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HALIFAX COMMISSION,

1877.

APPENDIX J.

SPEECHES OF COUNSEL

INCLUDING

THE FINAL ARGUMENTS.

APPENDIX J.

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APPENDIX J.

SPEECHES OF COUNSEL BEFORE THE HALIFAX COMMISSION.

I.

At the 5th Conference held on the 31st of July, 1877, on the conclusion of the reading of the "Case of Her Majesty's Government;" the "Answer of the United States;" and the "Reply of Her Majesty's Government;"

Mr. THOMSON said:—

This, Your Excellency, and Your Honors, is the "Case of Great Britain;" the "answer of the United States" to this Case, and the reply. The issues are plain, and are not, I apprehend, to be misunderstood. I think I may not be presumptuous in saying on the part of Her Majesty's Government, that we feel these issues are trusted for adjudication and decision to able and impartial hands; and if it shall happen, as I hope it may, that the result of your deliberations in this case may be the basis upon which future and more lasting negotiations may be entered into, and so a source of continued national and local irritation be entirely removed, then I think I may fairly say to your Excellency and Your Honors that you will, have acquired no unenviable and no unimportant place in the history of your times; and I am quite satisfied that you will have earned by your labors the lasting gratitude of two great peoples.

II.

At the 25th Conference held on the 28th day of August, 1877, MR. TRESCOT, on behalf of the Government of the United States, made the following application:—

Mr. President and Gentlemen of the Commission:

As the time is now approaching when the evidence in support of the British case will be closed and we will be requested to open the testimony in behalf of the United States, we would ask leave to make a slight change in the order of our proceeding as it has been at present arranged.

According to the present arrangement, it will be our duty to open our case in advance of the testimony by laying before you the general scheme of our argument and indicating the points upon which evidence will be submitted in its support.

The character of the testimony which has been now submitted in support of the British Case, and the tenor of that which we will offer (as may be inferred from the evidence of the two witnesses whom we were allowed to examine out of order) have impressed us with the conviction that a practical discussion of the real issues will be more certainly secured, and the time and patience of the Commission will be more wisely economized, if we are allowed to submit such views as it may be our duty to maintain at the close instead of in advance of the examination of witnesses.

As we understand the wish of both Governments to be that the whole discussion should be as frank and full as possible, it has occurred to us that you might be disposed to allow us to adopt such an arrangement as would in our judgment best enable us to lay before you a complete presentment of the opinions of the Government we represent. And we feel more assured in that opinion as this privilege deprives counsel on the other side of no advantage which they now possess. For, beside the right to reply to the printed argument which they now have, we would of course expect that they would also be allowed the right of oral reply, if they desired to exercise it.

An opening speech is not necessary, as the counsel on the other side have shown, but it would be obviously improper to submit this case without a careful review of the testimony which will have been offered on both sides; and this can be done with much more convenience and thoroughness by an oral speech than by a written argument. To say all that it may be our duty to say in a printed argument would be impossible, without swelling it into a volume of unreadable proportions.

It is our purpose to make the printed argument a complete but concise summary of the contention, a clear statement of the principles involved and the authorities referred to, accompanied by an analysis of the leading facts of the testimony. This we can do, so as to make it an efficient help to you in your own examinations of the case, if we are not compelled to overload it with all the discussion which the evidence and the case itself suggest, but which we could sufficiently dispose of in oral argument.

We would therefore request permission so to distribute the argument on our side as to have the opportunity of submitting our views orally, upon full comparison of all the testimony taken. It is no small inducement to make this request that we believe that upon the close of the testimony we will be able to dispense with much argument which we can scarcely avoid in the present imperfect condition of the testimony.

Respectfully.

(Signed)
RICHARD H. DANA,
WM. HENRY TRESCOT,
Counsel for United States.

Mr. Foster said :—

As the motion just made involves a departure from the course of procedure adopted by the Commission, to which I assented, it is proper that I should say a few words in reference to it. At the time the rules were adopted, the Commission certainly cannot forget the position in which I found myself placed. Contrary to my own expectations and to the expectations of my Government, the Commissioners decided to allow the active participation in the conduct of the case of five Counsel, on behalf of the five Maritime Provinces. I came here expecting to meet only the Agent of the British Government, and suddenly found I was also to meet five leaders of the bar, from the five Provinces. I felt it important not to have five closing arguments against me. Now that there are counsel here to represent the United States as well as the British Government, it seems to me reasonable that such a modification of the rules should be made as will permit the services of the counsel who have been brought here in consequence of the decision of the Commission, to be made available to the greatest extent. While I should have been quite content to have discussed this matter in writing, with the British Agent, finding that I had to meet five counsel, my Government has been obliged to send counsel here, and it seems desirable that we should be able to use them in the most efficient way.

Then again, the evidence has assumed a very wide range, and is manifestly going to be conflicting to the last degree, upon some of the points, notably as to what proportion of the mackerel taken by the American fishermen in British waters is taken within three miles of the shore. On that subject there is going to be a very great conflict of evidence. I don't believe that such a question can be satisfactorily discussed, either in advance of the reception of the testimony or in writing after it is all in. It involves so much detail that the writing, if laid before you, would swell to a bulk that would be altogether unreasonable. I therefore very strongly concur in the application that has been made.

Mr. Doutre suggested that the British Counsel should have time to consider the matter before replying.

Mr. Foster concurred, and said that was the reason the application and the grounds of it had been put in writing.

At the Conference held on Wednesday, Aug. 23, 1877.

