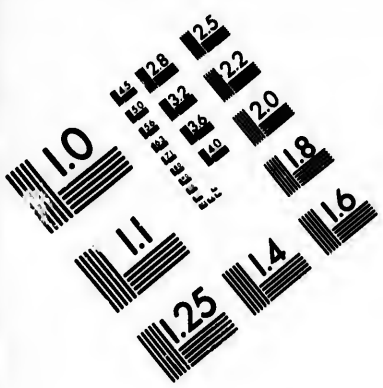


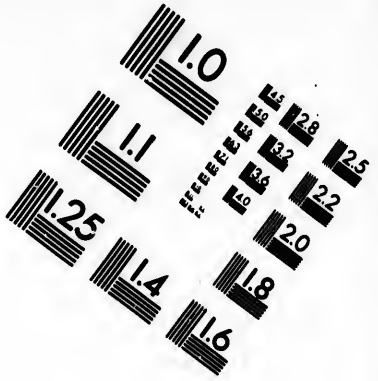


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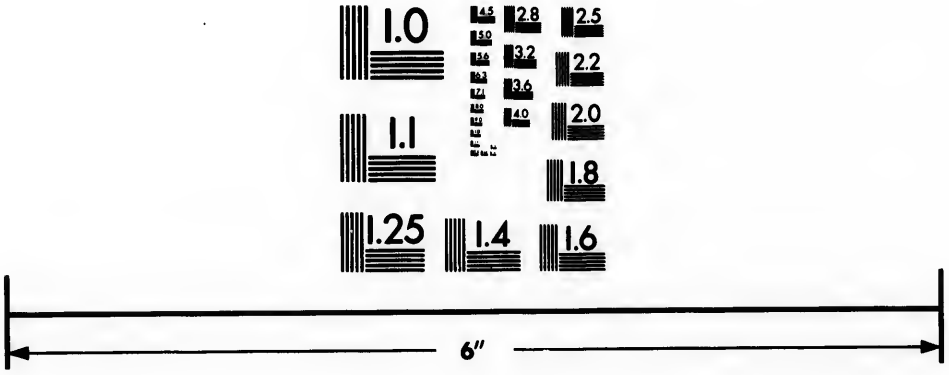



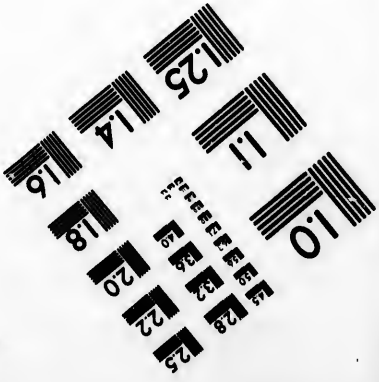


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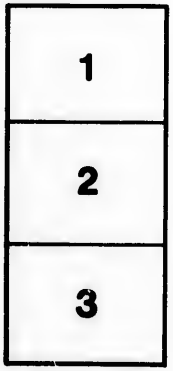


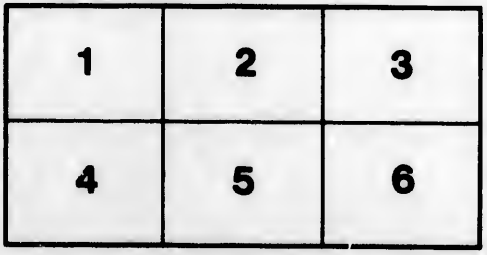

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# THE SEAL ARBITRATION.

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# THE SEAL ARBITRATION.

The area of Behring Sea is about 800,000 square miles. It is the northern part of the Pacific Ocean, and washes the North East Coast of Asia and the North West Coast of North America. The Aleutian Islands, which extend from the Peninsula of Alaska in a south westerly direction across the Pacific Ocean to within about three hundred miles of Kamtchatka, mark its southern boundary; while at the north it is separated from the Arctic Ocean by Behring Straits. The Straits separate Asia from North America, and at their narrowest part are about 50 miles in width. The extreme width of Behring Sea from East to West is about 1200 miles. Its greatest length is about 800 miles. The entrance to the sea from the south is through the water stretches or "passes" of the Aleutian Archipelago—several of which are upwards of fifty miles in width, and through the stretches of open sea separating the Coast of Asia from the Commander Islands, and, the Commander Islands from the Aleutian group—stretches respectively, of about one hundred and two hundred miles. The entrance to the sea from the north is by Behring Straits. The whole extent of the sea has been navigated without let or hindrance by British and other nationals from an early period for the general purposes of commerce and adventure.

It was only for a brief period in 1821—that any restriction was suggested with regard to portions of the sea

adjoining the coast—a restriction which on protest was promptly withdrawn. The Robben Island near the Asiatic Coast South of Behring Sea, and the Commander Islands before referred to also contain seal "rookeries." They belong to Russia.

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The Pribyloff Islands contain the principal "rookeries" or breeding resorts for the seals in the eastern part of the Behring Sea. They are four in number—but the seals resort only to the two principal, St. Paul and St. George. The Pribyloff group was discovered by a Russian whose name it bears, about 1786. It is situated in latitude 57° north, about 300 miles from the main land of Alaska, and about 200 miles north of Unalaska, one of the islands of the Aleutian Archipelago.

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To these two islands the female seals resort about the middle of July of each year, and almost immediately after give birth to their young. The males about the same time or a little earlier take up their positions on the rookeries, each attempting to establish his own *seraglio*. Between these, violent conflicts take place for the possession of coveted females. Conception takes place in the females very shortly after the delivery of their young. The mothers generally remain on or near the island until the young pups are able to swim. It is while the seals are on the Island, that portions of them, chiefly males between the age of three and seven years, are driven apart and clubbed to death for their skins, under regulations established on the Islands. As a rule the herd, male

and female, or more correctly what is left of it takes its departure about the end of August or the middle of September, going southward through the passes of the Aleutian Islands—and hundreds of miles south of them into the broad expanse of the Pacific Ocean. The northern migration again commences in January or February, the seals passing along the coasts of California and British Columbia through the Aleutian passes and into the Behring Sea, finally reaching the breeding islands in July. The seals are hunted on the open waters of Behring Sea, and during their journey northward, when many of the females are gravid with young—are killed by the Pelagic sealers. This sort of killing is the subject of special complaint by the American Government ; while on the other hand it is contended that the main cause of the diminution in the number of the seals is the reckless and indiscriminate killing of them on the breeding islands by the lessees of that government. There can be little doubt that both modes of killing urgently called for prudent regulation, and for the protection of the seal against the acts of man, but the jurisdiction of the Paris Tribunal was not sufficiently large to enable it to deal with the whole subject. For this reason it just escaped being the greatest of International Courts. The questions of right and jurisdiction unreservedly submitted to it were treated and decided on lines that have received the approbation of all the best contemporary jurists. This result is what was expected from a tribunal composed of the most eminent publicists and lawyers of our day. But they were restricted in their finding upon the second branch of the submission—the framing of regulations for the preservation of the seal race. Their decisions on questions of right and jurisdic-

tion are in conformity with the well settled principles of international law. Had the tribunal been given a free hand to frame regulations for the protection and preservation of the seal species it would have added a fresh chapter to international law. The arbitrators indicate in their recommendations—not only the want of complete jurisdiction—but also how the chapter might have been completed.

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ORIGIN OF THE CONTROVERSY.

The recent difference between Great Britain and the United States in regard to sealing in Behring Sea, took rise from the seizure by American Cruisers of Canadian sealing vessels frequenting that sea in 1886. Great Britain and the United States were at peace—and under the circumstances the seizure of the Canadian vessels at distances varying from 60 to 100 miles from the nearest land—was an act of war. The seized vessels were conveyed to Sitka in Alaska and there the masters and mates were tried in a Prize Court and condemned to fine and imprisonment, their vessels being detained and their crews turned adrift for the alleged violation of a statute of the United States—which provides that "No person shall kill an otter, mink, marten, sable or *fur-seal* or other fur bearing animal within the limits of Alaska or the waters thereof." Against these seizures and condemnation Great Britain protested, pointing out that such seizures on the high seas were in violation of the law of nations. To this protest the American Government rejoined that the seizures and condemnation were made in virtue of certain clauses of the revised statutes of the United States regulating the taking of Seals and other fur-

bearing animals in the waters and territory of Alaska. The judgments in effect held that the Behring Sea was *mare clausum*—and was ceded as such—the water as well as the land—by Russia to the United States in 1867.

This is the first appearance of the *mare clausum* doctrine in connection with the controversy. It was strongly combatted by Great Britain from the outset. The British Foreign Secretary promptly pointed out that at and long before the cession of Alaska to the United States, Russia had formally recognized that Behring Sea was open to the ships of all nations—and that when Russia in 1821 had attempted to enlarge the jurisdiction from three miles to 100 miles from the Shore on the North West Coast of America and East Coast of Asia--both England and the United States protested against any excess of maritime jurisdiction beyond the 3 miles recognized by international law and that these protests resulted in the formal abandonment by Russia of the claim to extended jurisdiction. It will be seen that the judgment of the Alaskan Court went further than the most extreme pretentions of Russia—and assumed that Russia practically owned the Behring Sea and that it was transferred to the United States with the Islands in it as well as the main land of Russian America.

The wording of the Treaty does not justify this interpretation, as all that the Emperor of Russia transferred was within prescribed bounds "his territories, and his sovereignty over them." The British protest, too, made clear that it was beyond the power of Congress to apply the municipal law of the United States beyond three miles from its own Shores—saving against its own citizens, and that other Nationals could not be deprived

of the freedom of the seas by any amount of legislation at Washington. The seizures ceased for a season.

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In 1887 Mr. Bayard, then American Secretary of State, announced the release of the vessels seized, the discharge of persons arrested—"but without conclusion of any question that may be found to be involved in these cases of seizure."

Further seizures were made in 1887 and 1889 and against these, strong remonstrances were addressed to the American Government. These seizures resulted in a long correspondence between the two Governments—and that correspondence eventuated in the Treaty of the 29th of February, 1892—providing for reference to an international tribunal of the matters that had formed the subject of the correspondence.

It will be found that during this correspondence the United States—not only changed the original ground put forward for the making of the seizures—but took up fresh ground including not merely the validity of the title derived from Russia—but a right of ownership in and of protection of the Seals. In order to a right understanding of the treaty it is necessary to refer to the correspondence showing the scope of the subject matter in controversy and in order to rightly understand the award it is necessary to recur to both the treaty and the correspondence.

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## THE DIPLOMATIC CORRESPONDENCE.

