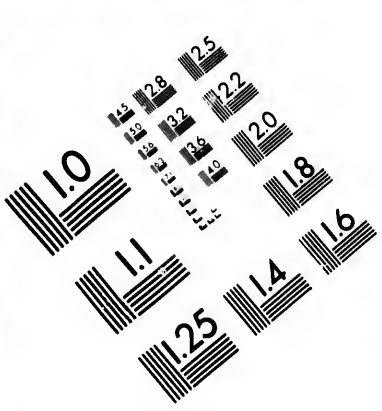

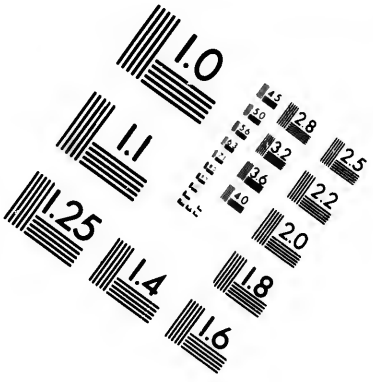

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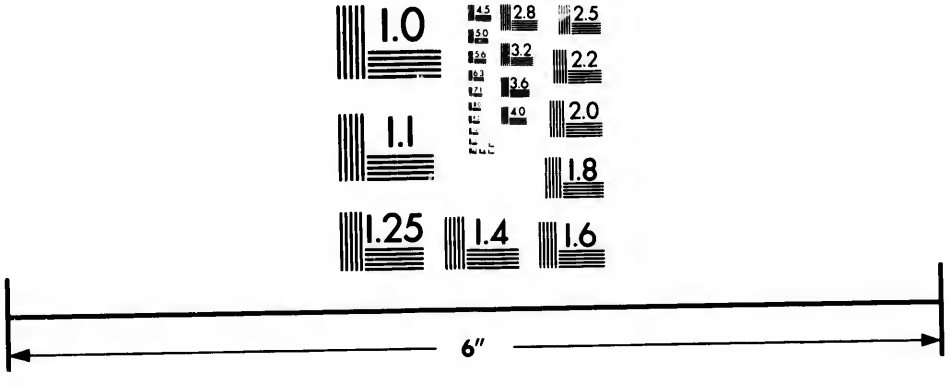

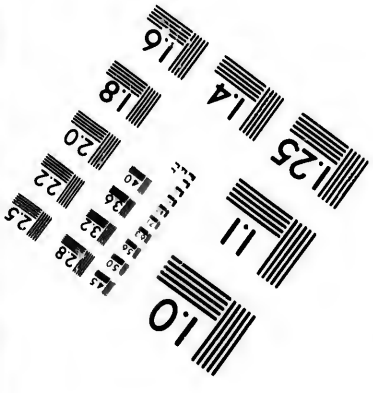

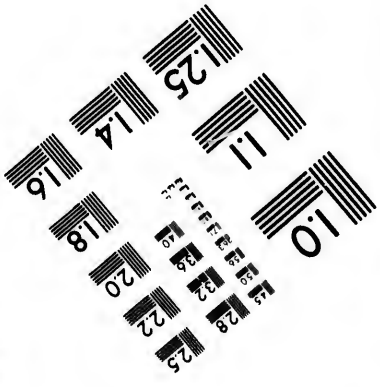

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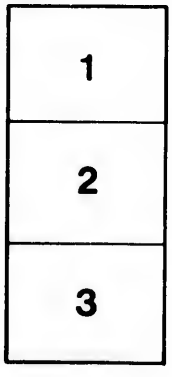

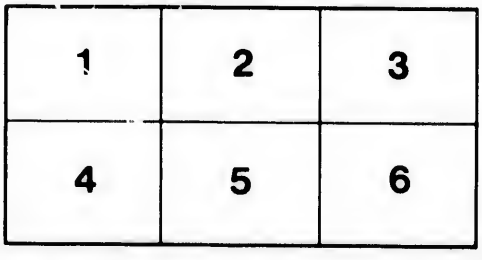

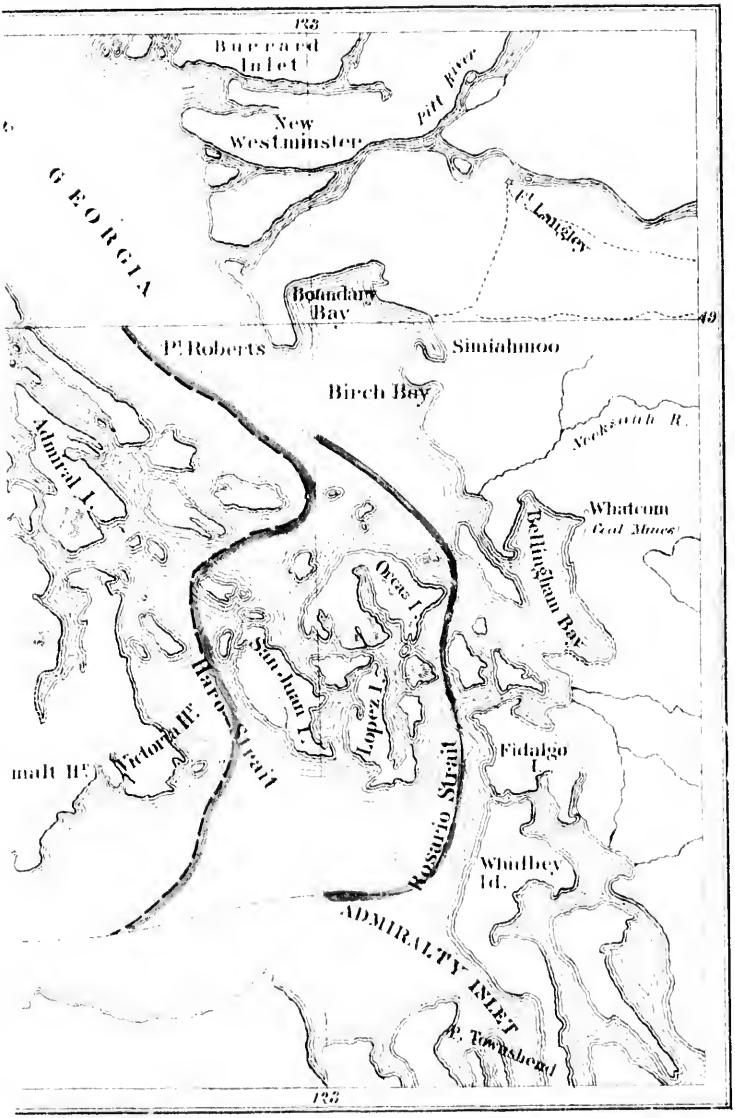
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BALANCE SHEET

OF THE

WASHINGTON TREATY

OF 1872,

IN ACCOUNT WITH THE

PEOPLE OF GREAT BRITAIN AND HER COLONIES.