Mr. Thomson :—

An application was yesterday made to the Commission. I was not present at the time, but I have seen the written proposition, and I understand that it was an application made to your Excellency and your Honors for the purpose of altering the rules. On behalf of Her Majesty's Government—I am also now speaking the mind of the Minister of Marine—I may say that these rules have been solemnly entered into. We have acted upon them from the commencement to the end so far as we have gone, but still we have no desire that our friends on the other side should be deprived of any right which they think they ought fairly to have in order to bring their case before this Tribunal. We, however, certainly deprecate any alteration of the rules, and we feel that we are just in this position : — during all this time that we have been examining our witnesses, we did so under the idea that the rules would remain as they were engrossed. It is important we think in such an enquiry as this that these rules should be rigidly adhered to, unless there be some very important reason why they should be deviated from I confess, speaking for myself, that I hardly see the force of the reasons advanced in favor of the proposed change on behalf of the United States Government. They say that their arguments if placed on paper, would be so bulky as to fill a large volume. Possibly that may be so; but still that is rather more complimentary to their powers of discursiveness than anything else, and they accompany this expression of opinion with the statement that they wish to be heard orally at great length. I presume that this will all be reported by the short-hand writers, and in the shape of a lengthy volume it will meet the eyes of the Commissioners—so I do not see how this bulky volume is in any way to be escaped. Nevertheless as I said before, we are not desirous to object to our friends on the other side taking this course in order to fairly bring the merits of their case before the Tribunal if they so think fit. We therefore are willing that they shall, if they please, be heard orally at the close of the evidence on both sides but we submit—and we trust that in this respect there can be no difference of opinion—that your Excellency and your Honors will not make any deviation from the rule which requires our friends on the opposite side at the close of their case to fyle their written argument if they intend at all so to do. We contend that it would be entirely at variance with the whole spirit with which this enquiry has been conducted, that they should, after making their speech, to call upon us if we please to make a speech in answer—to make it, and that they then should fyle their written arguments. Such a course would wholly displace the position which we occupy before this tribunal. Great Britain stands here as the plaintiff, and the ordinary rule in courts of Common Law is this : that the plaintiff, after a short opening of his case, calls witnesses, as we have, and at the close of the plaintiff's case, the defendant, after a short opening of his case, also calls witnesses; the respective counsel for the defendant and the plaintiff then make their closing arguments; after which the case is submitted to the jury by the judge. This is the course followed; and therefore while we are willing, if it is really thought necessary by my learned friends so to proceed, that they should have the right to close their case by arguments in writing, or verbally and in writing; yet if they close verbally and then wish to put in a written argument, that must be done at once; and we, if we so please, will then answer them verbally or in writing, as we like, or in both ways. I confess, speaking from the stand-point of counsel, that so far as I have a voice in the matter, I rather reluctantly agreed to this, because I think that these rules were formally framed; and in reality the proposition that the case should be conducted by written agreement came from the learned agent of the United States, if I understand rightly—and we acceded to it, and entirely on that basis we have conducted the whole of our case. Still, I say again, that we will meet our friends half way.

Mr. Trescot :—I suggest that my friends proposition is an attempt at meeting by proceeding half-way in different directions; the trouble is that our half-ways do not meet at all. I am not sure that I understood my

friend exactly, but as I understand him, he claims the right of two replies: that is the right to reply to our oral argument, and then the right to reply to the printed argument, to which we have no objection.

MR. THOMSON:—I said we would reply to your two arguments, oral and written.

MR. TRESCOT:—If you mean that we are to make an oral argument, and that if you do not want to make an oral argument you shall not be obliged to do so, I have no objection.

MR. THOMSON:—I suppose that we will exercise our pleasure regarding that matter.

MR. TRESCOT:—If we make an oral argument, they have the right to reply. If, then, we give a printed argument they have the same right to file a printed argument in reply—their relation to us in the case is preserved throughout. My friend refers to the character of the case, and taking into consideration not only the character of case, but of the parties, of the court before which we are, I may even venture to say of the counsel engaged, I do not think we ought to proceed in the spirit of a Nisi Prius trial. Your judgment certainly cannot be prejudiced by a full and frank discussion. Our purpose is to save time and labour. We propose orally to discuss this subject before you with a frankness and freedom that we cannot do in writing, and then to put in a printed summary, giving counsel on the other side the right to put in the final one. Surely my friend does not want us to adopt his suggestion because he wants to say something at the last moment to which we will not have opportunity to reply. There cannot be anything of a mystery in an argument like this. We all now understand what are the issues which are before us. We only want to discuss them with perfect frankness and fullness, so that everything that is to be said on the case may be said. I want this case to be so argued, both in spirit and fact, that whatever the award may be, and whoever is called upon to submit to an adverse decision, they will be satisfied, having obtained the fullest possible hearing on the subject. I want to secure no advantage over my friends on the other side, and I do not believe that they desire to have any advantage over us; if they will allow me to borrow an illustration from the language of their witness, we do not wish to "lee-bow" them. But I think that my learned friend is sacrificing himself to a sort of technical superstition for the word "reply." In this case there is nothing mysterious, and no necessity exists in regard to having the last word. We are willing to lay our whole argument before the Commission, and then to let them reply to it, if they so wish, but if they do not choose to do it we do not intend to compel them to reply; and it is perfectly in their power to effect themselves what they propose, by declining to reply to our oral argument and confining themselves to their final argument. I say frankly I would regret such a decision very much. We wish to know their case as they regard it, and without depriving them at all of their right to reply to have a frank, full, straightforward and manly discussion of the whole question. I have always thought that the fairest manner for submitting a case is followed before our Supreme Court. Both parties put in their printed arguments, bringing them within the common knowledge of each party before the Court, and then they are allowed to comment on these arguments as they please.