The protests of Great Britain against the seizure of its ships on the high seas, and the defence of the United

States that the seizure was made and penalties imposed in virtue of a municipal law of the United States need not be referred to, further than to add, that the Canadian Government took prompt steps to test the strength of this pretension by applying to the Supreme Court of the United States for a writ of prohibition to restrain the execution of the Alaskan judgment in the case of the W. P. Sayward—one of the seized vessels The Supreme Court heard arguments, but evaded a decision on the validity of the seizures, holding that as the question of the jurisdiction of the Alaskan Court had not been raised when the case came up for trial in Alaska it could not be raised in appeal. The Court made no intimation of its opinion—and the owner of the W. P. Sayward, and the Canadian Government took nothing by their motion. The application, however, was a clever tactical manoeuvre and might have resulted in the settlement of the question of international law in the highest court of the United States—in which case the tribunal of arbitration would in all probability have never had an existence—or at all events a reference on other lines would have been adopted.

On the 12th November, 1887, while the conflict as to jurisdiction in Behring Sea was going on it would appear from the correspondence that Mr. Phelps, the American Minister to England, had an interview with the Marquis of Salisbury, the British Secretary of State for Foreign Affairs, in which Mr. Phelps proposed—" that by mutual agreement of the two Governments a code of regulations be adopted for the preservation of the seals in the Behring Sea from destruction at improper times, and by improper means by the citizens of either countries—such agreement to be entirely irres-

pective of any questions of jurisdiction in those waters." In this view—reported Mr. Phelps to his Government—"his lordship promptly acquiesced and suggested that the American Minister obtain from his Government and submit a sketch of a system of regulations that would be adequate for that purpose."

The suggestion was for the preservation of "the Seals in Behring Sea"—and the Pribyloff Islands being situated in that sea—the Marquis of Salisbury might well have supposed that the "code of regulations" would extend to the Islands containing the "rookeries" to which the Seals resorted from the sea, in the breeding season.

By a despatch dated February 7th, 1888, Mr. Bayard communicated to Mr. Phelps the views of his Government upon the point submitted. It is stated concisely by Mr. Justice Hanlan, one of the arbitrators, thus, and may be designated as the

FIRST DEFINITE PROPOSAL:

"The only way to prevent the destruction of the Seals appeared to be for the United States, Great Britain and other interested powers to take concerted action restraining their citizens or subjects from killing them with fire-arms or other destructive weapons, *north of* 50° *of north latitude* and between 160° of longitude west and 170° of longitude east from Greenwich, during the period intervening between April 15th and November 1st."

This proposal is a decided extension of water boundary, embracing practically the whole of Behring Sea, and a large slice of the Pacific Ocean outside of Behring Sea and south of the Aleutian Islands. The proposal

does not in express terms exclude the Aleutian and Pribyloff Islands, and the killing with "destructive weapons"—is not so restricted as to exclude killing with clubs,—the method in use for extinguishing seals, on the Pribyloff Islands. However, no specific reference is made to killing on the islands.

When this proposition was communicated to the Marquis of Salisbury it was submitted to the Russian Minister, and after consultation between the representatives of the three powers Lord Salisbury proposed that:

"With a view to meeting the Russian Government's wishes respecting the waters surrounding Robben Island, the whole of the Behring Sea, those portions of the sea of Okhotsh, and of the Pacific Ocean north of latitude 47° should be included in the proposed arrangement." This is another proposed addition to seal area.

Lord Salisbury also proposed that the close season should terminate on 1st of October instead of on 1st November as proposed by Mr. Bayard.

There is no suggestion in Lord Salisbury's counter proposal that the regulations should extend to the land or the territorial waters of either power. The proposed arrangement was however to be "provisional in order to furnish a basis for negotiation, and without definitely pledging our governments"—as Lord Salisbury expressed it in a letter to Sir Julian Pauncefote the British Minister at Washington.

In May 1888, Mr. Bayard declared his willingness to accept the provisional arrangement as amended by Lord Salisbury—expressing however a preference for the 15th of October, rather than the first as the termination of the "close time."

The Canadian Government objected to the basis of negotiations—and for the time the proposal and counter proposal came to naught.

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In September 1888, Mr. Phelps, wrote to Mr. Bayard, complaining bitterly of the destruction of the seals " in the open sea " and concludes :

" Under these circumstances, the Government of the " United States must, in my opinion, either submit to " have these valuable fisheries destroyed or must take " measures to prevent their destruction by capturing the " vessels employed in it. Between these alternatives " it does not appear to me there should be the slightest " hesitation."

In other words the right of the Canadian vessels to the freedom of the seas was to be forcibly denied in order that a land interest of the American Government should not suffer. Mr. Phelps advice was a direct invitation to employ force.

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On the 24th October, 1889, a conference took place at Washington, between Mr. Blaine, the Secretary of State in President Harrison's Administration, and Sir Julian Pauncefote. The latter reports the interview, the accuracy of which, is not disputed : Mr. Blaine stated that the seizures of the Canadian vessels had taken place " under the belief that it was warranted by the " Act of Congress, and the President's proclamation. In " this view the department had been confirmed by the " District Court of Alaska. I observed that this appear- " ed like an assertion of the *mare clausum* doctrine, which

" I could hardly believe would be revived at this day by " his government or any other, to which he replied that " his government had not officially asserted such a claim, " and therefore it was unnecessary to discuss it."

This was a practical abandonment of the *mare clausum* pretension in virtue of which and of the acts of Congress, the judgment had been rendered by the Alaskan Courts imposing fines and penalties on the Masters and Mates captured while sealing in the Behring Sea at distances of from 60 to 100 miles from the shore.

The Secretary of State proceeded however to make the following formal statement of the American position at the same interview Oct. 24th, 1889:

" This Government claimed the exclusive right of " seal fishery, which the United States and Russia before " them, had enjoyed for generations without any attempt " at interference from any other country. The fur-seal " was a species most valuable to mankind and the Behring " Sea was its last stronghold. The United States had " bought the Islands in that sea to which these creatures " periodically resort to lay their young, and now Cana- " dian Fishermen step in and slaughter the seals on their " passage to the Islands, without taking heed of the " warnings given by Canadian officials themselves, that " the result must inevitably be the extermination of the " species This was an abuse not only reprehensible in " itself, and opposed to the interests of mankind, but an " infraction of the rights of the United States. It inflicted " moreover a serious injury on a neighboring and friendly " State, by depriving it of the fruits of an industry on " which vast sums of money had been expended, and " which had long been pursued exclusively and for the " general benefit. The case was so strong as to neces- " sitate measures of self defence for the vindication of " the right of the United States and the protection of " this valuable fishery from destruction."

Here we have set up:

1. The exclusive right of the United States to the seal fisheries under the Russian title.

2. The right of ownership in the seals, in virtue of the ownership of the Pribyloff Islands.

3. A self constituted undefined trusteeship from the rest of "creation" to protect the seal "in the interests of mankind."

The answer of the British Minister was brief and to the point:

"I replied (said Sir Julian Pauncefote), that as re-
"gards the question of right I could not admit that the
"seizure of the Canadian vessel was justified under the
"terms of the Act of Congress or the proclamation of the
"president. Municipal regulation could have no opera-
"tion against foreign vessels beyond territorial waters. *
"* * As regarded the question of fact namely the
"extermination of the fur seal species, and the necessity
"for a "close season" there was unfortunately a conflict
"of opinion. But if upon a further and more complete
"examination of the evidence, Her Majesty's Government
"should come to the conclusion that a "close time" is
"really necessary, and if an agreement should be arrived
"at on the subject, all questions of legal right would, *ipso*
"*facto*, disappear"

Mr. Blaine expressed his readiness that such an inquiry should be held—and conceded that sealers who in good faith had suffered injury should be compensated.

Sir Julian Pauncefote reported the interview and asked for the Marquis of Salisbury's instructions in regard "to resuming in Washington the tripartite negotiation."

Shortly after the above interview the British Government complained of further seizures. To these complaints Mr. Blaine replied in a letter dated 22nd January, 1890.

In this letter he takes up fresh ground. The Canadian

vessels seized in the Behring Sea were engaged in a "pursuit that was in itself *contra bonos mores*"—a pursuit "which of necessity involves a serious and permanent "injury to the people of the United States"—and this, apart from arguing "the question of the extent and "nature of the sovereignty of this (the American) "Government over the waters of Behring Sea." He refers to the title by descent from Russia—but says "it "may be safely left out of view while the grounds are "set forth upon which this Government rests its justifica- "tion for the action complained of by Her Majesty's "Government."

Then Mr. Blaine proceeds to explain that the seal fisheries were "exclusively controlled by the Govern- "ment of Russia, without interference or without ques- "tion from the original discovery till the cession of "Alaska to the United States in 1867—and that the "United States had remained in uninterrupted and "un- "disturbed possession" till 1886.

This looks like invoking the Russian title, in order to make good a title to the fisheries by long, undisturbed and uninterrupted possession—failing defects in the original title deeds when tested by the standards of international law. Then Mr. Blaine tells the story of how the wicked pelagic sealers slaughtered the seal on the open sea—thus interfering with the investment made by his Government in the Pribyloff Islands as part of the Alaska purchase and concludes this part of his argument thus:

"The precedent. customs and rights had been established and enjoyed either by Russia or the United States for nearly a century. The two nations were the only powers that owned a foot on the continents that bordered, or on the islands included within the Behring Sea waters where the seals resort to breed. Into this peaceful and secluded field of labour"—* * * "certain

Canadian vessels in 1886 asserted their right to enter"—and to poach on Uncle Sam's Happy Hunting Ground.

Why should they not enter if Behring Sea were an open sea? This part of Mr. Blaine's argument looks decidedly like a return to the *mare clausum* doctrine. But then he reproaches Her Majesty's Government for defending the Canadian sealers in asserting their rights. Next he sets up in express language a prescriptive title to the fisheries in the Behring Sea, founded partly on long and exclusive use by Russia and the United States, with the acquiescence of Great Britain and other nations. Mr. Blaine expresses great solicitude for a solution of the differences between the two countries—regrets that the proposals made by his predecessor were not accepted, and announces that, "the President now awaits with deep interest not unmixed with solicitude any proposal for reasonable adjustment which Her Majesty's Government may submit." Mr. Blaine sums up thus:

"The forcible resistance to which this Government is constrained in the Behring Sea, is in the President's judgment demanded not only by the necessity of defending the traditional and long established rights of the United States, but also the rights of good government and of good morals the world over."