BY THE

RIGHT HON. VISCOUNT BURY, M.P., K.C.M.G.

London:
EDWARD STANFORD,
6 & 7, CHARING CROSS.
1873.


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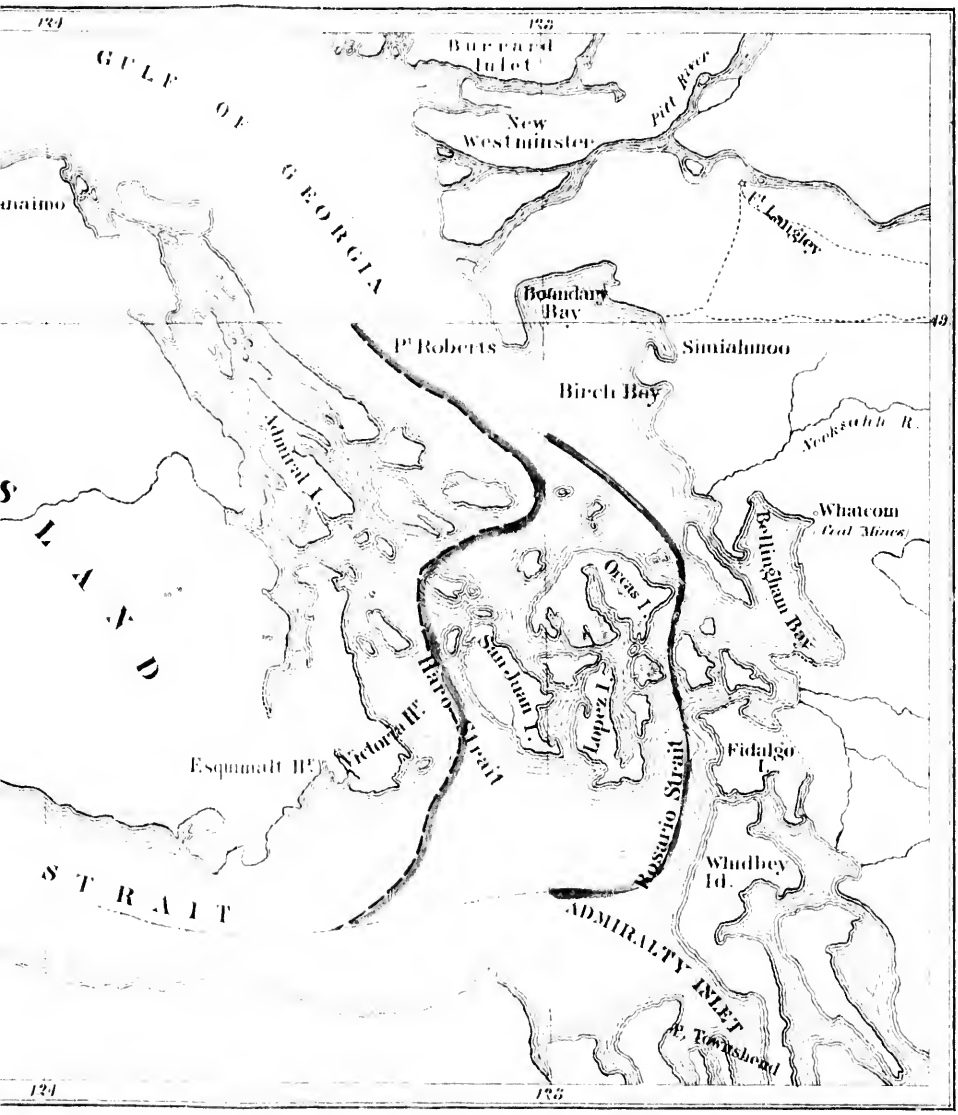
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CONTENTS.

ARTICLES XXXIV TO XLII.

There is a class of questions, which, belonging emphatically to politics in the highest sense of the word, lie outside the range of party disputes, and are judged by all good citizens on grounds altogether separate from their party predilections. To this class belongs the treaty lately concluded with the United States of America.

I propose to submit to the Royal Colonial Institute a balance-sheet, showing on one side the profit, and on the other the loss, accruing from this Treaty to the people of Great Britain and of her Dependencies.

It cannot be wise, it cannot be patriotic, to exaggerate any advantages we may have obtained, or to extenuate concessions we have been obliged to make—we should try to strike an honest balance between the two. Allow me, having said so much by way of preface, to take the protocols of the conferences of the Joint High Commission as my text, and to make a running commentary on the various clauses of the Treaty.

The questions placed before the Joint High Commission were—

(1.) The Fisheries.

(2.) The Navigation of the St. Lawrence, and privilege of passing through the Canadian Canals.

(3.) The Alabama Claims.

(4.) Claims of British subjects arising out of the War, but having no reference to the Alabama Claims.

(5.) The claims of the people of Canada on account of the Fenian raids.

(6.) The revision of the Rules of Maritime Neutrality.

If we turn to the correspondence which preceded the appointment of the Joint High Commission, we shall see that the English Government did not at first propose to include the Alabama Claims among the matters to be referred to the Commission. Our Minister at Washington, Sir Edward Thornton, in his letter to Mr. Fish, with 26 Jan. 1871.

which the correspondence commenced, proposed that a Joint High Commission should be appointed, "to treat of and discuss the mode of settling the different questions which have arisen out of the Fisheries, as well as those which affect the relations of the United States towards Her Majesty's possessions in North America."

This sentence, very cautiously worded, is obviously intended to mean the Canadian Claims for Fenian raids, and the disputes which had arisen respecting Canadian Fisheries; and it was these questions alone that the British Government was in January, 1871, prepared to discuss.

Mr. Fish, in his reply, shows plainly that this was the im-
30 Jan. 1871. pression left upon his mind by Sir Edward Thornton's letter. He saw that a discussion of the Fenian Claims was by no means to be desired by the United States; he therefore evaded the attack, and while he agreed to the appointment of a Commission, he took occasion to add that the main subject in dispute between England and America was the Alabama Claims.

1 Feb. 1871. Sir Edward Thornton answered in effect—"Very well, we will agree that the Alabama Claims shall be discussed; but do not forget that it is part of the bargain that the Canadian grievances
3 Feb. 1871. shall be adjudicated upon." Mr. Fish saw his advantage: Sir Edward Thornton had been induced to treat the Alabama Claims as the principal subject to be submitted to the Commission. Mr. Fish was therefore careful to do the same. It was only parenthetically, at the end of his reply, that Mr. Fish says, "With reference to the *remainder* of your Note, the President desires me to say that *if there be other and further claims* of British subjects or of American citizens, ... he (the President) assents to the propriety of their reference to the same Commission."