MR. THOMSON:—

I agree with Mr. Trescot that this cause has not to be tried as one at Nisi Prius; we do not want Nisi Prius rules here, but we want the broad principle understood that Great Britain in this case is the plaintiff, and as such she is first to be heard, and last to be heard. A great advantage is obtained by the United States by hearing our case first, and for this very simple reason, during the whole time our evidence is being given before this Court they can be preparing their witnesses to meet it.

There is always this advantage given to the defendant in every case. He has the privilege of hearing the plaintiff's testimony, and during the time the testimony is being given, he has the opportunity of preparing his answer. On the other hand when the plaintiff comes to close the case, if there be an advantage in having the last word, the plaintiff has it. So the advantages are about balanced. A "frank" discussion under the proposition submitted by the counsel for United States simply means that the United States would get entirely the advantage in [redacted] cause. There is not the slightest desire on the part of the British Government or on the part of the Canadian Government represented here by the Minister of Marine, that one single fact should be kept back or forced out as against the United States, on the contrary that they shall have the fullest opportunity of being heard, but we submit that not only the rules solemnly adopted by this Tribunal, but the rules which govern the trial of ordinary causes should not be departed from. We have given way a great deal, when we are willing to allow our learned friends who represent the United States, to take the course they propose to this extent: that they shall make their oral speeches if they choose to do so, and if they choose, in addition, to put in a written argument, well and good, but they must do it at once, and that, if we please we shall answer their written argument and speeches orally and by written argument, or by one of those modes only. We ought not to be asked to yield more.

MR. DANA:—

Your Excellency and your Honors: From all the experience I have had in the trial of causes, where there has been examination of witnesses, it appears to me to be the best course, to argue the facts of the case after the facts have been put in. Such is the practice in the United States, and I presume in Canada. This seems a simple proposition: that the time to argue upon the facts to affect the minds of those who have to judge and determine, should be when it is fully ascertained what all the evidence is, and it is always dangerous, often inconvenient and always illogical, to argue upon supposed, assumed, suppositious, hypothetical testimony which may never come before the Court.

I suppose your Excellency and your Honors understand my objection. It is to a rule which permits that when the plaintiff has put in all his evidence, and the witnesses have been cross-examined, the defendant's counsel may rise and state what he is instructed will be the testimony, what he supposes or assumes will be the testimony on his side, and then to make an argument upon that testimony assumed and hypothetical as it is, and to contrast it with the testimony of the plaintiff, and deliver his mind fully and finally on the subject. This is dangerous and utterly unsatisfactory. Consequently in the United States, and I presume in the Dominion, the argument is made after it is known what the testimony is, because the plaintiff's counsel in an ordinary cause, or the counsel representing the Government here, may rise with full belief that it will be in his power to place the case in a certain position by his testimony, but it may turn out that he will be disappointed in his testimony, that the witnesses have not said all he expected, and that the cross-examination reduced or altered the testimony. But there is another reason. When the defendant has put in his entire case there is the right of rebuttal possessed by the plaintiff, and the rebutting testimony may produce effects which the defendant's counsel had no reason to anticipate, and which, without directly contradicting his testimony, may place it in a new light. So I think every person will see, and I am quite sure this tribunal will see, it would be wasting time for us to attempt to impress by argument, comparison and illustration, the effect of testimony which has not been put in. Now, when we speak of opening the case for the plaintiff or defendant we do not mean arguing the case. On the contrary, an argument is not allowed by our practice in opening a case. All you can ever do in opening a case is to state very generally what kind of testimony you expect to produce, what you think will be the effect of it, and the positions of law to which that evidence is to be applied—mere signals of what is expected to be done. If in opening a case, counsel attempts to say anything about the evidence put in on the other side, and argue on the character or effect of his own testimony, he is stopped, because he is arguing.

Now if I recollect the rules of the Commission, there is a provision, not that the British counsel should argue the case upon supposed testimony, but that they should open their case and put in their testimony; then not that we should argue upon their testimony and our supposed testimony, but that we should open our case by merely explaining what evidence is expected, and when all the testimony should be in, rebutting testimony included, then there was to be a complete printed argument on the testimony, the points of law and everything connected with the case. The learned counsel for the Crown thought, wisely, no doubt, that it was not worth while to have an opening at all, and they did not make one. Now, your Honors might have said, "We wish you would open your case, because we will better understand the testimony as it comes in and know how to apply it, and also the counsel of the United States will have a better opportunity to understand your case from the first, and be better able to cross-examine witnesses, and adopt what course they may see fit with better intelligence of your position." But the learned counsel for the British Government made no opening, and of that we made no complaint. Now, we are very much in the same position they were in then, only we have a much stronger reason than they had.

By this time, an opening, technically speaking, is not necessary. If the British counsel thought it was not necessary three weeks ago, it is much less necessary now, because this tribunal understands the main points taken on each side, and has a general view of the manner in which each side expects to meet them by testimony. As the counsel on the other side did not open the case, they would surely not think of maintaining that we should now open ours. We propose, as soon as they have concluded their evidence, to begin on our evidence. If this tribunal, or any member of it, should ask that before we proceed to put in any testimony we should make any explanation, we are quite ready to do it, or if the counsel for the Crown should so desire, we are ready to do it. For ourselves, we do not propose to do so, but to go directly on with the testimony. We will then be on the same terms, neither side having opened, neither thinking an opening necessary or desirable. We shall then proceed with our testimony until it is completed; the rebuttal testimony will then be put in by the British counsel, and it is not until the rebuttal testimony is completed that this tribunal can be supposed to know on what facts it is to proceed. Now, do your Honors think it is desirable to have an argument before you know on what facts you are to proceed? All the facts having been placed before the tribunal, then is the time to argue the question.