Mr. Blaine in addition to protecting what he assumed and what, as the result shows he wrongly assumed to be the rights of his own country, voluntarily constitutes himself, or rather the President, the High Constable of the rest of the world, in order that the rights of good government "and good morals the world over" may suffer no wrong. The farcical side of this pretension is that the High Constable himself has been since adjudged to be the wrong doer.

It is not necessary here to detail the Marquis of Salisbury's replies to Mr. Blaine's despatches. The British Foreign Secretary endeavored to discover in each case the position last assumed—for the ground was shifting—by the American Government and then proceeded in calm but forcible reasoning to demolish it.

The claim of the United States Government to abridge the rights of other nationals outside the three mile limit was summarily and unanswerably disposed of. The effect and extent of the Ukase of Paul the first, and of the subsequent Ukase of 1821 were discussed in a manner that left nothing to be added. In short Lord Salisbury demonstrated that the Russian title upon which so much stress was laid by Mr. Blaine amounted to nothing more than a transfer of the Russian Alaskan possessions with territorial rights over the waters for three miles from the shore only—that there never had been any acquiescence by Great Britain in any exclusive or exceptional right claimed by Russia in the Behring Sea or the seal fisheries therein ; that on the contrary the rights of other nationals were recognized by Russia; that a forfeiture of the freedom of the seas could not be assumed, even if there had been non-user ; but that in this instance Behring Sea had been an unquestioned avenue for trade and navigation for British and other nationals throughout the whole period of the Russian tenure and subsequently.

The American pretension that the Pacific Ocean did not include the Behring Sea and that therefore the treaty of 1824 between Russia and the United States, and that of 1825 between Russia and Great Britain did not apply to Behring Sea, in which Russia had reserved to herself certain exclusive and recognized privileges—the Marquis of Salisbury was able

to oppose—and did oppose and overturn with convincing force, citing the pretensions of the American Government itself at the time the controversy was at its height, against their present claims.

He also showed that the Behring Sea was always considered a part of the Pacific Ocean and consequently the treaties of 1824 and 1825—limiting the Russians to the ordinary 3 mile limit—were applicable to the Behring Sea.

Lord Salisbury also with complete conclusiveness demonstrated that the ownership of the Pribyloff Islands, and the control ef the fishing thereon, or within three miles of the sea surrounding it, gave the Americans no ownership or right to protection of the seal outside of the territorial waters, that "fur-seals were animals *ferae naturae*, and were *res nullius* until caught; that no person could have property in them until he had reduced them into possession by capture, and that any interference by the United States with the hunting and taking of these fur-seals, in the open waters of the ocean, was a violation of rights secured to the subjects of Great Britain by the law of nations.

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The British Counsel before the Paris Tribunal happily summarized the pith of the Marquis of Salisbury reasoned replies to Mr. Blaine's despatches in these words:

"To all this shadowy claim the Government of the "Queen submit but one answer—the Law. The whole "case and every part of it, and every form in which in- "genuity can frame it, are covered by this law. And to "that law Her Majesty's Government must confidently "appeal."

"And there is another law to which that Government "appeal with equal confidence—the law on which de- "pends the freedom of the sea."

"What is the freedom of the sea ?

"The right to come or go upon the high sea without "let or hindrance, and to take therefrom at will and "pleasure the products of the sea.

"It is the right which Great Britain and the United "States endeavoured, and endeavoured successfully, to "maintain against the claim of Russia 70 years ago. It is "the right in defence of which against excessive claims "of other nations, the arguments of the United States "have in former times held so prominent a place. And "what is this claim to protect the seal in the high sea ? "It is of right and for all time, to let and hinder the "vessels of all other nations in their pursuit of seals upon "the high seas ; to forbid them entrance into those vast "seas which the United States have included in the de- "nomination of the "waters of Alaska," to take from "these vesseis the seals they have lawfully obtained, and "to search, seize and condemn the vessels, and the crew, "or with show of force to send them back to the ports "from which they set out. And so according to the con- "tentions of the United States, "protection of an in- "dustry" at sea justifies those acts of high authority "which by the law of nations are allowed only to "billigerents, or against pirates with whom no nation is "at peace. From giving its high sanction to these views "this tribunal may well shrink ; and it is with no mere "idle use of high sounding phrase that Great Britain once "more appears to vindicate the freedom of the seas."

This is the gist of Lord Salisbury's argument on the questions of right and jurisdiction, and these are the views that triumphed before the tribunal of arbitration at Paris.

In respect to regulations, if on proper inquiry found to be necessary, the British Foreign Secretary at all times avowed the willingness of his Government to the fram-

ing of measures for the control of the sea fishing, provided that such measures be equitable and framed with due regard to the common interest, and not in order to promote the interest of any particular nation.

Lord Salisbury's reply to Mr. Blaine's despatch of 22nd January, 1890—evidently made an impression on the latter's mind, for in his letter of 17th December, 1890, we find Mr. Blaine expressly renouncing to the *mare clausum* doctrine. "The Government of the United States never claimed it and never desired it. It expressly disavows it," says Mr. Blaine.

It is not surprising that Sir Julian Pauncefote found it difficult to determine with exactitude just what position the United States assumed. But now that Mr. Blaine had so expressly excommunicated the *mare clausum* doctrine, we might expect to have heard the last of it. After disavowing it Mr. Blaine proceeds:

"At the same time the United States does not lack "abundant authority, according to the ablest exponents "of international law for holding a small section of "Behring Sea for the protection of the seals."

This is quite a discount on the claim made in his preceding despatch of 22nd January, 1890.

He continues:

"Controlling a comparatively restricted area of water for that one specific purpose is by no means the equivalent of declaring the sea, or any parts thereof, *mare clausum*"

This is indeed "taking backwater"—though Lord Salisbury's argument did not leave him the solace of an inch in the sea outside of the three mile limit.

Mr. Blaine complains bitterly that even his own countrymen have to some extent turned pelagic sealers,

and worse still have sought the shelter of the British flag under whose protection they were plying their nefarious games on the high seas. In this connection it is interesting to see what opinion renegade and lawless American sealers, when captured, entertained of Mr. Blaine's policy of interference with the freedom of the seas.

Here is their protest :

" They wish to explore the waters of Behring Sea and the Arctic Ocean. They believe they, as American citizens, have a right to fish or hunt in the American waters of the Behring Sea outside of three nautical miles, from any island or the mainland of Alaska. They believe that William H. Seward did not purchase Alaska for the Alaska Company, but for the whole nation. They demand as a right that they be permitted to pursue their honorable business in the American waters of the North Pacific, Behring's Sea and the Arctic Ocean, without being treated as criminals, and hunted down and seized and imprisoned by the piratical Revenue Cutters of the United States at the dictation, and for the sole benefit of the Alaska Commercial Company."

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The Alaska Commercial Company had acquired the right to take seals on the Pribyloff Islands under contract from the American Government, and this company was supposed by Canadian and American sealers alike to be under Mr. Blaine's special protection. There was probably nothing to justify this supposition, and whether there was or not, it has nothing to do with the discussion of the question under consideration.

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SECOND PROPOSAL.

Mr. Blaine in this dispatch, 17th Dec. 1890 in addition to burying the *mare clausum* doctrine, made this important statement and proposal—of "an effective mode of preserving the seal fisheries for the use of the civilized world."

"The President will ask the Government of Great Britain to agree to the distance of 20 marine leagues within which no ship shall hover around the Islands of St. Paul and St. George, from the 15th May to 15th October of each year. *This will prove an effective mode of preserving the seal fisheries for the use of the civilized world*, a mode which in view of Great Britain's assumption of power over the open sea, she cannot with consistency * decline. Great Britain prescribed 8 leagues at St. Helena: but the obvious necessities in the Behring Sea, will, on the basis of this precedent, justify 20 leagues for the protection of the American seal fisheries. The American Government desires only such control over *a limited extent of the waters in the Behring Sea, for a part of each year* as will be sufficient to insure a portion of the fur fisheries already injured possibly to an irreparable extent, by the intrusion of Canadian vessels" and no doubt also of American vessels flying the Union Jack.

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This proposal should be carefully compared with that made by Mr. Bayard, and with the proposals submitted to the arbitrators by the two governments and with the regulations settled by the Tribunal.

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* With the consent and approval of the great powers.

In the light of later events Mr. Blaine's proposal was modestly personified and had it been accompanied with an offer of compensation to the injured sealers, and the right of participation in regulating the killing of seals on land as an equivalent for abstention from hovering within the 60 mile limit, it might have been accepted with advantage.

In Mr. Blaine's letter of 17th December, 1890, he quotes a passage from the letter of Mr. Phelps, of 12th September, 1888, in which Mr. Phelps says: "Much learning has been expended upon the discussion of the abstract question of the right of *mare clausum*. I do not conceive it to be applicable to the present case. * * * It is suggested that we are prevented from defending ourselves against such depredations, because the sea at a certain distance from the shore is free. * * * If precedents are wanting for a defence so necessary and proper it is because precedents for such a course of conduct are alike unknown. The best international law has arisen from precedents that have been established when the just occasion for them arose, undeterred by the discussion of abstract and inadequate rules."

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Still later Mr. Blaine in a letter dated 14th June, 1891, addressed to Sir Julian Pauncefote, summarizes the American contention thus: "It (the American Government) holds that the ownership of the island upon which the seals breed, that the habit of the seals in regularly resorting thither, and rearing their young thereon, that their going out from the island in search of food and regularly returning thereto, and all the facts and

incidents of their relation to the island, give the United States a property interest therein; that this property interest was claimed and exercised by Russia during the whole period of its sovereignty over the land and waters of Alaska; that England recognized this property interest so far as recognizing is implied by abstaining from all interference with it during the whole period of Russia's ownership of Alaska, and during the first nineteen years of the sovereignty of the United States. It is yet to be determined whether the lawless intrusion of Canadian vessels in 1886 and subsequent years has changed the law and equity of the case theretofore prevailing."

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The pretensions of the United States in the diplomatic controversy have been given with much more particularity and detail that those of Great Britain and this has become necessary in order to show what these varying contentions were from time to time. So much particularity is unnecessary in defining the British position. It was the same throughout. Lord Salisbury took his stand along the well recognized lines of international law. He defined his position at the outset—and never changed it.

The American position was not fixed—the case was novel and the American Secretaries were attempting to rest it on new lines, when dislodged from old ones. Their ground was constantly shifting It is safe to say that they made their best fight over the alleged right of property in the seals, and though they did not succeed their arguments were not lacking in ingenuity and originality. They were, too, evidently pressed with

sincerity—and not without a certain semblance of authority held however to be inapplicable.