Thus, at the very outset of the discussion, we were diverted from our purpose. We proposed a Commission to decide Canadian grievances, and it was straightway settled that the main subject of discussion should be the Alabama Claims; and, further, Mr. Fish successfully paved the way for a refusal on the part of America to discuss the Fenian Claims at all. No reply was sent to Mr. Fish,
11 Feb. 1871 his view was taken for granted, and within a week Lord de Grey and Mr. Bernard were on board the Cunard steamer bound for New York, to deal as they best might with the diplomatists of Washington, leaving Sir Stafford Northcote to follow by the next steamer.

I have insisted upon this point—the change of the subject originally proposed—because it is one of much interest to the Colonial Institute. The original subject proposed for consideration was a Canadian grievance. Far from obtaining satisfaction for that

grievance, it was not even discussed, and in the end Canada was called upon to pay the principal part of the price demanded for such advantages as were gained by England under the Treaty.

The Alabama Claims.

The history of the question which thus became the main topic of discussion by the Joint Commission will be fresh in the minds of every member of the Colonial Institute. The American Civil War broke out in 1861, and lasted four years. The victorious North and the conquered South had no sooner made up their quarrel and become once more the United States of America, than they cried loudly before the world that they had been aggrieved by England. The reality of the grievance was at first denied, and redress was somewhat haughtily refused, but as time wore on the attitude of refusal gave place to one of attention, and attention was succeeded by an intimation that we were willing to negotiate. Lord Russell, 30 Aug. 1865.

Successive British Ministries tried their hands at negotiation. A Treaty was concluded, which was known as the Clarendon-Johnson Treaty, but the American people indignantly refused to ratify it. Mr. Reverdy Johnson, then Minister of the United States at the English Court, was recalled, and the Treaty itself was rejected by the Senate with every mark of scorn. England having once changed her tone, quickly ran through the whole descending gamut from arrogance to the extreme of conciliation; and when the Embassy of Lord de Grey was despatched, the English people were heartily tired of the Alabama Claims, and were prepared to submit to great sacrifices rather than leave a matter so troublesome in abeyance any longer.

Perhaps Lord Derby was too severe in saying, as he did in the House of Lords, that "a mission so sent out, with such unusual pomp and ceremony, was bound, under penalty of making itself ridiculous, to conclude a Treaty of some sort." Without going so far, the Treaty itself and the text of Lord Granville's Despatch clearly show the nature of the Instructions given to the High Commissioners. N. America, No. 3, 1871.

From the first meeting of the High Commissioners it became apparent that all other matters referred to the Commission were considered by both parties subordinate in importance to the Alabama Claims.

The High Commissioners met on the 27th February, 1871, and sat almost daily until the 14th March, when they adjourned for three weeks, in order to allow the British Commissioners to com-

municate with their Government on a question of the greatest importance; it was as follows:—

N. America, No. 3, 1871, p. 4.

Lord Granville, in his Instructions, had told the Commissioners that "it would be desirable to take this opportunity to consider whether it might not be the interest of both Great Britain and the United States to lay down certain rules of international comity in regard to the obligations of maritime neutrality, not only to be acknowledged for observance in their future relations, but to be recommended for adoption to the other maritime Powers."

The American Commissioners were not, however, satisfied with this concession. They insisted that certain new rules of International Law should be agreed to by both parties, and made retrospectively applicable to the facts in respect of the Alabama Claims. A demand so startling was necessarily referred to the English Cabinet. Events have proved that the results of the whole arbitration depended upon the decision arrived at by that body; and, indeed, it is not easy to avoid the influence that the Cabinet, in acceding to the American demand, rather courted than endeavoured to avert an adverse decision of the Arbitrators. If, as is very generally supposed, the main object of the Commission was to invent a graceful pretext for terminating a wearisome dispute by a moderate money payment, the reason of the concession was sufficiently obvious, and, indeed, if that had been its only result, few Englishmen would have refused their assent to it. Be that as it may, on the 5th April, when the High Commission re-assembled, the plenipotentiaries were able to announce that Her Majesty's Government would accept the new rules, and would agree that they should be retrospective in their action, adding, by way of protest, that Her Majesty's Government could not admit that the new rules correctly stated the principles of international law which were in force when the Alabama Claims arose.

The American negotiators had one more point to insist upon. They had obtained the postponement of the subject which was originally to have been the main subject of the Commission. They had obtained a Declaration that their new rules (which no one pretended to be in accordance with international law) should be held good international law both in the future and in the past; it was now absolutely certain that by their aid arbitration would go against Great Britain. It only remained to reiterate their demand for an apology. Accordingly on the following day "The American Commissioners, referring to the hope which they had expressed on the 8th March, inquired whether the British Commissioners were prepared to place upon record an expression of

N. America No. 3, 1871 p. 10.

regret by Her Majesty's Government for the depredations committed by the vessels whose acts were now under discussion; and the British Commissioners replied that they were authorised to express, in a friendly spirit, the regret felt by Her Majesty's Government for the escape under whatever circumstances of the '*Alabama*,' and other vessels from British ports, and for the depredations committed by those vessels." This apology was forthwith embodied in the Treaty, where it occupies the post of honour at the beginning of Article 1.

It is a disagreeable task to dwell upon this point. On the 8th March the British Commissioners stated that "Her Majesty's Government could not admit that Great Britain had failed to discharge towards the United States the duties imposed on her by the rules of international law, or that she was justly liable to make good to the United States the losses occasioned by the acts of cruisers to which the American Commissioners had referred."

Surely the position of England had not changed for the worse between the 8th March and the 13th April. If the refusal of an apology on the 8th March was right, it was wrong to make an apology on the 13th April.

A national expression of regret is an act of the gravest importance. If England had been clearly in the wrong, an expression of regret would have been consistent with her dignity; but it has not hitherto been usual for nations of the highest rank to apologise for acts which they never committed. The same Englishman who offered the apology framed the British case: the case is an elaborate statement that England was in the right. It is hard to escape from this dilemma: either the apology was unnecessary, or the English case was a tissue of mis-statements. It is beside the question to say that the Award has proved us to be in the wrong—the Award did no such thing—we were tried by the three new rules, and not by international law, the Geneva Arbitrators expressly said so.

I am aware that this matter presents itself in a different form to some minds. The destruction of American commerce, which undoubtedly took place during the war, is in fact a matter of regret to all Englishmen; and it is said that the expression of a regret so generally felt could not be improper. We cannot, however, forget that the destruction of that commerce was the work of enemies with whom the United States were at war, and that the unfair complicity of England with those enemies was actually the very matter which was to be referred to arbitration. The past history of the question must also be borne in mind. It

must be remembered that it had been persistently said in America that no settlement of the Alabama Claims would ever be satisfactory which did not include an ample apology from England. The way in which the American High Commissioners returned to the subject, when the main points had been decided according to their views, shows that mortification to the pride of England was the object aimed at.