It may be said by the learned counsel that what I have so far stated is unnecessary, because they don't mean to compel us to open. But I think your Honors will see it is well to understand in advance what is meant by an opening and an argument. When the whole of the evidence is before the tribunal, then comes the question—in what form can the counsel for the respective Governments most beneficially to themselves, to their opponents, and, what is most important, to the tribunal that has the weighty responsibility of determining the case, present all the facts and the principles of law and policy to which they are applicable? Whatever mode will do that best, is the one we ought to adopt. We, the agent of the United States and the two United States counsel, have made up our minds that it will be more satisfactory to the tribunal that has the judgment of the case, quite as fair to the opposite side, much more satisfactory to us and more just to the United States, that the course which we propose should be taken. The only question is whether the course we propose should be adopted, or the course proposed by the counsel for the Crown in amendment thereto. They seem to see that after the examination of witnesses and reading of affidavits, extending over a long period, an oral argument is advantageous; at all events they do not object to our making one. It is advantageous because it can be done always with more effect. I do not mean more effect as respects the person who delivers the argument, but more effect on the course of justice, than a printed argument. When an oral argument is delivered, any member of the court who thinks the counsel is passing from a point without making it perfectly clear, can ask for an explanation. We desire that this tribunal shall have an opportunity to ask, at any time during the argument, for an explanation, if any explanation is needed. It is, moreover, a hardship to those who hand in a printed argument to be left in uncertainties as to whether further explanations may be necessary. I therefore think the experience of all engaged in ascertaining truth by means of witnesses and arguments, shows that there should be an oral argument, if possible, on the testimony and such of the principles of law as are to be affected by it.

In this case it seems to be thought expedient also to have a printed argument. Perhaps it may be; but if it should be given up by both sides, we do not object. If there is an oral argument only and no printed argument, we shall be more careful in our oral argument to examine into all questions of law. If there is to be also a written argument, the oral argument would be confined more to the facts. Now, your Honors, our suggestion is that we shall, as the defendant always does, when the evidence closes, argue the facts with such reference to principles as may be thought expedient. When that is done, it is the plaintiff's time to reply orally. The briefs are a different thing, the printed arguments are a different thing. In a great case like this, a question between the two greatest maritime powers of the world and entrusted to three gentlemen with absolute power over it, whatever will best tend to enable each side to understand the other fully, at the time when it is necessary to understand them, is for the benefit of justice. When we have made our oral argument, the counsel for the Crown will make their oral argument. If they choose to waive the privilege of making that oral argument, if they think their policy will be best subserved by making neither an opening nor a closing oral argument, which we cannot compel them to do, and by hearing all we can possibly say before their mouths are opened, and to have their only speeches made after our mouths are closed—if that is their view of policy, I should like to know whether the Agent of the Crown here tacitly gives his consent to such a course of procedure, that is, that the American side shall be obliged to put in both its oral argument and its printed argument, when the other side has put in nothing, and then have an oportunity to close upon us without our knowing from their lips anything whatever. We have had what is called the British Case and what is called the American Case But they are simply in the nature of pleadings. They do not go into the testimony, they do not argue the facts of the testimony, they do not state what the testimony is to be; they are of a general character, and in no sense arguments. I think this tribunal will agree with me on that point.

In regard to the amendment proposed by the other side, by which we will be compelled to put in our printed argument the moment we close our oral argument, I will suggest to your Honors some objections to it. One objection is that we shall have to prepare our printed argument before we begin to speak. Would not that be a ridiculous position in which to place counsel? They would have to prepare and print a full argument, and then come into court and make an oral argument, and then hand in the printed argument. I hardly know how I could proceed with such an undertaking as that. But a stronger objection is this: They claim the right, under their amendment, to make an oral argument as well as a printed argument after we are through. So they are not going to open their mouths, and we shall not have the benefit of hearing anything from them in this case until our pieces are discharged and our ammunition exhausted. It is then the battle is to begin on the side of the Crown. Now, your Honors will see that it comes right down to this: We propose that first an oral argument should be made on the testimony. Counsel on the other side agree that an oral argument on the testimony is a good thing; at all events, they do not object that there is anything unreasonable in having the arguments on the facts postponed till the facts are known. The only question, then, is this—Shall there be first an oral argument by the American side and then an oral argument for the Crown, if the counsel for the

Crown desire it, and then our printed argument to be followed by their printed reply; or shall we be compelled to put in both arguments, before hearing anything from them?

The counsel for the Crown may rise and say they don't intend to make any oral argument, and thereby retain all the benefit of a policy of secresy, and then it would be our duty to put in a printed argument. They can force us to this by simply declining to make an oral argument. Then they would come in with a printed argument which would be the final argument. Nothing we have proposed or can propose can prevent the counsel for the Crown having the closing words, because if our suggestion is adopted,—first we will make an oral argument, then they may rise and say they do not wish to make one, then we must put in a printed argument, and then they will close with a printed argument; only they cannot get the advantage of refusing to make an oral argument at its proper time, and make it afterwards, out of time. Their own proposition, on the other hand, is this: that they shall not be required to make an oral argument after we have closed ours, but shall have the right to transfer that oral argument from the stage immediately after ours, until the United States counsel have finished their oral argument and put in their printed final argument. Then the counsel for the Crown can argue orally on all the testimony, and in addition put in their printed argument. The result, therefore, your Honors, would be that you yourselves would be placed under a disadvantage. You will hear our argument under a disadvantage; you will always be obliged to say to yourselves: "The American counsel have given us a printed argument, but we cannot expect to find in it adequate replies to arguments they never heard."