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Concurrently with the discussion on matters of right and jurisdiction and of property, came up the question of referring the matter in dispute to arbitration. In settling the reference the British Foreign Secretary did not display the same firmness, and the same unfailing judgment that he did in discussing the questions of right and jurisdiction.

Mr. Blaine was allowed to take the lead in stating what matters should be referred. It is a matter of common knowledge that in a dispute between two private individuals, he whose counsel draws the deed of arrangement has the advantage. He impresses his own ideas upon the instrument. The task of criticism is easier than that of creation but then in such a case as this duty does not end with criticism. And when the object is to arrive at a common agreement the critic as a rule gets the worst of it.

It is no reflection on the national character to say that the individual American is a good bargainer and likes to get the best of a bargain. The American diplomat is as a rule a cross between a shrewd lawyer and a good bargainer—often a combination of both.

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Mr. Blaine in his letter Dec. 17th, 1890, to Sir Julian Pauncefote, said:

"It will mean something tangible, in the President's opinion, if Great Britain will consent to arbitrate the

real questions which have been under discussion between the two Governments for the last four years. I shall endeavor to state what, in the judgment of the President, those issues are:

"First. What exclusive jurisdiction in the sea now known as the Behring Sea, and what exclusive rights in the seal fisheries therein did Russia assert and exercise prior and up to the time of the cession of Alaska to the United States?

"Second. How far were these claims of jurisdiction as to the seal fisheries recognized and conceded by Great Britain?

"Third. Was the body of water now known as the Behring Sea included in the phrase 'Pacific Ocean' as used in the treaty of 1825 between Great Britain and Russia; and what rights, if any, in the Behring Sea were given or conceded to Great Britain by the said treaty?

"Fourth. Did not all the rights of Russia as to jurisdiction, and as to the seal fisheries in Behring Sea east of the water boundary, in the treaty between the United States and Russia of March 30, 1867, pass unimpaired to the United States under that treaty?

"Fifth. What are now the rights of the United States as to the fur-seal fisheries in the waters of the Behring Sea outside of the ordinary territorial limits, whether such rights grow out of the cession by Russia of any special rights or jurisdiction held by her in such fisheries or in the waters of Behring Sea, or out of the ownership of the breeding islands and the habits of the seal in resorting thither and rearing their young thereon and going out from the islands for food, or out of any other fact or incident connected with the relation of

those seal fisheries to the territorial possessions of the United States ?

"Sixth. If the determination of the foregoing questions shall leave the subject in such position that the concurrence of Great Britain is necessary in prescribing regulations for the killing of the fur-seal in any part of the waters of Behring Sea then it shall be further determined : First, how far, if at all, outside the ordinary territorial limits, it is necessary that the United States should exercise an exclusive jurisdiction in order to protect the seal for the time living upon the islands of the United States and feeding therefrom. Second, whether a closed season (during which the killing of seals in the waters of Behring Sea outside the ordinary territorial limits shall be prohibited) is necessary to save the seal-fishing industry, so valuable and important to mankind, from deterioration or destruction. And if so, third, what months or parts of months should be included in such seasons and over what waters it should extend."

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The Marquis of Salisbury assented to the first, second and fourth questions, made some criticism on the third and fifth, which were subsequently amended in conformity with his views. The five points in Article 6, of the Treaty, were finally settled as follows :

THE FIVE POINTS.

Art. VI. In deciding the matters submitted to the arbitrators, it is agreed that the following five points shall be submitted to them, in order that their award

shall embrace a distinct decision upon each of said five points, to wit:

1. What exclusive jurisdiction in the sea now known as the Behring Sea, and what exclusive rights in the seal fisheries therein, did Russia assert and exercise prior and up to the time of the cession of Alaska to the United States?

2. How far were these claims of jurisdiction as to the seal fisheries recognized and conceded by Great Britain?

3. Was the body of water now known as the Behring Sea included in the phrase "Pacific Ocean," as used in the treaty of 1825 between Great Britain and Russia; and what rights, if any, in the Behring Sea were held and exclusively exercised by Russia after said treaty?

4. Did all the rights of Russia as to jurisdiction, and as to the seal fisheries in Behring Sea east of the water boundary, in the treaty between the United States and Russia of the 30th March, 1867, pass unimpaired to the United States under that treaty?

5. Has the United States any right, and if so, what right of protection or property in the fur seals frequenting the islands of the United States in Behring Sea, when such seals are found outside the ordinary 3 mile limit?

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It will be seen at a glance that underlying these five points are but two main questions.

1st. What was the extent and effect of the Russian title in Behring Sea, and the seal fisheries therein, and

2nd. Has the United States any right of protection or property in the fur seal frequenting the islands in the sea when found outside the ordinary three mile limit.

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Article 6, of the treaty involved the determination of all the questions of right and jurisdiction. If the answers on these five points were in favour of the United States, that is to say, if it were found that under the Russian title, the United States had acquired an exclusive jurisdiction in the Behring Sea, and exclusive rights in the seal fisheries; or if it were found, apart from the Russian title that the United States owned the seals that resorted to the breeding Islands, even when found outside the three mile limit, the controversy would be at an end, for the effect of such a decision would be to constitute Behring Sea an American Lake, and each individual seal in it American property whether found in the sea itself or anywhere in the wide expanse of the Pacific. The seal in such a case, would be judicially branded U. S., and the United States would exclusively have the right to make regulations in respect to it.

In that event the concurrence of Great Britain or of any other nation would not be necessary, as the United States would certainly have the right to preserve and protect its own property.

A decision against the United States on these points would mean that outside of territoral waters, they had no more rights in Behring Sea and no more property in the seal than any other nation on the globe, and incidentally it would follow that all the seizures made of Canadian sealers plying their trade outside of territorial water, were illegal, and that damages must be paid for losses sustained. Now as that was the original bone of contention, and the protection and preservation of the seals was only introduced as a mere graft upon that question, one would have thought that before considering any other

question the matters of right and jurisdiction should be first settled.

These settled, then the making of regulations for the preservation of seal life might properly form the subject of a separate reference.

This was the view of Lord Salisbury who, on the 21st February, 1891, in reply to Mr. Blaine, comments on the 6th question:

"The sixth question, which deals with the issues which will arise in case the controversy shall be decided in favour of Great Britain, would perhaps *more fitly form the subject of a separate reference.* Her Majesty's Government have no objection to refer the general question of a close time to arbitration, or to ascertain by that means how far the enactment of such a provision is necessary for the protection of the seal species; but any such reference ought not to contain words appearing to attribute special and abnormal rights in the matter to the United States."

This criticism must be considered in connection with the 6th question (ante.)

The sixth question has reference to regulating the killing of seals "in the waters of Behring Sea" whether the United States should exercise an "exclusive jurisdiction in order to protect the seal for the time living upon the islands of the United States and feeding therefrom"—as well as provisions for a close time.

The Marquis of Salisbury ~~took exception~~ objected to giving the United States any exceptional jurisdiction in policeing the seas, but makes no protest against the killing on land being excluded from regulation. It may be that he had no right to say to the Americans that they should submit their islands and territorial waters to regulation

by the arbitrators. But as this question was to be submitted in case the controversy on the questions of right and jurisdiction should be decided in favour of Great Britain, surely Great Britain should not be asked to curtail the rights it was decided she was entitled to exercise, without some concession from the Americans. Is this the penalty we have to pay for making a bargain with the Americans ? If Great Britain won on the great points in controversy, then she is to surrender so much of her winnings, ostensibly for the benefit of the seal species, but really for the benefit of the owners and lessees of the Pribyloff Islands. If the United States won on the five points then the Behring Sea would be closed to Great Britain and to all the world for sealing. Every seal that swam, coming from the Pribyloff Islands, became American property. The calling of pelagic sealing would be at an end and every dollar invested in it lost. But if the United States lost then a device was created in the 6th question by which she was to get by regulation what she could not by law, without giving up one tittle of her rights on sea or land. This clause in the treaty, as finally settled, will probably forever survive as the most perfect example of "heads I win, and tails you lose."

It is a complete reversal of the Jacksonian doctrine which should now read :

"To the vanquished belong the spoils."

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Mr. Blaine, replying to Lord Salisbury on 14th April, 1891, remarked that he did not understand that Lord Salisbury objected to the 6th question, though he under-

stood him to propose *a different mode of procedure.* Mr. Blaine blandly attempts to raise a side issue of little importance and to keep the dynamite out of sight. He reformed the third and fifth questions so that the first five questions would read as they now do in article 6 of the treaty and again submitted the 6th question in its original form.

Sir Julian Pauncefote on 3rd June, 1891, notified the American Government that Her Majesty's Government would assent to the first 5 questions as amended (art. 6 treaty) but that:

"Her Majesty's Government cannot give their assent to the sixth question formulated in that note. In lieu thereof they propose the appointment of a commission to consist of four experts, of whom two shall be nominated by each Government, and a chairman who shall be nominated by the arbitrators. The commission shall examine and report upon the question which follows: "*For the purpose of preserving the fur-seal race in Behring Sea, from extermination, what international arrangements, if any, are necessary between Great Britain, the United States and Russia, or any other powers.*"

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There can be no doubt that Lord Salisbury's suggestion as to procedure was the proper one, that the question of right and jurisdiction should be first settled, and if Great Britain won then there should be a separate reference in respect of regulations.

The further suggestion of Sir Julian Pauncefote was the complement of the first, and surely should have been adhered to. It avoided completely the dynamite in Mr. Blaine's 6th question. It provided a commission for

investigating what international arrangements were necessary for *preserving* "the fur-seal race in Behring" from "extermination"—not to prescribe "regulations for killing of the fur-seal in any part of the waters of Behring Sea."

Had such a commission been appointed it would have been able to make a thorough report on the conditions of seal life and what arrangement should be made between the three powers in order to preserve it from extermination. Its scope would have extended to arrangement, relating to seals on land and within territorial waters as well as to seals in the high seas. With such a report, and the power to deal with it, the tribunal of arbitration might have made regulations relating to the land as well as to the sea, and not have left its work as it is to-day, confessedly incomplete and insufficient.

But the American Government with all its professed anxiety for "the preservation and protection of the seal" refused the suggestion of the British Government. The *modus vivendi* then under discussion embarassed both Governments. The Americans pressed for the acceptance of the sixth question and offered to incorporate with it a provision for a commission, and to agree to co-operate with Great Britain in securing the adhesion of other powers to the regulations to be made.

The result was the abandonment of the British proposal and the substitution of question 6, in a slightly modified form—with provision for a commission.

From this moment the case in so far as regulations were concerned was "given away."

The modified 6th question became Article 7 of the Treaty, and Article 9 is complementary to it.