Referring to Claims both of British and American Citizens (not being Alabama Claims).

On the 15th April, two days after the conclusion of the Alabama Articles of the Treaty, the High Commission agreed upon the manner in which "other claims arising out of acts committed during the Civil War and not referable to the cruisers." A Commission for the consideration of these claims was appointed, and it was agreed that the Convention of 1853 should be followed as a precedent. These Articles, from 12 to 17, do not call for any remark at present, except that the Fenian Claims, which would have here come in in logical sequence, were not brought forward by the British Commissioners.

The Fisheries. Articles 18 to 25.

The subject dealt with by these Articles has long been a matter of dispute. Fourteen years ago I brought it before the House of Commons. It had then been a matter of controversy for nearly 150 years—since the Treaty of Utrecht in 1713—and when the High Commission met at Washington, we were wrangling over it more fiercely than ever. Our quarrels used principally to be with the French—of late years they have been with the Americans.

6 Jan. 1871. We have already seen that when this Commission was proposed by Sir Edward Thornton to Mr. Fish, the larger question of the Alabama Claims was substituted for the original subject, and the Fisheries assumed in the minds of the Joint High Commission a position of secondary importance.

The matter in dispute is shortly this:—When Lord Elgin concluded the Reciprocity Treaty in 1854, the American fishermen obtained leave to fish in some parts of the British-American waters from which they had before been excluded by Treaty. For several years they enjoyed this advantage, and naturally came to look upon it as a right. Every one who has seen the rough fishermen of Connecticut, of Maine, of New Brunswick, and Newfoundland at their work, must know that they are a class of men with

whom abstract rights would have very little weight, unless they were backed by physical force. The employment of physical force means quarrels and collision, which could not fail ultimately to produce bad blood, and possibly involve the Governments concerned in hostilities. The enjoyment of the Fisheries by the Americans under the Reciprocity Treaty was balanced by certain tariff concessions of which British North America had the advantage. But when the fiscal necessities or the prejudices of the Americans caused them to put an end to the Reciprocity Treaty, their fishermen were deprived of a right of fishing to which they had become accustomed, and were compelled, as far as law could compel them, to content themselves with rights acquired under former Treaties. The disagreeable but almost inevitable consequence was that the Americans began to strain the Treaty of 1818, and to discover that under it they had rights to which the British were by no means prepared to admit. Certain arrangements were made by Canada by which license to fish was granted to American vessels, but it was obvious that this could only be a temporary expedient. The matter was more pressing every year, and at last it became absolutely necessary to effect the settlement of a question which might at any moment involve the two nations in war. This was the condition of affairs in June, 1870—about a year before the appointment of the High Commission. The Canadian Government then despatched to England the Hon. Mr. Campbell, Postmaster-General of the Dominion, and leader of the Senate, in order to press on Her Majesty's Government the necessity of securing, with as little delay as possible, the restoration to Canada of the rights which she enjoyed prior to the Reciprocity Treaty. The Canadian Committee of Council, in writing to Lord Kimberley, say that they "cannot conceal their apprehension that if the citizens of the United States are any longer permitted, as they have been doing for the last four years, to fish in waters where, according to our interpretation of the Treaty of 1818, they are trespassers, it may be difficult to obtain an amicable solution of the point in dispute." Lord Kimberley at once promised that they would propose a joint British and American Commission, on which the Dominion should be represented, to settle the geographical limits of the exclusive fishing rights of Canada under the Treaty of 1818.

Before the Joint Commission commenced its labours, Lord Kimberley wrote as follows to the Governor-General of Canada:— 18 Feb. 1871.

"As at present advised, Her Majesty's Government are of opinion that the right of Canada to exclude the Americans from fishing in the waters within the limit of three marine

miles of the Coast is beyond dispute, and can only be ceded for an adequate consideration. Should this take the form of a money payment, it appears to Her Majesty's Government that such an arrangement would be more likely to work well than if any conditions were annexed to the exercise of the privilege of fishing within the Canadian waters. The presence of a considerable number of cruisers would always be necessary to secure the performance of such conditions, and the enforcement of penalties for the non-observance of them would be certain to lead to disputes with the United States." The position taken up by Lord Kimberley was, as we see by this letter, a very intelligible one. He was of opinion that right was on the side of the Canadians, but that it was a right very difficult of assertion.

When the Joint Commission took up the subject of the Fisheries, the British Commissioners proposed that the Reciprocity Treaty of 5th June, 1854, should be restored. This proposal was peremptorily declined, and an American counter proposal was made, that the value of the inshore fisheries should be ascertained, and the right to use them in common with the British fishermen purchased by the United States. Failing all attempts to persuade the American Commissioners to modify their tariff arrangements, it was ultimately decided that free fish and fish oil were to be admitted free of duty in the American ports, and that a Commission was to be appointed to determine the amount, if any, to be paid by the Americans for joint proprietary rights in the inshore fisheries of Canada.

As soon as this arrangement was known in Canada, it produced great excitement. The Canadians pointed out that the cession of territorial rights involved in the Treaty had never been contemplated by Canada, and would never be conceded by her Legislature. They declared that even the widest American interpretation of the Treaty of 1818 would not have placed them in such a forlorn position as that which was absolutely accepted by the Treaty, and they plainly intimated that the clauses of the Treaty affecting Canada were too distasteful to the great body of the people to afford any ground of hope that they would be accepted. The Earl of Kimberley could only reply that, "looked at as a whole, Her Majesty's Government considered the Treaty as beneficial to the interests of the Dominion;" and he contended that free fish and fish oil, together with a money payment, to be assessed by the Convention, would, in fact, be an equitable solution of the difficulty.

The real point, however, was that however just the Canadian position might be, the British Government could not under-

take to maintain it. As Lord Kimberley had previously said, on the 17th June, "the causes of the difficulty lay deeper than any question of the interpretation of Treaties, and the mere discussion of such points as the correct definition of Bays could not lead to a really friendly agreement with the United States;" and again, on the 26th of February, 1871, "The exclusion of American fishermen from resorting to Canadian ports, except for the purpose of shelter and of repairing damages therein, of purchasing wood and of obtaining water, might be warranted by the letter of the Treaty of 1818, and by the terms of the Imperial Act, 59 George III. cap. 38; but Her Majesty's Government feel bound to state that it is inconsistent with the general policy of the Empire."

In fact, to put the matter into plain language, the Imperial Government were constrained to appeal to the loyalty and self-devotion of the Canadians to sacrifice their wishes and their rights to the necessities of Imperial policy.