All the learned counsel on the side of the Crown have been able to say is, "We have submitted the Case of Her Majesty's Government, and they have our case." I have reminded your Honors what these Cases are. Then as to the briefs. We put in a brief six weeks ago, and we were to have a brief from the counsel for the Crown, but we have not seen it yet, I suppose owing to the fault of the printers. That brief will not be a brief on our testimony: that, I suppose, I may assume.

MR. FORD:—

Yes.

MR. DANA:—

Therefore, as far as the facts are concerned, that brief can be of no use, and the original Case of Her Majesty's Government will also be of no use to us. I hope your Excellency and your Honors will fully understand we consider an opportunity to argue the facts as of very great value to the United States, and we assume you consider it at all events your duty—how much value you may attach to it I cannot say—to give counsel the fullest opportunity to argue the facts with the knowledge of two things: First, what the facts are; and, second, how our opponents propose to use and treat them.

Now, it seems to me that the most common justice requires that the result should not be that before we file our final printed argument, and leave this Court and this part of the world, and return to our several homes, having done all we could do under the circumstances, we should not have heard by the ear or read by the eye, one word that would explain to to us what the counsel for the Crown think of our testimony or of their own, how they mean to use it, to what points they mean to apply it, what illustrations they mean to use. That will be our position if the proposal of the counsel for the Crown should be adopted. If we are forced into that position by the counsel on the other side refusing to make an oral argument, we cannot help it; but I hope this tribunal will not give that course its sanction in advance, and so compel the result, that we must open everything and they nothing. The adoption of our proposal would be of very great advantage to us. I am not defending myself against a charge of trying to get an undue advantage, for under no possible constuctrion of our proposed rule would it give us any advantage, except the opportunity to know fully what is the case on the other side, and if that is an advantage, it is a just advantage; but I wish to say that I am quite confident the learned counsel have not fully considered the position in which they place themselves, us and the members of this Court by the amendment they propose to-day. I think it would give me great gratification to see them rise, and withdraw it and say:—"You may make your argument on the facts orally when they are placed before the tribunal; we will then consider whether we wish to make an oral argument or not; if we do not, you will never know our views; if we do, you will get such knowledge as we see fit to disclose. Then you may put in your printed argument, and we will have the opportunity of putting in our printed closing argument, which ends all, unless the Court should intervene and think the other side should have a reply, because some new points were made."

That power, of course, is possessed by the tribunal, and no doubt will be fairly administered. But I do not like to take my seat until I feel I have impressed on the agent and learned counsel for the Crown the fact that, if we are compelled to make both our arguments before they are called upon to make any observations, and before we have heard what course they are going to take, it will be a very great disadvantage to us, especially when we consider they will be in possession of all we propose to say on the subject of the testimony and the facts. Now the view which the learned counsel for the Crown may take of certain facts may be one that has not occurred to us. The illustrations they may furnish, and the manner in which they may deal with the various witnesses, are matters regarding which we have not the prescience absolutely to know. We have got, however to make our oral argument without having this knowledge; but if our proposal is adopted, we have at least the power of answering the other side in our printed argument. So it seems to me fair that before we put in our second argument we should have heard their first. I am quite sure this tribunal will feel, and never cease to feel, while you are discharging your present duties and afterwards, if the amendment is adopted and the counsel of the United States compelled to deliver their arguments, written and oral, before the Crown had given us any idea of their views of the facts, how they mean to apply them to your Honors' minds—that this, though fairly intended, is not fair, and you will say—"We find so much in the final argument of the counsel for the Crown on the testimony, which evidently was not foreseen by the counsel for the United States in making their argument, that, to give them an opportunity to reply, we must call them back."

We do not desire that, and your Honors do not desire it. As the learned counsel on the other side do not object to our proposition in itself, but are willing to accept it upon a single condition, which condition would operate as I have shown, I trust your Honors will say you cannot impose that condition upon us. I do not hesitate to say, although my learned friend, the Agent of the United States, is alone responsible for the course to be taken by the Government, we could not accept it and we would withdraw the proposal altogether. Then we would either have to proceed with our testimony or make an argument in advance on hypothetical testimony. Therefore, the proposition of the Crown, unless forced upon us, which I have no idea will be done, will be declined by us, and we fall back on our own proposition. I need not remind your Honors that it gives the counsel of the Crown the opportunity of declining to make an oral argument, nevertheless I think it would be in the interest, I will not say of counsel or of my own country, but of international justice that they should let us know before we submit our final printed argument, what they propose to say about the facts of the case.

MR. THOMSON:—

A great deal of Mr. Dana's argument, and it really was the chief argument, was not in reply to what I had to say in regard to the motion; in a great deal of what he said, I agree with him. I deprecate as he does arguing on hypothetical evidence. Such is not the practice in the United States or in our own courts. Who asks that the

American counsel in this case shall argue on hypothetical evidence? Who asks that they shall be heard, either orally or on paper, on a mere hypothesis? Every fact and circumstance material to the case, both on the part of Her Majesty's Government and the United States, I assume, will have been presented before the counsel on the other side close their case. Then the counsel for the United States, as defendants in this case, will make their arguments, either orally or on paper, just as it seems best to them, supporting their own views of the case, and we, as counsel for Great Britain, will present to the Court our arguments in answer to the arguments which they have adduced in support of their case. It was perfectly idle for Mr. Dana to have taken up so much time in arguing that they would be called on a mere hypothesis. Is it not idle to say to your Excellency and Honors, that you do not know what the case is about? Do we not all know what the points in issue are; do we not all see them? So well do the learned counsel see them that they absolutely declare they do not intend to open the case—that it is wholly unnecessary, as the Court now understands every single view that is likely to be put forward. So they will understand, at the end of our case, every fact put forward by the British Government.