ARTICLE VII.

"If the determination of the foregoing questions as to the exclusive jurisdiction of the United States shall leave the subject in such position that the concurrence of Great Britain is necessary to the establishment of regulations for the proper protection and preservation of the fur-seal in, or habitually resorting to, the Behring Sea, the Arbitrators shall then determine what concurrent regulations outside the jurisdictional limits of the respective Governments are necessary, and over what waters such regulations should extend, and to aid them in that determination, the report of a Joint Commission to be appointed by the respective Governments shall be laid before them, with such other evidence as either Government may submit."

ARTICLE IX.

The High Contracting Parties have agreed to appoint two commissioners on the part of each Government to make the joint investigation and report contemplated in the preceding Article VII, and to include the terms of the said agreement in the convention, to the end that the joint and several reports and recommendations of said commissioners may be in due form submitted to the arbitrators, should the contingency therefor arise, the said agreement is accordingly herein included as follows:

Each Government shall appoint two commissioners

to investigate conjointly with the commissioners of the other Government all the facts having relation to seal life in Behring Sea, and the measures necsssary for its proper protection and preservation.

The four commissioners shall, so far as they may be able to agree, make a joint report to each of the two Governments, and they shall also report, either jointly or severally, to each Government on any points upon which they may be unable to agree.

These reports shall not be made public until they shall be submitted to the arbitrators, or it shall appear that the contingency of their being used by the arbitrators cannot arise.

## Article VII.

Article 7 not only retains the objectionable features of the 6th question in limiting regulations to "waters,' but in not limiting these "waters," as the 6th question did to the waters of "Behring Sea." Here the door was opened to making regulations extend over the whole Pacific Ocean. It will be seen how liberally the tribunal availed itself of this power.

The commission instead of being a highly trained and efficient scouting party for the tribunal itself, to ascertain for it from actual investigation what "international arrangements" were "necessary for the purpose of preserving the fur seal-race in Behring Sea," became minimized into each government appointing two commissioners, the four to make a joint report to each of the two governments "so far as they may be able to agree." Each government's commissioners made long reports to their own government. One side of one sheet of note paper would suffice for the joint report. They agreed that the

seal race was diminishing "from excessive killing by man."

The reports to the respective governments were in many respects excellent, and speaking more especially for the report of the British commissioners with which the writer is more familiar, a well considered and essentially fair report. But the misfortune was that much of what was useful and germain to the subject, the preservation of the seal life on the islands and in the territorial waters of the United States, was excluded from the issue by the terms of article 7 of the treaty which restricted the tribunal to making regulations for the preservation of the seal "outside of territorial jurisdictions of either power."

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From the moment the British Ambassador set his hand to the treaty of the 29 February, 1892, the fate of the case of the British Government was sealed. For if they lost on the five points involving questions of right and jurisdiction they were irretrievably routed; and if they won they were immediately bound to submit to the tribunal what part of their gains they should surrender by regulation, that they were not bound to concede by right, and that too without any concession from the American Government and without one compensating advantage, except the advantage that comes from the temporary settlement of a dispute as to jurisdiction and any advantage that may accrue to Canadian claimants for losses on account of the illegal seizing of their vessels and the imprisonment of their crews.

Having already set out articles 6, 7 and 9 of the Treaty, it will only be necessary now to refer to the preamble, and the first and fourteenth articles. These are so important that it will be best to set out such portions of them as are relevant in the exact language of the convention.

The preamble recites that the United States and Her Majesty desiring "to provide for an amicable settlement of the questions that have arisen between their respective Governments concerning the jurisdictional rights of the United States in the waters of Behring Sea, and concerning also the preservation of the fur-seal in, or habitually resorting to, the said sea, and the rights of the citizens or subjects of either country, as regards the taking the fur-seal in or habitually resorting to the said waters, have resolved to submit to arbitration the question involved."

The first article of the treaty provides that: These questions "shall be submitted to a tribunal of arbitration, to be composed of seven arbitrators * * * who shall be jurists of distinguished reputation," of whom two shall be named by the President of the United States, two by Her Britannic Majesty, one by the President of the French Republic, one by the King of Italy, and one by the King of Sweden and Norway.

The fourteenth article of the treaty is as follows: "The High Contracting Parties engage to consider the "result of the proceedings of the tribunal of arbitration, "as a full, perfect and final settlement of all the questions "referred to the arbitrators."

The tribunal of arbitration being duly constituted

and having disposed of some preliminary matters proceeded to hear arguments on the 5 points submitted in Article 6, of the Treaty, and subsequently to hear the arguments of counsel with respect to regulations.

These arguments fill several books. It would be quite out of place to refer to them at length in an article of this character. Besides, except for the student who wishes to increase his store of knowledge, it would serve no useful purpose to give more than the merest outline of what the arguments were. It is with the result, the decision, that the world is now, and will be, most concerned.

The first point submitted in Article 6 is :

1. *What exclusive jurisdiction in the sea now known as Behring Sea, and what exclusive rights in the seal fisheries did Russia therein assert and exercise prior and up to the time of the cession of Alaska to the United States ?*

This point may conveniently be considered with the second and third points of Article 6.

2. *How far were these claims of jurisdiction as to the seal fisheries recognized and conceded by Great Britain ?*

3. *Was the body of water known as the Behring Sea, included in the phrase " Pacific Ocean " as used in the treaty of* 1825, *between Great Britain and Russia ; and what rights, if any, in the Behring Sea, were held and exclusively exercised by Russia after said treaty ?*

### THE RUSSIAN TITLE.

The matters embraced in the three first questions involve the validity and extent of the Russian Title acquired by the treaty of cession of 1867.

Russia claimed the North-West of America and

the islands in the Behring Sea by the right of first discovery. The United States urged that Russia had asserted and exercised exclusive jurisdiction in Behring Sea from a very early period and that this was witnessed by the Russian Ukase of 1799. This Ukase is simply a charter which "Paul the 1st, by the Grace of God, Emperor and Autocrat to all the Russias" granted to the Russian American Company * * * "to enjoy the profits of all industries and establishments "now existing on the north east (sic.) coast of America," (His Majesty tripped in his geography,) "from the aforesaid 55° to Behring strait, and beyond the strait, as well as on the Aleutian and Kurile Islands and the other islands situated in the North Eastern Ocean."

No dominion over the ocean, is granted or could be granted. The concession is entirely territorial, and limited to the coast and the islands specified. There is no pretence that the sea is closed. There is no reference to seal fisheries. Moreover it is a purely domestic charter giving certain privileges to certain of the Tzar's own subjects, as against the rest of them, but not against other nationals.

The Ukase was never notified to foreign powers.

The Ukase of Alexander 1st in 1821 was more far reaching, but still fell far short of the *mare clausum* doctrine.

The Ukase is in the following language:

"The pursuits of commerce, whaling and fishery, and of all other industry on all islands, ports and gulfs, including the whole of the northwest coast of America, beginning from Behring Straits to the 51° of northern latitude, also from the Aleutian Islands to the eastern coast of Siberia, as well as along the Kurile Islands from Behring's Straits to the South Cape of the Island of Urup,

viz, to the 45° 50 northern latitude, is exclusively granted to Russian subjects."

The Ukase also prohibited all but Russian vessels from landing on the coasts or islands described or even approaching them within less than 100 Italian miles.

This Ukase was notified to foreign nations and was regarded as a clear invasion of the freedom of the seas. Great Britain and the United States protested against it. The Russian Government attempted to explain that it was necessary to protect Russian commerce. The explanation was not heeded.

Mr. Adams, the American Secretary of State, on 22nd July, 1823, addressed to the Russian Government the following vigorous protest:

"The pretensions of the Imperial Government extend to an exclusive territorial jurisdiction from the 45th degree of north latitude, on the Asiatic Coast, to the latitude of 51° north on the western coast of the American continent; and they assume the right of interdicting the navigation and the fishery of all other nations to the extent of 100 miles from the whole of that coast. *The United States can admit no part of these claims* The right of navigating and of fishing is perfect, and has been in constant exercise from the earliest times, after the Peace of 1783, throughout the whole of the Southern Ocean, subject only to the ordinary exceptions and exclusions of the territorial jurisdictions, which, as far as Russian rights are concerned, are confined to certain islands, north of the 55th degree of latitude, and have no existence on the continent of America."

Then again, Mr. Middleton, the American Minister to Russia commenting on the Ukase in his letter of the 13th Dec., 1823, says:

"The Ukase even goes to the shutting up of a strait which has never been till now shut up, and which is at present the principal object of discoveries interesting and useful to the sciences. The extension of territorial rights to the distance of 100 miles from the coasts upon two opposite continents, and the prohibition of approaching to the same distance from these coasts, or from those of all the intervening islands, are innovations in the law of nations and measures unexampled."

Nothing could be more explicit than the ground taken up by the American Government at this time against the claims of Russia. The British Government also took up a firm and decided position, and during the Congress at Verona, in 1822, the Duke of Wellington formally put himself on record in a note addressed to Count Lieven in regard to a memorandum received by the Duke from Count Nesselrode a short time before.

The Duke's letter is an important document and is in the following language:

VERONA, November 28, 1822.

M. le Comte: Having considered the paper which your Excellency gave me last night on the part of His Excellency Count Nesselrode on the subject of our discussions on the Russian Ukase, I must inform you that I cannot consent, on the part of my Government, to found on that paper the negotiations for the settlement of the question which has arisen between the two Governments on this subject.

We object to the Ukase on the grounds:

1. That His Imperial Majesty assumes thereby an exclusive sovereignty in North America of which we are not prepared to acknowledge the existence or the extent. Upon this point, however, the memorandum of Count

Nesselrode does afford the means of negotiation, and my government will be ready to discuss it either in London or St. Petersburgh whenever the state of the discussions on the other question arising out of the Ukase will allow of the discussion.

2. The second ground on which we object to the Ukase is that His Imperial Majesty thereby excludes from a certain considerable extent of the open sea vessels of other nations.

We contend that the assumption of this power is contrary to the law of nations, and we cannot found a negotiation upon a paper in which it is again broadly asserted. *We contend that no power whatever can exclude another from the use of the open sea.* A power can exclude itself from the navigation of a certain coast, sea, &c., by its own act or engagement, but it cannot by right be excluded by another. This we consider as the law of nations, and we cannot negotiate upon a paper in which a right is asserted inconsistent with its principle.

I think, therefore, that the best mode of proceeding would be that you should state your readiness to negotiate upon the whole subject, without restating the objectionable principle of the Ukase, which we cannot admit.