The Canadians nobly responded to the appeal. Whatever, as citizens of the great Empire to which the inhabitants of these islands and of the Dominion alike belong, we may think of the reasoning of Lord Kimberley (and I am bound to say that it is difficult altogether to withhold one's assent to it), it is impossible to look without admiration at the self restraint exhibited by our Transatlantic fellow subjects, and at the cheerful way in which they accept a heavy share of the burden imposed by our joint nationality.

But this was not the only sacrifice imposed upon the Canadians.

Canadian Claims on Account of the Fenian Raids.

It was not till the 26th April that the British Commissioners found themselves at liberty to bring before the High Commission the claims of the people of Canada for injuries suffered from the Fenian raids. The Americans having already obtained all they wanted, peremptorily refused to enter upon the subject. Upon this the British Commissioners referred the matter to their Government, and on the 3rd May the British Commissioners gave up the point.

It might not unnaturally be supposed that the claims thus easily given up by the British Plenipotentiaries came within the scope of the new rules devised by the Americans, and applied at their instance to the conduct of England. It was but three weeks since 13 April
the new rules had been solemnly embodied in the Treaty. Were the new principles of international law to be good only as against

England, and not good as against the United States? A short survey of the facts will enable us to answer the question.

British Counter Case, p. 40.

Several societies of Irishmen, based upon the sentiment of hostility to England, were formed in America. The earliest was called the "Irish Republican Union," but we need not notice any other until the "Fenian Brotherhood" was established at Chicago in November, 1865. The Chicago meeting was attended by 300 delegates representing "circles," including twelve from military and naval circles. At the second annual congress of this society the President declared that they were "virtually at war with England." In October of the same year Fenian Bonds were issued, and an "Irish Republic" was established at New York, with a President, Senators, a Secretary of the Treasury, a Secretary of War, and other officials.

As a measure of precaution against the constantly-expressed threats of this body, the Canadian Government were obliged to call out nine companies of Militia, and to station them on the Frontier.

Early in 1866, meetings were held at which it became evident that the Fenians were on the eve of some great aggression. War-like stores were purchased, and large contracts made. The American papers reported the proceedings at the meetings, and

1866.

the *New York World*, of March 5, concluded an article with the plain words, "if they really mean war, if, as is given out, they contemplate the invasion of Canada, this is a serious business, which challenges the thoughtful attention of all Irishmen and all American citizens." On the 7th March the Canadian Executive called out 10,000 Canadian Volunteers, but it was not till the end of May that the Fenian preparations were complete. On Friday, 1st June, a body of Fenians, between 800 and 900 strong, crossed the frontier from Buffalo to Fort Erie, and on the following day came into collision with the Canadian Volunteers from Fort Colborne. Reinforcements soon arrived to the assistance of the Canadians. Sixty-five prisoners were taken, and the remainder recrossed the Frontier, where they were taken prisoners with O'Neill, their leader, by the United States authorities. The stores of arms which the Fenians had provided were also seized by the Americans. Here was a hostile force fitted out on American soil for the invasion of a friendly State. Their leader, with his stores and many of his men, were in the hands of the American authorities. What did they do? The President issued a proclamation against similar expeditions in future, but on the very day that the proclamation was issued, the Fenian leader, O'Neill, was released from custody, and before the end of the year, the arms and other war-

like stores were restored by the Americans to the Fenians. In addition to this the House of Representatives passed resolutions urging the United States authorities to demand the release of the men who were taken by the Canadians, and to stop all prosecutions pending in the United States Courts against Fenians.

In this raid one officer and six privates of the Queen's Own Volunteer Rifles were killed, and four officers and twenty-seven men were wounded.

In 1866 a renewal of the attack was threatened, and a camp of Volunteers was formed in Canada at an expense of $80,000. In 1867 the Fenians were engaged in promoting disturbances in England and Ireland; it was therefore not till 1870 that they were ready to undertake a new invasion. O'Neill was again at their head; arming and drilling went on openly in the United States; and so imminent was the danger that the Canadian Executive obtained leave to suspend the Habeas Corpus Act, and to call out a force for the defence of the Frontier. The attack was made on two points at once, but the Fenians, who uniformly were as cowardly as they were mischievous, fled in disorder as soon as they were confronted. They crossed the American Frontier, and were taken by the United States authorities. Thirteen tons of arms are said to have been seized, and the prisoners were tried in the United States Courts and condemned. They all, however, two months later, received an unconditional pardon from the President.

Within a year after his release O'Neill made another raid across the Frontier, but was this time stopped by the United States troops. He received no punishment, as he was said not to have committed any overt act.

Thus in the four years preceding 1871 the Canadian Government was three times obliged to call out its troops. Besides maintaining camps for months at a time, there was a heavy expense to the country in pensions, gratuities, and payments of claims arising out of the raids, as well as a serious charge on the Treasury for summoning the Volunteers, and the hindrance to industry, especially in 1866, by disturbance of the country at a season of the year when agricultural pursuits were in full operation.

It was only natural that the Canadian Government should be bitterly disappointed at the non-settlement of these claims. They pointed out that the Fenian organisation was still in full vigour, and that there was no reason to suppose that the American Government will do its duty better in the future than in the past. They state that Her Majesty's Government had never energetically pressed the Government of the United States to perform its duty; Enclosure in No. 8. C. April, 1872.

"on the contrary," they say, "while in the opinion of the Government and of the entire people of Canada, the Government of the United States neglected, till much too late, to take the necessary measures to prevent the Fenian invasion of 1870, Her Majesty's Government hastened to acknowledge by cable telegram the prompt action of the President, and to thank him for it."

To this Lord Kimberley's answer was that they had no choice, but either to abandon the Treaty or relinquish the claims; the Americans declined even to discuss the question "and," writes Lord Kimberley, "when the choice lay between the settlement of all the other differences between the two countries on terms which Her Majesty's Government believed to be honourable to both, and beneficial alike to Canada and the rest of the Empire, and the frustration of all hope of bringing the negotiations to a satisfactory issue, they could not hesitate as to the course which it was their duty to take."

Free Navigation of the St. Lawrence, of the Canadian and American Canals, and of Lake Michigan.

The Fenian Claims were surrendered, as I said, on the 3rd May, but before that time the Articles 26 to 33 of the Treaty were under discussion. These Articles referred to the navigation of the St. Lawrence and of the Canadian and American canals which connect the great lakes with the sea. Failing to obtain the restoration of the Reciprocity Treaty (which the Americans refused on grounds which we cannot quarrel with, however much we may disagree with them), the Articles 26 to 33 call for no especial remark. There is, however, in the Protocols a paragraph which any one who is duly imbued with the traditional policy of American diplomacy may well regard with dismay.