The points are salient and plain and are understood thoroughly by the agents and counsel of Her Majesty and of the United States. How, then, can it be said there is any hypothesis at all? My learned friend (Mr. Dana) says I am asking that an amendment to the rules should be adopted. I am not. So far from that the United States are coming in at this late stage of the proceedings and asking for an amendment of rules that were made in their present form not merely by consent of, but I believe at the instance of the learned Agent of the United States. Can it, then, be said we are asking for any amendment to be made. They are asking as a favor that the Court shall lay its hands on its own rules,—rules made at the instance (and in the form they now are) of the American Agent. They are asking that as a favor, and at the instance of Her Majesty's Gov't. and with the consent of the Minister of Marine, I come forward and say on behalf of the two Governments that they are quite willing so far depart from these rules as to consent to an oral argument if the United States Counsel think it is any advantage to have one, though the Government I represent can see no such advantage.

I can understand that a jury may be led away from justice, by specious arguments, but I apprehend that this tribunal will not be swayed by any such means, and that the epitomised statement of facts given by witnesses will have more effect than all the eloquence of the counsel on the other side If the case is to be decided by the eloquence displayed in the oral arguments, then I admit that Her Majesty's Government would stand at great disadvantage, but I do not think that eloquence will have a feather's weight in this case. I desire the Court to understand distinctly that this is a motion made by the counsel of the United States to have the rules altered, and I come forward, for Her Majesty's Agent and the Minister of Marine, to state we are willing it shall be done as they wish, provided always they don't, in getting an inch, take an ell. They will have, if they think it is an advantage, the right to make a closing speech, but must immediately afterwards put in their closing printed argument. They are simply to support their own case. We are, then, simply called on to answer the case and argument in support of the speech they put forward, and nothing else. Not one principle of ordinary justice will be infringed or departed from. In conclusion, I must confess I cannot help feeling a little surprised at the manner in which Mr. Dana submitted the motion, for he put it in an almost threatening manner to the tribunal, that if it was not acceded to the counsel for the United States would withdraw the proposition altogether. That is not the usual mode in which a favor is asked by counsel before a tribunal.

Mr. Foster:—I think I am entitled to a few words in reply. If the learned counsel (Mr. Thomson) had been present yesterday afternoon when I made the explanation which accompanied Mr. Trescot's motion, I think he would not have made the observations which he has made. This is what I said: When I came here I found myself met suddenly by five of the most eminent gentlemen who could be selected from the five maritime provinces—contrary to the expectations of myself and my Government, they were to be admitted to take charge of this case, and they were assisted by a very eminent lawyer, now Minister of Marine, who is spoken of by counsel as having largely the conduct of this case, I alone, a stranger in a strange land, having no reason to suppose counsel would be brought here to assist me, found myself, I say, by the unexpected decision of the Commissioners, placed in such a position that, instead of meeting the British agent I had to meet the British agent, the Minister of Marine and five counsel. Now, to avoid five closing oral arguments against one, I was well content with the original arrangement of the rules. But the rules provided that they might be changed if in the course of the proceedings the Commissioners saw fit to alter them; and as to our application being an application for a favor either from our opponents or the Commissioners, it is no such thing. It is an application to your sense of justice. Before a judicial tribunal there are no such things as favors. Decisions go upon the ground of right and justice, and especially so in regard to a treaty, under the oath which the Commissioners have taken equity and justice are made the standard of all their proceedings. Now, how are we placed? We have, in the first place, a much greater mass of testimony than I anticipated, or any of you anticipated, I presume. In the next place, we are on the eve of a much greater conflict of testimony than I anticipated; we see that very plainly. Then again, from prudential considerations, counsel on the other side saw fit not to open their case. It was a greivous disappointment to me; I could not help myself, as I saw at the time, and so said nothing. But is was a great disappointment to find they did not think fit in their opening, to explain the views they intended to enunciate. As the testimony has gone forward for more than a month, it has become obvious to all of us that in a printed argument, prepared within ten days' time, and compressed within the necessary limits of a printed argument, we cannot examine this testimony, and cannot render the tribunal the assistance they have a right to expect from counsel. It is, therefore, proposed that, instead of making opening oral arguments, which obviously would be quite inadequate, we should have the opportunity of making closing oral arguments, to be replied to by the British counsel, and then that the printed arguments should follow, giving them the reply then also. Whatever we do, we are willing they should have the reply—the reply to our speeches, the reply to our writings. Is it possible that any arrangement could be fairer than that, or any arrangement more calculated to render your Honors assistance in coming to a just and equitable conclusion? Now, I know my friend the British agent does not mean to deal with this case so that batteries can be unmasked upon us at the last moment. I know the Commissioners will not allow such a course to be taken. Unless that is to be done, it is quite impossible that any unfair advantage would result to us, or that the British counsel would be in the least deprived of their admitted right to reply, which always belongs to the party on whom lies the burden of proof, by the course which we propose to follow. What we do desire is, that we should have the chance to explain our views fully before your Honors orally; that we should then hear from counsel on the other side; and then that the printed summaries, which are to be placed in your hands to assist you, should be left with you when you go to make up your minds on this case. What do they lose by it? What can they lose by it? By omitting to make any oral arguments, as Mr. Dana has said, they can get the last word and unmask their batteries; but if printed arguments are to be made at all, does not common sense require that the printed arguments on both sides should follow the oral arguments on both sides? I put it to each member of the Commission, I put it to my friend the British agent—is not that the course which every human being knows will be most likely to lead to a thoroughly intelligent and just decision. If it was a matter of surprises—if we were before a jury, and a poor one, if it was one of those *Nius Prius* trials, which we are sometimes concerned in, I could understand the policy of trying to have both