Ever yours, &c.

(Signed) WELLINGTON.

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Behring Straits being only fifty miles wide the effect of the Ukase of 1821 would be to close the entrance to them, and to the Pacific from the North. Both Mr. Adams and Mr. Canning made this point in

reply to a memorandum from Count Lieven in reference to Russian subjects living on the Arctic Coast, outside the Behring Straits. Mr. Canning wrote on 21st July, 1824:

"The person who could think of making the Pacific "a *mare clausum* may not unnaturally be supposed capable "of a disposition to apply the same character to a strait "comprehended between two shores of which it becomes "the undisputed owner; *but the shutting up of Behring "Straits or the power to shut them up hereafter would be a "thing not to be tolerated by England*, nor could we submit "to be excluded either positively or constructively from "a sea in which the skill and science of our seamen have "been (and are still) employed in enterprizes interesting "not to this country alone but to the whole civilized "world."

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The result of these protests was that Russia abandoned the whole of the extreme pretensions of the Ukase along the whole of the said territories to which it was made applicable, and has never since in this regard asserted or exercised any rights not recognized by the law of nations.

After the abandonment, a treaty was signed between Russia and the United States in 1824, and one between Russia and Great Britain in 1825.

It was contended in the diplomatic correspondence and in the American case and argument that, although Russia in the treaty with Great Britain in 1825 withdrew the extreme pretensions of the Ukase of 1821 in so far as the "Pacific Ocean" is concerned, the withdrawal did not apply to the Behring Sea, which being known and designated by a specific name, could not be assumed to fall within the designation of "Pacific Ocean." The argument therefore was that the Ukase remained in full force and effect in so far as Behring Sea and the seal fisheries in it were concerned, notwithstanding the

treaty of 1825, at the time Alaska and the islands in Behring Sea were transferred to the United States by the cession of 1867.

This called for a construction of the treaty of 1825, and considerable geographical investigation as to whether Behring Sea was really a part of the Pacific Ocean. The weight of evidence was overwhelmingly, that Behring Sea was and had always been regarded as part of the Pacific Ocean; while an examination of the treaty of 1825 shows that in its first article :

"It is agreed that in any part of the Great Ocean commonly called the "Pacific Ocean," the respective subjects of the High Contracting Powers shall be neither disturbed or restrained either in navigation or fishing."

"The north west coasts of America" referred to in the Ukase as extending to Behring Strait are also referred to in the treaty without qualification or restriction, which would have been made if the treaty were to have only a limited operation.

In addition to this the Russian government were called upon to construe the treaty of 1824 with the United States, the first clause of which is couched in almost precisely identical language as the first clause in the treaty with Great Britain, when the Russian American Company protested against American and other foreign whalers in Behring Sea. The Russian Government on this protest decided that the treaty of 1824 gave the citizens of the United States the right of fishing and navigation "over the whole extent of the Pacific Ocean."

As a matter of fact it was shown that from the earliest times British vessels had enjoyed all the rights of the high seas in Behring Sea, and that on the only occasion when Russia attempted to usurp the freedom of the sea

and to restrict fishing and navigation upon its waters. Great Britain promptly resisted until not only the abandonment of the obnoxious Ukase was obtained, but a formal convention putting that abandonment beyond question was signed. Russia, therefore, neither asserted nor exercised exclusive jurisdiction in Behring Sea or exclusive rights in the seal fisheries therein, at or prior to, the time of the cession of Alaska to the United States, and Great Britain never recognized any jurisdiction or rights other than such as appertained to Russia by the law of nations. And so the tribunal of arbitration found.

The arbitrators unanimously decided that the phrase Pacific Ocean in the treaty between Great Britain and Russia, included the Behring Sea; and decided by a majority, Senator Morgan dissenting, that after the treaty of 1825 Russia exercised no exclusive right or jurisdiction in Behring Sea, and no exclusive right as to the seal fishery therein, outside of territorial waters.

The Russian title can hardly be disposed of without a brief reference to the terms of the cession which are contained in the

TREATY 30TH MARCH, 1867.

This treaty was negotiated for the United States by Mr. Seward.

By the first article of the treaty:

"Sa Majesté l'Empéreur de Toutes les Russies, s'engage * * * à céder aux Etats-Unis * * * tout le territoire avec droit de Souveraineté possédé par Sa Majesté sur le continent d'Amérique, ainsi que les îles contiguës."

(Then follows a description about which there is no dispute.)

By the sixth article of the treaty:

The "cession du territoire avec droit de souveraineté" is declared to be "libre" and with all appurtenant privileges and rights.

The Americans translated the words, "avec droit de souveraineté" as "dominion," whereas they unquestionably mean "the right of sovereignty" and not "dominion."

What the Emperor did was to transfer the "territory" and the "islands" and such rights as belonged to him, as for instance, right in territorial waters, with "the right of sovereignty," or the right which he possessed as ruler or sovereign over these territories. It is another form of relieving his subjects from their allegiance and putting them under the jurisdiction of another power, but it does not add anything to the territorial extent of the thing transferred.

He did not transfer, or profess to transfer Behring Sea or "the waters of Alaska" or anything except territory, and such territorial rights as were incident to it by the law of nations, and the power of government over his people inhabiting these territories and islands; and it might also be any right or royalty that appertained to him as Tzar, in the soil, or in the mines. But no exceptional right of this kind is claimed. There is no reference to any royal or national right in fishing on the seas washing the coasts of the transferred territory.

The arbitrators were therefore able to answer unanimously in the affirmative to the fourth of the five points of art. 6, namely:

4. Did all the rights of Russia as to jurisdiction and

as to seal fisheries in the Behring Sea east of the water boundary, in the treaty between the United States and Russia of 30th March, 1867 pass unimpaired to the United States under the treaty ?

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### THE PROPERTY IN THE SEALS.

The American case however did not alone rest on the determination of the exclusive jurisdiction in Behring Sea, and exclusive rights in the seal fisheries therein, being the questions involved in the first three points. After having dealt with them, it contains this further proposition that the United States "is not compelled, neither does it intend to rest its case altogether on the jurisdiction exercised over Behring Sea established or exercised by Russia prior and up to the time of the cession of Alaska."

Mr. Blaine had said the same thing and this brings us to the 5th point of article 6th of the treaty, viz:

5. *Has the United States any right, and if so what right of protection or property, in the fur-seals frequenting the islands of the United States in Behring Sea, when such seals are found outside the ordinary three mile limit ?*

The United States based the right here claimed "upon "the established principles of the common and civil law, "upon the practice of nations, upon the laws of natural "history, and upon the common interest of mankind."

The British case met this proposition with the answer that there could be no right of protection where there was no jurisdiction ; that there could be no right of property in the seals which were animals *ferae naturae*, and as such were *res nullius* until taken. The law as laid down

by Kent, even, was against the American contention. The "common interests of mankind" in question could only be such as international law recognizes.

The American contention for a right of property in seals received no countenance from either the common or civil law. The common law of Great Britain and the United States in regard to wild animals was the same. It recognized no property in animals *ferae naturae* until possession, and property only lasts so long as possession lasts; when possession is lost, the property is lost. They are then wild animals at large and "the right of capture reverts to all alike."

"The law does not give to the owners of land the qualified property as to wild animals on their land by reason of any care or feeding of the wild animals, or management, which falls short of reducing them into possession; it is vested solely on the fact of the ownership of the land, and the fact that any other person coming on the land to take the animals is a trespasser."

The American Counsel pressed the argument that the seals returned annually to the breeding islands, where a certain control was exercised over them by the United States Government or their lessees, and that when they left the breeding ground it was *animo revertendi*, as evidenced by the fact that they did return the following year. Counsel assimilated the government's ownership in them to that of the owner of bees or doves, which fly away from their owner's land, but habitually return again to their hives or cots. The arbitrators could not find an analogy and refused to countenance the argument. The life of the seal is indeed *sui generis*.

That the American contention with regard to *ferae*

*naturae* is not without colour of authority is obvious from the following observations of Blackstone ;

"These are no longer the property of a man than while they continue in his keeping or actual possession ; but if at any time they regain their natural liberty, his property instantly ceases, unless they have *animum revertendi*, which is only to be known by their usual custom of returning. The law, therefore, extends this possession further than the mere manual occupation ; for my tame hawk, that is pursuing his quarry in my presence, though he is at liberty to go where he pleases, is nevertheless my property, for he hath *animum revertendi*. So are my pigeons that are flying at a distance from their home, all which remain still in my possession, and I still preserve my qualified property in them. But if they stray without my knowledge, and do not return in the usual manner, it is then lawful for any stranger to take them."

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But it could hardly be said that there was any control or reduction into possession of seals on the islands except in so far as the portion of them that was driven apart to be put to death and skinned. There was no interference with, or control over, or reduction into possession of, the balance of the herd. The seal outside the three mile limit was the property of the first taker. There was nothing illegal in pelagic sealing. The sea sealer was simply the business rival of the land sealer, objectionable to the latter because he diminished his catch. The rights of the United States were not violated by other nationals exercising their lawful rights on the high seas.

The majority of arbitrators, Mr. Justice Harlan and Senator Morgan, dissenting, found that the United States had not any right of protection or property in the fur seals frequenting the islands of the United States in the Behring Sea, when such seals are found outside the ordinary three mile limit.

The United States Government and counsel made their main fight over the right of property in the seals, now designating it a right in the seals, now in the seal herd, and finally in the seal industry.

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Notwithstanding that the American Government upheld the original seizures of Canadian sealers, on the ground that the statute of congress, the president's proclamation, and the judgment of the Alaskan Court justified them, notwithstanding that Mr. Blaine in the diplomatic correspondence placed much stress on the Russian title to exclusive right in the Behring Sea and in the seal fishing there, notwithstanding that the treaty puts forward these questions for specific determination, and that they are seriously argued in the American case, it will be found from the opening words in the American counter case that these considerations are practically abandoned or so completely superseded as to be practically abandoned.

These are the opening words of the American counter case:

"It appears from an examination of the British case and the diplomatic correspondence above referred to that a different opinion is entertained by the two governments as to the object and scope of the present arbitra-

tion. That case is almost exclusively devoted to showing that the government of the United States is not entitled to exercise territorial jurisdiction over the waters of Behring Sea, or to exclude therefrom the vessels of other nations. On the other hand the case of the United States makes it plain that the main object had in view by the latter government is the protection and preservation of the seal herd which has its home on the Pribyloff Islands."

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While the American position was constantly changing, it must be remarked that the position of Great Britain set forth in the diplomatic correspondence in the British case and counter case, and elaborated in the argument of counsel was uniform and consistent throughout.