"The British Commissioners stated that they regarded the concession of the navigation of Lake Michigan as an equivalent for the concession of the navigation of the St. Lawrence;" and the Americans replied that in their opinion "the citizens of the United States could now justly claim to navigate the river St. Lawrence in its natural state, and they could not concede that the navigation of Lake Michigan should be taken as an equivalent of that right." Now this is a new assumption altogether on the part of the Americans, as may be easily seen by the Reciprocity Treaty of 1854. Article 3 of that Treaty admitted certain products of Canada and the United States reciprocally free. Article 4 conceded on the part of the Americans the right to Great Britain to navigate Lake Michigan as long as the free navigation of the St. Lawrence should

continue, and Great Britain on her part conceded the free navigation of the St. Lawrence. It was further decided that if Great Britain should suspend this privilege, the Americans should stop not only the navigation of Lake Michigan but the Free Trade Article No. 3 as well. Not only then in 1854 the exclusive right of Great Britain to navigate the St. Lawrence was *explicitly* acknowledged, but as that right was balanced against the navigation of Lake Michigan and the Free Trade Article No. 3, the British right of exclusive navigation was *implicitly* valued at a very high price.

The Article 26 of the Washington Treaty, therefore, ceding to the United States the joint right to navigate the St. Lawrence, with no other equivalent than the free navigation of three rivers in Alaska—which few persons have even so much as heard of—may fairly be put down on the debtor side of the account between the Treaty and the people of Great Britain.

The remaining Articles with regard to internal navigation do not call for special remark.

Articles 34 *to* 42 (*agreed to* 22*nd April*).

THE SAN JUAN BOUNDARY.

I now come to the San Juan Boundary. This matter has been for many years in dispute, and, as we all know, has unfortunately been settled against us by the Arbitrator appointed under the Treaty. But whether the decision be or be not satisfactory to us it cannot be laid to the account of the Treaty now under discussion. The San Juan Water Boundary was agreed upon by the first Article of a Treaty made in June, 1846, but the British and American Commissioners appointed for its demarcation differed, and it was never decided. The decision of the dispute was proposed by Lord Russell as a fit subject for arbitration in 1859, but, owing to the Civil War, the negotiations were not brought to a conclusion, and it was not until 1869 that a convention was signed by Lord Clarendon and Mr. Reverdy Johnson for referring the matter to an arbitrator. That Treaty was, however, never ratified, and the true interpretation of the Treaty of 1846 still remained in dispute when the High Commissioners assembled at Washington,

The Treaty of 1846 defined the boundary on the West Coast as follows :—

"The line shall be continued westward along the said 49th parallel of north latitude to the middle of the Channel which separates the Continent from Vancouver Island, and thence southerly through the middle of the said Channel and of Fuca Straits to the Pacific Ocean."

Unfortunately, the "middle" of the said channel is filled by small islands, so that instead of one channel down the middle of which the boundary might run, there were several channels, neither of which could be called *the* channel, because there were other channels: and the channel which most nearly corresponded geographically to the words of the Treaty was obviously not *the* channel, for no navigator who had his choice ever used it. The plain fact was that the negotiators of the Treaty of 1846 had either imperfect maps or no maps at all, and their agreement could not be literally carried out.

The Americans claimed to have the line run through the Western or Haro Channel, which would give to them the Island of San Juan. The British contended that the possession of Vancouver Island carried with it the possession of the adjacent islands, and so claimed to have the Rosario Channel declared *the* channel under the Treaty. They also contended, with perfect accuracy, that the Haro Channel was not known at the time the Treaty was made; therefore, the Rosario Channel was *the* channel under the Treaty.

The American negotiators led off with a bold shot—one whose magnificent audacity has really not been properly appreciated. They proposed to abrogate the whole of the Treaty in so far as it related to boundaries between the United States and British America, and re-arrange the boundary line which was in dispute before that Treaty was concluded.

Imagination pauses aghast before the magnificent spectacle: Over four thousand miles of coterminous frontier between Great Britain and the United States, without a landmark or a Treaty definition! One involuntarily recalls the exclamation of President Polk, when he came into office in 1845, that if he had not been embarrassed by the offers of his predecessors he would, as he called it, "have gone for the whole of Oregon." Fancy an American President unembarrassed by former negotiations, and empowered to re-arrange with a Joint High Commission, such as lately sat in Washington, the whole boundary from the Atlantic to the Pacific!

The British Commissioners answered, as well they might, that the proposal to abrogate a Treaty was one of a serious character, and that they had no instructions which would enable them to entertain it. It would appear that they did submit the matter to their Government, for it was not, as we learn from the protocol, till the Conference of the 20th March, that they declined the proposal.

Several attempts were made to procure a settlement, but the Americans would be satisfied with none that did not give them the

Haro Channel. They made one proposition, which, looking at it by the light of after events, we should have been wise to accept. It was that the Joint High Commission should recognise the Haro Channel as the channel intended by the Treaty of 15th June, 1846, with a mutual agreement that no fortifications should be erected by either party to obstruct or command it, and with proper provisions as to any existing proprietary rights of British subjects in the Island of San Juan. It was ultimately decided that the matter should be referred to arbitration.

Serious as must be the results to the Dominion of the Award given by the Emperor of Germany, it must, I think, be conceded that the fortune of the question was neither made nor marred by the Treaty of Washington. The High Commissioners did nothing more than refer the meaning of a former Treaty to arbitration.

When we remember that the alternative was to re-open the whole question of boundary between British America and the United States, we can hardly regret the decision of our Commissioners, and, indeed, it is impossible, without impugning the award given by the Emperor of Germany (which would not be consistent with the honour of this country, and ought not to be done by any of her citizens), to state in their full force all the reasons which justified a confident hope that the award would be in our favour. However, we have lost, and must acquiesce. Still the loss is another heavy item of that part of the cost of the Treaty which has fallen upon the Dominion of Canada. Articles 34 to 42, which have reference to this subject, were completed on the 22nd of April. The completed Treaty was signed on the 8th May.

Having pursued, in rapid review, the various Articles of the Treaty, it remains to estimate the value of the results obtained. Foremost among the advantages claimed for the Treaty is the renewal of a thorough good understanding with the United States. Every true Englishman must contemplate with satisfaction a result so advantageous to both parties. To some it will appear equivalent to a receipt in full for all concessions made under the Treaty; others will attach more importance to the fear that a policy of concession such as we have uniformly pursued towards the Americans since the peace of 1814, may be more likely to induce further demands, than to be a continued source of good understanding. Both opinions are speculative, and I desire to confine myself to-night strictly to facts. I merely point out that opinions represent unknown quantities, which every man must fill up on the balance-sheet according to his own judgment.