oral and written arguments made against us after our mouths are closed for ever; but I cannot understand it now If the matter should be left as they desire to have it left, I venture to predict that either on our application, or more likely at your own request, we shall be called upon to reargue this case after the original arguments are supposed to be closed, for you will find in their final arguments, oral and written, matters which you will think common justice and fair-play, for which Englishmen are said to be distinguished all the world over, require that we should have an opportunity to answer. They may close upon us orally, they may close upon us in writing, but as for their possessing the privilege of keeping their policy concealed till the last moment, I do not believe they really want it; I do not believe my friend the British agent wants it; and if he does not want it, there is no conceivable objection to the adoption of the course we propose.

Mr. Doutre:—May it please your Excellency and your Honors,—My learned friend Mr. Dana has spoken of the usages of the courts in different countries, and with those observations we might have agreed until he came to claim a most extraordinary thing, and one which I am sure our learned and experienced adversaries never heard of being conceded in any country in the world—that the defendant should have the reply. My conviction is, that there is no danger in challenging our friends to name any court in the world where the defendant has the right to reply. I think we would be far below the standard given to us in the compliments of our learned friends if we did not see very clearly the course which they propose to follow. They would have the means of meeting everything we could state; and anything we might state after that, I don't conceive what it could amount to. It may strike persons not familiar with courts of justice that it is strange we should insist on having the last words, and our friends magnify that extraordinary desire on our part to point out that we have not to deal here with a jury, which might be misled by the elegance of some skilful lawyer, but that we have to deal with a far higher order of judges. This I admit. But I would like my learned friends to explain the strenuous efforts they are making to get that reply. It is nothing but such a demand that my learned friends are putting forward. Our American friends have been so extraordinarily lucky in all their international difficulties that they have arrived at the last degree of daring. We are living in hope that sometime or other the balance in connection with international difficulties between England and the United States will turn on the right side. I do not know if we are in the way of reaching such fortunate result, but we live in that hope. Our learned friends on the other side pretend that they have been placed at a disadvantage, from the fact that we did not, as they say, open our case. We did open our case. We opened through Mr. Thomson, who stated to the Commission that all he had to say was printed, cut and dried, and ready to be read; that it set out the case in better language than he could have used in a speech, and that there was nothing to add to or take from it. I think this was the best opening that could have been made; otherwise, our learned friends might have complained and said they expected to have obtained more detailed information about the case. But they felt it was a saving of time, and they have expressed the opinion to-day that it would have served no real interest to have gone any further than Mr. Thomson proceeded. Mr. Dana has complained that the brief which has been fyled by the American agent has not yet received an answer. I think we are not bound to answer the brief If we do so, it will be merely out of courtesy to our friends. Our answer might come in our final written argument, and there is no reason whatever, and no right on the part of the counsel of the United States, to demand to have it sooner than that. If we choose not to answer it even then, I question if we can be required to answer it; so that if we give an answer to their brief it will be a mere matter of courtesy, because we are not bound to do so.

Mr. Dana:—Do we understand there is to be no answer?

Mr. Doutre:—I do not say so. While I think we will fyle an answer, it will be done out of courtesy to the counsel for the United States. We have been told we are keeping masked batteries for the last moment. I would like to know where we would find ammunition to serve those batteries. Is not all our case in the documents fyled, in the depositions of the witnesses and in the affidavits? Can we bring anything more to bear? These are our ammunition; they are all here, our hands are empty, and we have no more to serve any masked batteries. The argument may be very plausible, that in a large question involving two great countries, it is necessary that everything should be done which tends to enlighten the minds of the judges so that a just result may be secured; but that argument, Your Honors will understand, would be as good in every court in the world to obtain for the defendant the last words and change all the rules of judicial tribunals. Hon. Mr. Foster says he has been induced to agree to the demand now under discussion because when he saw he was going to be met, contrary to the expectation of his Government, by five gentlemen, whose talents he magnifies for the occasion because it suits the purpose he has in view, he thought he would be under a disadvantage if the rule in question should be maintained. If we go back to the time when the rule was adopted it will be recollected that the five lawyers on behalf of the British case were then before the Commission. If they were not admitted, it was known for several weeks that the British agent intended to be assisted by counsel; so the fact was fully before every one of us when the rules were adopted. Now we are asked to change these rules. So long as it is a matter of convenience and pure courtesy to the United States we have no difficulty in acceding to their request, and in doing this we are acting within the terms of the written document under discussion, which says:—

"As we understand the wish of both Governments to be that the whole discussion should be as frank and full as possible, it has occurred to us that you might be disposed to allow us to adopt such an arrangement as would, in our judgment, best enable us to lay before you a complete presentment of the opinions of the Government we represent, and we feel more assured in that opinion as this privilege deprives counsel on the other side of no advantage which they now possess, for besides the right to reply to the printed argument, which they now have, we would, of course, expect that they would also be allowed the right of oral reply if they desired to exercise it."

