of suspending of laws, or the execution of laws, by regal authority, without the consent of Parliament, is illegal."

And among the statute laws of the Empire which such a *modus vivendi* would affect, or agree to suspend, or dispense with, or to render unenforceable, are the following and some other clauses of the Merchant Shipping Act of 1894 (re-enactments of section 521 of the Act of 1854) which vest special civil and criminal jurisdiction over the territorial coast waters of the Empire in the respective British Courts situate thereon—including those in Canada and Newfoundland—to enforce against British and foreign vessels and their crews, such British and Colonial laws as affect, and are legally enforceable against, all such vessels and crews while within, or passing through, such territorial coast-waters:—

"685. (1) Where any District within which any Court, Justice of the Peace, or other Magistrate, has jurisdiction, either under this Act, or under any other Act, or at Common Law, for any purpose whatever, is situate on the coast of any sea, or abutting on, or projecting into, any bay, channel, lake, river, or other navigable water, every such Court, Justice or Magistrate shall have jurisdiction over any vessel being on, or lying or passing off, that coast, or being in or near that bay, channel, lake, river, or navigable water, and over all person on board that vessel, or for the time being belonging thereto, in the same manner as if the vessel or persons were within the limits of the original jurisdiction of the Court, Justice or Magistrate.

"(2) The jurisdiction under this section shall be in addition to and not in derogation of any jurisdiction or power of a Court under the Summary Jurisdiction Acts.

"712. This part of this Act shall, except where otherwise provided, apply to the whole of Her Majesty's Dominions."

A different Colonial Policy influenced the Imperial Government when the Anglo-French Treaty of 1857, respecting the

that an Act of Parliament has in Great Britain:" Chitty on the Prerogatives of the Crown, page 37.

Newfoundland Fisheries was submitted to the Legislature of Newfoundland, containing the following regal pledge to France:—
“Her Britannic Majesty hereby engaging to use her best endeavours to procure the passing of such laws by the Legislature of Newfoundland as are required to carry it into effect.”
The Legislature declined in a series of resolutions, the last reading as follows: “We deem it our duty most respectfully, to protest in the most solemn manner, against any attempt to alienate any portion of our fisheries, or our soil, to any foreign power, without the assent of the Local Legislature.” “As our fisheries and territorial rights constitute the basis of our commerce, and are the birthright and legal inheritance of our children, we cannot assent to the terms of the convention.” The Colonial Secretary’s reply recognized this constitutional right: “The proposals contained in the convention having been unequivocally refused by the Colony, they will of course now fall to the ground; the consent of the Legislature of Newfoundland is regarded by Her Majesty’s Government as the essential preliminary to any modification of their territorial or maritime rights.”⁶³

Up to the present the Imperial solidarity between the Imperial and Colonial Governments in dealing with the contentions of the United States in these fishery disputes, has been fairly maintained by the British Government. In a despatch from the American Minister in London to Mr. Secretary Seward in 1866, in which he reported that Lord Clarendon had communicated to him the decision of the British Government “to send out authority to Sir F. Bruce to proceed in conjunction with you after consultation with the respective Provincial Authorities. This had been thought the better course, as the latter had now substantially reached such a position of independence as to make it inadvisable for the Government here to attempt to act without regard to them.”⁶⁴

In 1886, Lord Rosebery, in a despatch replying to Mr.

⁶³Prowse’s History of Newfoundland, page 474.

⁶⁴Foreign Relations (U.S.), 1866, Part 1, page 119.

Bayard's complaints against the Canadian Government's seizure of American vessels, said: "The matter is one involving the gravest interests of Canada. I now enclose a copy of an approved report of the Canadian Privy Council in which the case of Canada is fully set forth."⁶⁵ And Lord Salisbury, in 1887, was more emphatic when, after informing the Government of the United States of the agreement in views entertained by Her Majesty's Government and the Government of Canada upon the most important points of the controversy respecting the Treaty of 1818, he added that he had "thought it right, in justice to the Canadian Government, to embody almost in their own terms their repudiation of the charges brought against them by Mr. Bayard."⁶⁶

The action of the Imperial Government in yielding to the arguments of Mr. Secretary Root, may be further tested by transferring these fishery privileges from the colonial to the home territorial coast-waters of Great Britain; and by assuming that French fishermen, within the territorial coast-waters along the south coast of England; or that German fishermen within the territorial coast-waters along the east coast of Scotland, had by treaty, a concession of competing coast fishery privileges with British fishermen similar to those conceded to American fishermen, within the colonial coast-waters of Canada and Newfoundland. Would such arguments, if advanced by the Foreign Secretaries of France or Germany, be yielded to by the Imperial Government proposing a *modus vivendi* suspending in the interest, and at the urgency of either nation, any of the British fishery laws, operative within such coast-waters, and equally binding upon all British fishermen exercising their trade of fishing within such coast-waters?

The question whether the local fishery laws of a nation are binding on the privileged alien citizens of a foreign nation, exercising fishery privileges conceded to them by treaty within

⁶⁵Ibid., 1886, page 395.

⁶⁶Ibid., 1887, page 469.

the territorial coast-waters of the conceding nation, on conditions similar to those of the Treaty of 1818, as on its own subjects, is, when disputed, peculiarly one to be settled according to the doctrines of International Law, and more especially in view of recent contentions; or by a reference to the Hague Tribunal, and not as desired by an interested Foreign Government.

And if International Law is the final appellate authority, then the disciplinary censure administered by the British Government, at the urgency of the United States Government, to the Responsible Government of Newfoundland because it declined to waive or suspend its fishery laws, is rather a constitutional and diplomatic surprise,—more especially in view of the many previous diplomatic decisions of the British Government on substantially similar contentions, quoted above; and after their affirmance in the Foreign Office Memorandum just issued; for neither the national sovereignty, nor justice, of the Crown, nor appellate legal jurisprudence, permits a re-argument of a final diplomatic or constitutional decision, for the purposes of review, or reversal.

Furthermore the publication of this disciplinary censure has intensified the difficulties of the international situation; and it seems to be a violation of that confidential and reticent policy which is universally recognized as governing incomplete diplomatic discussions; and especially those between a foreign sovereignty and the British Imperial power—composed as it is of a home sovereignty and several colonial self-governing sovereignties, each constitutionally exercising the regal and legislative powers of the Crown; and in which incomplete diplomatic discussions the administration by one of its colonial self-governing sovereignties of such regal and legislative powers respecting the treaty privileges of the alien citizens of such foreign sovereignty, within its colonial territory, is impeached.