The next important argument, that the new rules, as between us and America, are likely to be greatly in our favour in future years, demands a little more examination. It is said that Great Britain is at war a dozen times to the United States once; that any agreement explaining and extending the obligations of neutrals, would be much more likely to tell in our favour than against us. That is true as far as it goes; or, rather, it would be true if it were in any degree probable that we should ever enjoy the advantages of the new rules. American diplomacy is not conciliatory, and no one, with the experience of the Washington Treaty before him, can suppose that if a future war should leave us with a new Alabama Claim against the United States, it would be treated in the spirit which our negotiators displayed at Washington. It has been abundantly proved that the traditions of American diplomacy in such cases has been invariably to refuse redress, and to assert to the fullest extent the rights of neutral commerce. Yet their new rules impose upon neutral commerce restrictions never heard of before, and, in fact, place neutrals in such a position that either a great portion of their trade will be crippled, or that they will unavoidably incur heavy damages to one or other of the belligerents. This is a position which has hitherto been strongly repudiated by the Americans, and it is difficult to believe that the propositions invented by them, when they were belligerents, would appear to them so just when applied against themselves as neutrals.

It must be remembered that the new rules are loosely worded. We have already, by our Counsel at Geneva, argued that the phrase "due diligence" means something quite distinct from the meaning we should have to affix to it in order to obtain an award if we quoted it in our favour, and no one can suppose that our own arguments would not be skilfully turned against us.

Again, the new rules have not the force of international law. At present they are in force only as between England and America. Those two nations undertook to bring them to the notice of other maritime powers, with a view to their adoption as part of international law, but they do not seem in a hurry to do so, and the only foreign jurist, as far as I can remember, who has expressed any opinion upon them—I mean Count Beust, in the latest Austrian Red-book—recommends their determinate rejection, and devotes a long paper to prove that they are entirely preposterous.

The peculiar action of the three new rules may be easily seen if we examine where, in the late Geneva Arbitration, they hit us on

points which international law without their aid would have passed by.

Neutrality, under international law, is the position of a State which remains at peace, with reference to two belligerent States with both of which it remains in friendly relations. The neutral State is bound to help neither combatant either with money or material, and to prevent its territory from being made a base of military operations by either. We were held liable because we did not use "due diligence" to prevent the outfit and escape of the "*Alabama*." By international law we should have been held harmless. We should have discharged our international obligations by stopping the ship on receiving due evidence of her character. Such evidence not having been tendered, by international law we were blameless, even though the "*Alabama*" did escape.

If the new rules had been in force, it would have been our business to get evidence for ourselves, and as, for the purposes of arbitration, the new rules *were* in force, we were held liable accordingly.

The new rules only increase the responsibility of a neutral Government in its governmental capacity; the subjects of a neutral Government are in the same position as they were before the new rules. They owe no deference to international law as such; they need obey only their own municipal law. It was lawful for them to sell arms or to build ships before the war broke out, and the breaking out of war does not alter that right. They owe no allegiance to either belligerent, possibly they care about neither. They would as soon trade with the one as with the other, and the stoppage of such trade might ruin them. All they have to do, therefore, is to observe the law in their own country; it is the duty of that country to see that its laws are such as will enable it to perform its international obligations, and it is, further, the duty of that country to see that its subjects obey the laws so made. But such laws are in their nature only measures of police. Belligerents care nothing what may be the state of the law in a neutral country; the law may be sufficient or insufficient, that is nothing to them, provided the requirements of international law are complied with. If those requirements are not complied with, the belligerent is justly aggrieved, and may demand reparation.

But although the subjects of a neutral may lawfully deal in articles contraband of war, they must do so at their own risk. The belligerent may capture such goods *in transitu* if he can, and the neutral merchant has no claim on his own Government for

protection, or on the belligerent who captures his goods, for damages. War is, as regards a neutral, an invasion of his rights. If no war existed, the neutral might trade with whom he would. Any restriction imposed upon him in the interest of a belligerent is an injury to the neutral. In fact, as the American Chancellor, Kent, says, "The right of a neutral to transport, and that of a belligerent to sieze, are conflicting rights, and neither party can charge the other with a criminal act."

Kent's Commentaries, Vol. I. page 142.

There are, then, three classes of rights and duties:

1. The duty of a neutral State to afford no assistance to a belligerent, and not to allow its territory to become a base of warlike operations.

2. The duty of a neutral subject to obey such laws as his Government may have framed to enable it to perform its international obligations.

3. The right of belligerent Government to seize contraband of war *in transitu*, if he can.

Now let us go a step further. War being an accidental dislocation of the relations which ought to subsist between nations, and entailing per force a restriction on neutral rights, all nations have been very chary of unnecessarily restricting those rights; in fact what are called belligerent rights have been conceded more as a necessary evil than from any abstract sympathy with them. Three short passages, all from American authorities, will prove not only the teaching of international law on this point, but (what is of more importance to our purpose just now), the construction which the Americans have put upon international law from the earliest times. The first is in 1793, a little after the declaration of American Independence; the second in 1862; and the third in 1863. A crowd of witnesses might be cited to fill up the interval with an uniform and unbroken tradition.

On the breaking out of the war between France and England in 1793, Mr. Jefferson, the American Secretary of State, thus writes:—

"Our citizens have been always free to make, vend, and export arms. It is the constant occupation and livelihood of some of them. To suppress their callings, the only means perhaps of their subsistence, because a war exists in foreign and distant countries in which we have no concern, would scarcely be expected. It would be hard in principle and impossible in practice. The law of nations, therefore, respecting the rights of those at peace, does not require from them such an internal derangement of their occupations."

The second authority is Mr. Seward, who, when complaint was made that the French were allowed to purchase horses and mules in the United States for the war in Mexico, writes to maintain what he calls the settled and traditionary policy of the United States. He says that if the Mexicans were allowed to dictate to a neutral State what commerce should be allowed, all neutral commerce would be destroyed. If Mexico, he says, were allowed to do this, "every other nation which is at war would have a similar right, and every other commercial nation would be bound to respect it as much as the United States. Commerce in that case instead of being free or independent, would exist only at the caprice of war."

The third is Mr. Adams, one of the Geneva arbitrators, who, writing to Lord Russell on the 6th of April, 1863, states as follows:—

"The sale and transfer by a neutral of arms, of munitions of war, *and even of vessels of war*, to a belligerent country, not subject to blockade at the time, as a purely commercial transaction, is decided by these authorities not to be unlawful. They go not a step further, and precisely to that extent I have myself taken no exception to the doctrine."

We thus see that the law of nations treats the sale and purchase of contraband of war as a matter entirely conventional, and not arising out of any of the obligations of neutrality. Ships, like other articles contraband of war, may be therefore built and sold in the neutrals own ports; but they must not be armed or fitted for war there, because, if the ship be sent to sea with officers and a fighting crew for the purpose of immediate warfare, the transaction ceases to be one of mere commerce, and assumes the form of a hostile expedition sent forth from the territory of the neutral. Such an expedition is plainly a violation of neutrality, according to international law, and one which the neutral Government is bound to do its best to prevent.