Speaking of this Blackwood remarks: "We may say that the British case, presumably prepared in great part, if not altogether, under the control of or in person by the members of the Canadian Ministry engaged in this affair, i.e., the Premier Sir John Thompson and the Minister of Marine, the Honourable Charles Hibbert Tupper, is prepared in a manner calculated to excite a feeling of satisfaction that the public service of the colonies and the empire can still command the use of very extraordinary ability for very insignificant rewards."

The same magazine speaking of that part of the British counter case which deals with right of property in, and protection over, the seal, says that it "was prepared with singular ability."

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All the questions of right and jurisdiction having been decided in favor of Great Britain and against the United States, or otherwise stated, it having been decided that all nations had equal rights on the high seas, (inclusive of Behring Sea) it then became necessary for the arbitrators to consider the framing of concurrent regulations under article 7 of the treaty.

That article is as follows:

ARTICLE VII.

If the determination of the foregoing questions as to the exclusive jurisdiction of the United States shall leave the subject in such position that the concurrence of Great Britain is necessary to the establishment of regulations for the proper protection and preservation of the fur-seal in, or habitually resorting to, the Behring Sea, the arbitrators shall then determine what concurrent regulations outside the jurisdictional limits of the respective governments are necessary, and over what waters such regulations should extend, and to aid them in that determination, the report of a joint commission to be appointed by the respective governments shall be laid before them, with such other evidence as either government may submit.

The High Contracting Parties furthermore agree to co-operate in securing the adhesion of other powers to such regulations.

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This article, as already indicated, contemplates the framing of regulations limiting the rights of Great Britain, (for the United States has no interest in sea seal-

ing), provided Great Britain should win her case before the Tribunal of Arbitration.

The British counsel vainly argued that the tribunal should make regulations affecting the land as well as the sea catch.

Her Majesty's government in the printed argument submitted:

"The object of the regulations is the proper protection and preservation of the fur-seal in, or habitually resorting to Behring Sea. It would be unjust that other nations should be asked to enforce by legislation this curtailment of the rights of their nationals, without some corresponding concession on the part of the United States, as owners of the islands and the territorial waters thereof."

Quite so; nothing could be more unjust, but this point should have been urged and pressed in the negotiations preceding the convention, and surely no convention should have been entered into that did not involve mutual concessions. Unfortunately the treaty does not provide for any concession from the Americans, in so far as the islands and territorial waters are concerned. The concurrent regulations are only to apply outside the jurisdictional limits. This is the bane of the treaty. Great Britain was doomed to suffer a sacrifice after winning all the jurisdictional points in dispute.

"The regulations for the islands," "urged the Govern-
" ment of Her Majesty," " which the United States may
" be willing to make, must, it is submitted, have an
" important effect upon the judgment of the arbitrators,
" as to what pelagic regulations would be reasonable or
" necessary, and it is further submitted that it is within
" the competence of this tribunal to make the latter re-
" gulations contingent or dependent upon the former. To
" apply restrictions to pelagic sealing, without effective

" and concurrent regulations being enforced on the breed-
" ing haunts, would be as unreasonable and useless as
" the institution of restrictions over a coastal or estuary
" salmon fishery, while the salmon on the spreading beds
" of the river were being taken without let or hindrance."

All unquestionably true ; but then all these considerations should have been submitted and pressed before signing a treaty. It is vain to ask for the application of these views and reasonable principles, when the treaty itself excludes their application.

Mr. Christopher Robinson, Q.C., the Canadian counsel fully recognized and admitted the real difficulty of the situation when he said in his oral argument before the tribunal :

" I do not think your powers are sufficient to enable you to frame regulations for the efficient protection of the seal race. In our judgment that would require regulations on the island, in Behring Sea and in the north Pacific ocean."

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The tribunal thought so too, and after making the regulations it deemed proper in respect of sealing outside of jurisdictional limits, qualified their decision with a special declaration that "in their opinion, these regula-
" tions, applicable to the high sea only, should be sup-
" plemented by other regulations applicable within the
" limits of the sovereignty of each of the two powers
" interested."

A more candid confession that sufficient power had not been given to the tribunal to efficiently deal by regulation with the preservation of the seal race could not have been made.

It remains to briefly notice the proposed regulations submitted to the tribunal.

The British commissioners had recommended a close season and a zone around the breeding islands within which pelagic sealing should be forbidden at all times. This may have been perfectly right, under proper conditions, but as the establishment of that zone would immensely contribute to the preservation and multiplication of the seals on the islands and thereby enrich the owners of the islands, it should never have been proposed unqualifiedly but should be the concomitant of some corresponding concession from the Americans. However the treaty left no leeway for concession. It is plain that the creation of a neutral zone around the island is in effect, not merely to enlarge and protect the breeding grounds, but to create a buffer against the pelagic sealer in favour of the owners of the rookeries on the islands. However, seeing the terms of the treaty and the report of the British commissioners, it seemed inevitable that a zone of some extent would be created about the islands. The British Government therefore proposed a zone of 20 miles, a close season in Behring Sea from the 15th September to 1st July, and the licensing of sealers.

THEN AND NOW.

It will be remembered that Mr. Blaine had as late as the 17th December, 1890, proposed a close time from the 15th May to 15th October, of each year, and a neutral zone of 20 leagues (60 miles) around the islands, and added: *This will prove an effective mode of preserving the seal fisheries for the use of the civilized world.*

But what was the *proposal of the United States* before the tribunal of arbitration?

It was simply that the tribunal should *prohibit* sea

sealing, not in a zone of 60 miles around the Pribyloff Islands, for 5 months in the year, not that it should *prohibit* sea sealing within the 800,000 square miles of water comprised in Behring Sea, alone; but that it should prohibit sea sealing in those portions of the Pacific Ocean (including Behring Sea) that are north of 35 ° of north latitude (the Pribyloff Islands are in 57 ° north latitude) and east of the 180th meridian of longitude west from Greenwich, all the year round, and for all time!

In effect they asked that pelagic sealing, should be annihilated *in toto*, and that all the waters of the Pacific ocean to which seals resort should be constituted a feeding ground for the Pribyloff slaughter house.

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The arbitrators made the following regulations, Sir John Thompson, Prime Minister of Canada, and the two American arbitrators dissenting.

CONCURRENT REGULATIONS.

Article 1. The Governments of the United States and Great Britain shall forbid their citizens and subjects respectively, to kill, capture, or pursue at any time and in any manner whatever, the animals commonly called fur-seals, within a zone of 60 miles around the Pribyloff Islands, inclusive of the territorial waters.

The miles mentioned in the preceding paragraph are geographical miles, of 60 to a degree of latitude.

Article 2. The two Governments shall forbid their citizens and subjects respectively to kill, capture, or pursue in any manner whatever, during the season extend-

ing, each year, from the 1st May to the 31st July, both inclusive, the fur-seals on the high sea, in the part of the Pacific Ocean, inclusive of the Behring Sea, which is situated to the north of the 35th degree of north latitude and eastward of the 180th degree of longitude from Greenwich till it strikes the water boundary described in Article I of the Treaty of 1867 between the United States and Russia, and following that line up to the Behring Straits.

Article 3. During the period of time and in the waters in which the fur-seal fishing is allowed, only sailing-vessels shall be permitted to carry on or take part in fur-seal fishing operations. They will, however, be at liberty to avail themselves of the use of such canoes or undecked boats, propelled by paddles, oars, or sails, as are in common use as fishing boats.

Article 4. Each sailing vessel authorized to fish for fur-seals must be provided with a special license issued for that purpose by its Government, and shall be required to carry a distinguishing flag to be prescribed by its Government.

Article 5. The masters of the vessels engaged in fur-seal fishing shall enter accurately in their official log-book the date and place of each fur-seal fishing operation, and also the number and sex of the seals captured upon each day. These entries shall be communicated by each of the two Governments to the other at the end of each fishing season.

Article 6. The use of nets, fire-arms, and explosives shall be forbidden in the fur-seal fishing. This restriction shall not apply to shot guns when such fishing takes place outside of Behring Sea during the season when it may be lawfully carried on.

Article 7. The two Governments shall take measures to control the fitness of the men authorized to engage in fur-seal fishing. These men shall have been proved fit to handle with sufficient skill the weapons by means of which the fishing may be carried on.

Article 8. The regulations contained in the preceding articles shall not apply to Indians dwelling on the coasts of the territory of the United States or of Great Britian, and carrying on fur-seal fishing in canoes or undecked boats not transported by or used in connection with other vessels and propelled wholly by paddles, oars, or sails, and manned by not more than five persons each in the way hitherto practised by the Indians, provided such Indians are not in the employment of other persons, and provided that, when so hunting in canoes or undecked boats, they shall not hunt fur-seals outside of territorial waters under contract for the delivery of the skins to any person.

This exemption shall not be construed to affect the municipal law of either country, nor shall it extend to the waters of Behring Sea, or the waters of the Aleutian Passes.

Nothing herein contained is intended to interfere with the employment of Indians as hunters or otherwise in connection with fur-sealing vessels as heretofore.

Article 9. The concurrent regulations hereby determined with a view to the protection and preservation of the fur-seals shall remain in force until they have been, in whole or in part, abolished or modified by common agreement between the Governments of the United States and of Great Britain.

The said concurrent regulations shall be submitted every five years to a new examination, so as to enable

both interested Governments to consider whether, in the light of past experience, there is occasion for any modification thereof.

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The regulations concede the British contention, as to a zone around the breeding islands, but make it a zone of 20 leagues, instead of 20 miles ; fix a close time from 1st May to 31st July, but instead of restricting it to Behring Sea, apply it to the Pacific Ocean, (inclusive of Behring Sea) north of 35th ° north latitude, and roughly speaking eastward of the 180th degree of longtitude from Greenwich—restricting the American pretention that pelagic sealing should be completely prohibited in the same waters.

The other regulations prescribe the sort of vessels that may participate in sea sealing, and establish a licensing system for them. The Governments are made reponsible for the " fitness of the men authorized to engage in fur-seal fishing "—a regulation much criticised. " The use of nets, fire-arms and explosives" are prohibited though " shot guns " may be used " outside Behring Sea " in the fishing season.

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The arbitrators unanimously made the following

DECLARATIONS AND RECOMMENDATIONS :

1. The arbitrators declare that the concurrent regulations, as determined upon by the tribunal of arbitration, by virtue of Article VII of the treaty of the 29th February,

1892, being applicable to the high sea only, should, in their opinion, be supplemented by other regulations applicable within the limits of the sovereignty of each of the two powers interested and to be settled by their common agreement.

3. The arbitrators declare moreover that, in their opinion, the carrying out of the regulations determined upon by the tribunal of arbitration should be assured by a system of stipulations and measures to be enacted by the two powers ; and that the tribunal must, in consequence, leave it to the two powers to decide upon the means of giving effect to the regulations determined upon by it.

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Three of the arbitrators, viz : His Excellency Baron De Courcel, the Honourable Mr. Justice Harlan and the Honourable Senator Morgan, made the following recommendation :

2. In view of the critical condition to which it appears certain that the race of fur-seals is now reduced in consequence of circumstances not fully known, the arbitrators think fit to recommend both Governments to come to an understanding in order to prohibit any killing of fur-seals either on land or at sea, for a period of two or three years, or at least one year, subject to such exceptions as the two Governments might think proper to admit of.

Such a measure might be recurred to at occasional intervals if found beneficial.

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The arbitrators also found that the sealing vessels named in a list submitted by Great Britain, were seized,

searched and captured by American cruisers of the United States, outside the jurisdictional waters of the United States, under Article 8 of the treaty which is as fol lows:

ARTICLE VIII.

The high contracting parties having found themselves unable to agree upon a reference which shall include the question of the liability of each for the injuries alleged to have been sustained by the other, or by its citizens, in connection with the claims presented and urged by it; and being solicitous that this subordinate question should not interrupt or longer delay the submission and determination of the main questions, do agree that either party may submit to the arbitrators any question of fact involved in said claims and ask for a finding thereon, the question of the liability of either Government upon the facts found to be the subject of further negotiation.

The finding under this article is especially important to the masters and owners of the Canadian sealing vessels which are held by the award to have been unlawfully seized while pursuing a lawful occupation on the high seas.

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Will the governments interested by common agreement supplement the regulations by making other regulations applicable within the sovereignty of the two powers interested—as recommended by the tribunal? Without such supplementary regulations, the present regulations though they may temporarily remove the causes of dispute would seem to be doomed to failure in

preserving and protecting the seal race. They merely facilitate a larger percentage of seals being *clubbed* each year on the islands. They restrict the *retail* killing of seals on the sea, but place no restriction on the *wholesale* slaughter of them on the islands. The individual seal—swimming in the open sea—and with a "sporting chance" for his life may only be killed at certain times and by certain methods; the whole herd may be driven to the killing grounds on the breeding islands without let or hindrance. The American interest in preserving the seal race reminds one very much of the spider's interest in the fly—until the latter "walks into his parlour."

And will not Great Britain and the United States require to take some joint action to protect themselves against other nationals? If these regulations be made effective by "stipulations and measures to be enacted by the two powers," that is if the United States and Great Britain consent to restrict themselves, what hope is there of other nations accepting such restrictions. In virtue of the decision on the questions of jurisdiction and right there is nothing to prohibit Russia or Japan or Mexico, or any other nation from fitting out fleets of sealers and pursuing pelagic sealing throughout the whole Pacific Ocean—including Behring Sea, to within 3 miles of the shore of the Pribyloff Islands! The regulations of the Paris Tribunal are not operative against other nationals not parties to that decision But other nationals have gained this advantage as onlookers. They now know their rights. They can hunt and fish seals without let, hindrance or regulation. It is evident that other nations will not assent to regulations which restrict their rights. They not only remain free now, but they can remain free while their two greatest competitors are bound.

A word as to the effect of these regulations if enforced in their present form.

It has been repeatedly stated that the regulations come to an end at the expiry of five years.

A writer in Blackwood says: "whatever mischief may be wrought by these rules, *will come to an end in a short time, or be remedied by further regulations.*" And again in the same article the writer says: "She (Great Britain) also insisted that the regulations should not be permanent, *and in this she has fortunately been successful.*" But has she? Article 9, provides that, the regulations "shall remain in force", "until abolished or modified by common agreement." Failing that common agreement they are permanent. The provision for submitting them every five years to a new examination amounts to nothing more than a provision for submitting the regulations for reconsideration. But unless both Governments concur in modification or abolition, the regulations stand until changed or abolished by "common agreement." The regulation is *permanent* unless both parties agree to change or annul it.

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There is one other consideration worthy the attention of the high contracting parties. Who is to enforce these regulations? Is Great Britain to maintain a fleet to police the 60 mile zone around Pribyloff Islands, to protect the American preserve against her own subjects? And who is to police the Pacific Ocean from 35 ° degrees north latitude to Behring Straits and eastward of 180 ° of longitude from Greenwich? The combined navies of the world would be inadequate for this service. Few can comprehend the extent of sea surface within these

boundaries. It would be safe to say it covers a surface approximately as large as the whole of the United States and Mexico combined.

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The Paris Tribunal in so far as it affirmed the great principles of International law has rendered a lasting service not only to Great Britain and the United States, but to all nations. In the determination of these questions it was aided by able and distinguished counsel—and it is upon its findings as to matters of right and jurisdiction that its real title to live in history must rest. Its attempt to legislate upon a new and imperfectly understood subject and without the power to deal with the whole subject—is confessedly an imperfect performance. Happily it recognizes the imperfection and indicates the remedy in so far as the two nations immediately interested are concerned. But if Great Britain and the United States should take the advice of the arbitrators, and supplement the legislation of the tribunal in a way to protect and preserve the seal race, in so far as their own nationals are concerned, what will other nations do? It is regretable that the Marquis of Salisbury's suggestion, that the questions of right should be first determined, and that after that, regulations should be the subject of a separate reference, was not adopted. Failing a separate reference it is even more to be regretted that Her Majesty's Government did not persist in their refusal to assent to the sixth question formulated in Mr. Blaine's note, and which in a modified form became Article 7, of the Treaty. The British counter proposal, made as late as 3rd June, 1891, to ascertain the facts about seal life by commission before making regulations—with a view to an "international arrangement,"

between Great Britain, the United States, Russia or any other power" "for the purpose of preserving the fur-seal race in Behring Sea from extermination, if any regulations are necessary," was sound and reasonable—in fact the only rational method of disposing of the subject on the basis of finality. It compassed the whole subject of preserving the seal species in Behring Sea, and why Lord Salisbury did not persist in it, must remain one of the mysteries of diplomacy. It is inconceivable that Lord Salisbury who had up to this time conducted the diplomatic correspondence in a manner that left nothing to be desired, should have yielded upon a point that consigned the success of his diplomacy to failure. He did yield, and the "heads I win, tails you lose" clause was inserted in the treaty.

The Canadian vessels were seized upon the high seas, as "lawless intruders" in American waters, and as poachers of American property. Great Britain asserted the freedom of the seas and remonstrated against the seizures as being against the laws of nations. This was the pivotal point in dispute between the two countries. The preservation of seal life was a side issue, insinuated into the controversy and finally into the treaty in a way that enabled the Americans to gain by regulation what they were not entitled to by right. Why should any nation be asked to surrender any portion of its rights without some compensating advantage and without compensation assessed and determined, for past injuries? It would be the merest hypocrisy to pretend that the American interest in the prevention of killing of seals on sea was unconnected with an interest in the catch on land. If the preservation of the seals was the first and real consideration, and if Great Britain and other powers were willing

to submit themselves to regulations limiting their right to kill seals on the high seas, why in reason should the Americans refuse to submit to regulations limiting their rights to kill on land?

It is a great satisfaction that Great Britain was found to be right in its contentions on the main subject in dispute, and that its triumph in this respect is unquestioned everywhere. It is satisfactory that under the award the owners of the sealing vessels seized, and the masters and mates of the vessels, have now established indisputably their rights to compensation for injuries. But while this is so it is regretable that victory was purchased on conditions that put its fruits in peril, the moment it was secured.

The form of the reference was the root of the evil.

For if our seamen were within their rights, exercising a lawful calling on the high seas, when their vessels were ruthlessly seized and they themselves imprisoned and fined, they should have been awarded compensation by the Tribunal, or at all events provision should have been made for receiving compensation with certainty, and the whole question not left open to "negotiation"—which simply means fresh bargaining—in which unfortunately the American wields a defter hand than the Britisher. And then if the sea was adjudged free to us and other nationals in common, why should we give up a right to take of its fulness, of all it yields to man, without compensation or equivalent? Alas, as Sir John Thompson, too truly said in the House of Commons, Canada went before the Paris Tribunal with "nothing to gain," "but there was an opportunity for her to be completely shorn at the instance of the United States."

Sir John Thompson and Sir Charles Hibbert Tupper, Mr. Christopher Robinson, Q. C. and the English Counsel did all that human skill, energy and intellect could accomplish at Paris. They could not prevail against the terms of the reference. Ajax sighed for a sight of his foeman's face ; our champions were permitted to see the faces of their foemen, and right well they battled with them, and won. The sea was indeed free to all, beyond dispute, for the future, and the owners of Canadian vessels seized on the high seas must be compensated for injuries. These were the legitimate results of victory. But these results were frustrated by the reference, under which in the contingency of victory " the liability " of the American Government was to form the subject of separate " negotiation," and the seas which had been declared free, should without any compensation whatever be subjected to restrictions in the interest of the owners of the Pribyloff Islands, and of them alone.

Really the " common interest of mankind," so-called, has demanded too great sacrifices of Canada.

The great seal arbitration has passed into history : but we have not yet heard the last of the seal.

# APPENDIX.

The Tribunal of Arbitration was constituted as follows:

H. E. the Baron Alphonse de Courcel, Senator of France, nominated by France: President.

H. E. the Marquis E. Visconti Venosta, Senator of Italy, nominated by Italy.

H. E. Monsieur Gregers Gram, Minister of State of Sweden and Norway, nominated by Sweden and Norway.

The Right Hon. Lord Hannen, Lord of Appeal; and the Hon. Sir John Thompson, K. C. M G., Prime Minister of the Dominion of Canada, nominated by Great Britain.

The Hon. John M. Harlan, Justice of the Supreme Court of the United States; and

The Hon. John T. Morgan, Senator of the United States, nominated by the United States.

The Agents were:

The Hon. Charles H. Tupper, (now Sir Charles Hibbert Tupper, K. C. M. G.,) Minister of Marine and Fisheries of the Dominion of Canada, on behalf of the Government of Great Britain.

The Hon. John W. Foster, on behalf of the Government of the United States.

The British Behring Sea Commissioners were:

Sir George Baden-Powell, K. C. M. G., M. P., Dr. George Dawson, C. M. G.

United States Behring Sea Commissioners were;

Mr. Thomas C. Mendenhall, Mr. C. Hart Merriam.

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PARLIAMENT 1980