The case is not altered if the vessel is sent out without its armament or its war crew, and these are put on board at some place beyond the jurisdiction of the neutral. The ship, armament, and crew, form part of one enterprise and undertaking.

Sir Alexander Cockburn quotes with approval an article in the *American Law Review*, which contains the following passage:—

"It was not because Messrs. Laird sold a war-ship to the Confederates that we have a claim against England for a breach of international law; it was because collateral arrangements for completing the equipment and armament of the ship so sold, by

placing on board officers and crew, guns and provisions, rendered the entire proceeding, in fact, the inception of a hostile undertaking from the confines of a neutral territory." Such being the case under the old rules of international law, how is the case altered by the new rules?

The alteration appears to be one of degree rather than of character. No absolutely new obligation is imposed by the new rules; we should have been liable under the old rules if it could be shown that we knew of the building, equipment, and destination of a ship of war in our ports; that is, that we had such legal evidence of the fact as to enable us legally to stop such vessel. The new rules imposed no more, except in one respect; formerly the building, the equipping, and the sale of a vessel, would have been no breach of neutrality, provided we had stopped the escape of the vessel on receiving legal evidence of its destination. By the new rules, we were bound to use due diligence to prevent even the equipment of such a vessel; and it further appears that the term due diligence was held by the arbitrators to transfer the *onus probandi* which formerly lay upon the shoulders of the belligerent who considered himself aggrieved, to those of the neutral Government.

Perhaps lawyers would object to my definition, but it seems to me to amount to this:—Formerly the presumption of international law was in favour of the neutral, now it is to be in favour of the belligerent.

In any future war, therefore, we may call on the United States to use "due diligence to prevent the fitting out, arming, or equipping, within its jurisdiction, of any vessel, &c."

That is to be our gain obtained under the new rules.

But the Americans declare that they have, from the very beginning, given to the world an example of most strict adherence to the principles now embodied in the Treaty.

United States' Argument, p. 91

"Qualis ab incepto talis ad finem," they write; with consistency unwavering, and at whatever hazard of domestic or foreign inconvenience, even if it were friendly powers like France and Great Britain, with which we were brought into contention, the United States have steadily adhered to principles of international neutrality; and we may well, therefore, demand the observance of those principles, or reparation for their non-observance on the part of Great Britain." Such is the American view of their own conduct: but it follows that they have really observed international neutrality as strictly as is here alleged, they can do no more under the new rules; and the new rules will do us no good. But there are two opinions as to the conduct of

the Americans. Sir Alexander Cockburn thus sums up an exhaustive review of the conduct of the Americans in the cases of Spain, of Portugal, of Cuba, of Mexico, of Central America, and of the Fenians in Canada, from 1794 to 1872:—

"The story of these expeditions, as told in a great part in the proclamations of the different Presidents, is pretty much the same. Some scheme of annexation, or other form of invasion is started, public meetings of sympathisers are held, a reckless soldier of fortune is selected for chief, funds are raised by bonds issued on the security of the public lands of the country which it is proposed to conquer, arms are collected, recruits advertised for under some transparent verbal concealment of the object, and at length a certain number of men are got together and embark, or otherwise set forth. If the country against which the attack is directed is feeble and unprepared, scenes of outrage and bloodshed follow until the marauders are driven to the coast, where they find refuge on board American vessels (in some cases it has been on board ships of war), and return to the protection of the United States to prepare a fresh attack. If the country is able vigorously to repel them, as in the case of the Fenian raids, they content themselves with a demonstration on the frontier, seek at once an asylum, are disarmed, and the ringleaders perhaps tried. Those who are convicted are almost certain of an immediate pardon, After an interval the arms are restored, and unless the scheme has been so discredited by failure as to be incapable of revival, preparations are forthwith recommenced for another attempt, and everything goes on as before."

If in the face of facts like these, which we have been able to-night to verify, as regards the Fenian raids, the Americans can contend that the new rules only embody the maxims upon which the United States have habitually acted, does it not seem rather sanguine to imagine that the new rules will be practically of much use to us? Even as I write, the newspapers of the day furnish yet another instance of the manner in which citizens of the United States construe international obligations. We read in the *Pall Mall Gazette* of Jan. 17—"The New York papers of yesterday state that the filibustering steamer '*Edgar Stuart*' has landed at Sino, in Cuba, large quantities of arms and ammunition, as well as sixty volunteers." It is not pretented that these marauders have any countenance from the Government: no such countenance was given in the cases cited by Chief Justice Cockburn. But if former precedents be followed, the marauders will, after scenes of outrage and bloodshed, be driven back to the coast, or to their own country

where the ringleaders will perhaps be tried, but will most certainly be pardoned. The words of Lord Chief Justice Cockburn will probably be again justified by the facts. But at any rate it is hard to agree with the sentence, I have quoted from the United States argument, that "with consistency unwavering, and at whatever hazard of domestic or foreign inconvenience, the United States have steadily adhered to principles of international neutrality."

With regard to the Fisheries, we have without doubt made a concession: the plain truth is this—right is on the side of the English, that is, right by Treaty. The Americans can be excluded, as the Canadians maintain they ought to be, if only there were force constantly available to do it. But the persons upon whom practically it devolves to assert American rights—I mean the fishermen—care very little for rights, and public opinion in America would back them up if the assertion of their pretensions involved their Government in war. We, rightly or wrongly, shrink from war in such a cause. It is fair to say that the Americans could not concede on the subject of the fisheries; if they had conceded, their fishermen would have infringed the Treaty by common consent, and public opinion would not back up their Government in punishing them.

I now submit the balance-sheet to your consideration. It cannot be wise nor patriotic to exaggerate either the advantages we have obtained, or the concessions we have been obliged to make; I have earnestly tried to estimate both impartially. Different minds will fill up with various amounts the blanks which I have left. I have honestly tried to state facts, leaving it to others to draw conclusions.

Cr.

BALANCE SHEET.

Dr.

BALANCE SHEET.

Dr.	£ s. d.	*Cr.*	£ s. d.
1. Cash £3,500,000		1. Renewed and increased amity with the United States of America	
2. National Expression of Regret		2. Three new Rules of International Law	
3. Canadian Loan £2,500,000 (guaranteed)		3. Disappearance of Alabama Claims	
4. Settlement of Claims arising out of the War		4. Settlement of Claims arising out of the War	
5. To cession of Territorial Rights (Fisheries) in perpetuity		5. Cash Payment (to be settled by Commission) for cession of Territorial Rights	
6. To cession in perpetuity of joint navigation of the St. Lawrence		6. Ten Years' Navigation of Lake Michigan	
7. To cession of Fenian Claims		7. Ten Years' Fishery Rights on the Coast of the United States of America	
		8. Navigation of certain American Canals