So far this is perfectly correct, but it does not show their hands to us at all. We do not see their real object, for there is a masked battery, Apparently a very simple alteration of the rule is asked for, and our friend Mr. Trescot thought yesterday that it was so unobjectionable that it would be immediately acceded to, Well, if this paper had stated the whole truth, and did not cover anything which is not mentioned, we should have accepted it immediately, as has been already stated by my brother counsel. But we suspected that this slight alteration concealed something, and we were not mistaken.

Mr. Trescot:—What is it?

Mr. Doutre:—I will explain it, certainly. Mr. Dana says, "You have a reply." Certainly we have the reply, but we might reply in eight months from this, and it would be just as good. Here is the practical result—If the proposition, which is not included in this paper, but which has been admitted verbally, were accepted, our learned friends would develop their case orally, and we would answer orally. They would then come with their printed statement. Now, is not this the reply? What would remain for us to say? What would be the value of that printed document which we could give afterwards? What new aspect or *expose* of our case could it contain? None whatever; so that virtually it gives our friends the reply, and that is the reason why they are insisting so strongly upon the change in the rule.

Mr. Dana:—You take the objection that under our proposed rule you would not be able to put in anything new?

Mr. WEATHERBE :—All you asked for was to substitute an oral for the written argument?

Mr. TRESCOT suggests that it would be better if he were now allowed to read the amendment which he proposes to submit

Mr. WEATHERBE :—It would have been better that we should have had it last evening.

Mr. TRESCOT :—It is entirely in accordance with the paper which I read last evening.

SIR ALEXANDER GALT : —We should have had the precise proposed alteration of the rule before us before hearing this argument.

MR. TRESCOT : —It is precisely the same as what was laid before the Commission. I will read it. The third rule reads this way : —

"The evidence brought forward in support of the British case must be closed within a period of six weeks, "after the case shall have been opened by the British counsel, unless a further time shall be allowed by the Commis-"sioners on application. The evidence brought forward in support of the United States counter case must be closed " within a similar period after the opening of the United States case in answer, unless a further time be allowed by " the Commissioners on application. But as soon as the evidence in support of the British case is closed, " that in support of the United States shall be commenced, and as soon as that is closed the evidence in reply shall " be commenced. After which arguments shall be delivered on the part of the United States in writing within a " period of ten days, unless a further time be allowed by the Commissioners on application, and arguments in clos-"ing on the British side shall be delivered in writing within a further period of ten days, unless a further time be " allowed by the Commissioners on application. Then the case on either side shall be considered finally closed, " unless the Commissioners shall direct further argument upon special points, the British Government having, in " such case the right of general reply, and the Commissioners shall at once proceed to consider their award. The " periods thus allowed for hearing the evidence shall be without counting any days of adjournment that may be " ordered by the Commissioners."

The amendment which we would move would be to insert after the words " the evidence in reply shall be " commenced," the following ; —

" When the whole evidence is concluded either side may, if desirous of doing so, address the Commission " orally, the British Government having the right of reply."

MR. DOUTRE:—I understand this, but it is not the motion under discussion. I have read the principal part of that motion, and I say this, that, if we take this to mean what our friends had in their minds when they made their application, the only alteration that this rule would require would be this, " after which arguments shall be " delivered on the part of the United States, orally or in writing, within a period of ten days, unless further time " be allowed by the Commissioners on application and arguments in closing the British case shall be, etc."

MR. TRESCOT :—That is what Mr. Thomson proposes.

MR. DOUTRE :—Exactly, and this does not give any more. But there was in their minds more than this contains. We have it in their verbal explanations.

MR. TRESCOT :—So far as the construction of language goes, I have no objection to your putting any construction you please or drawing any inferences you choose from the language of the application that was made last night. But that the intention of that application and of the amendment we propose to-day were one and the same thing, there can be no doubt. When we filed that paper what was wanted was distinctly known, otherwise it would have been bad faith on our part, as we would have been asking for one thing and intending to get another. There was no possible doubt what the object of this was, as is evident from the fact that Mr. Thomson suggested an amendment himself to counteract our object, showing that he had clearly in mind what object we had in view.

MR. DOUTRE :—My answer is that by reading this we suspected the object of this paper was something more than to change the time when our learned friends should address the Commission. It only meant that instead of doing so before adducing their evidence they would do so after the whole of the evidence had been brought in. The object that our friends have in view is very clear in the paper which has been read here to-day by Mr. Trescott, but it is not so in the paper which was presented yesterday, and we suspected this was an indirect way of securing that which is not known in any court in the civilized world, namely, that the defendants should have the reply. They would have twice the opportunity of discussing the matter, when they have no right to be heard more than once. Now, why is the reply given to the plaintiffs? Because up to that moment the position of the defendants is far more privileged. They have all the evidence of the plaintiffs in their hands, and they know what they are themselves going to prove. The plaintiff does not know it. When we shall have closed our evidence, they will have the whole case in their hands, whilst we have only half of it. For that and other reasons the final reply is given to the plaintiff, and we object to our friends in this manner seeking to upset the rules which prevail in all courts of justice that ever existed.

MR. DANA :—I beg that you will not sit down without explaining how you lose the reply.

MR. DOUTRE :—We have a reply which is worth nothing. That is what I mean. The virtual and practical reply is in your hands. That is exactly the position.

I think it is necessary in order to preserve the harmony that has so far existed here we should not introduce in this Commission a practice which has never existed in any court, that one of the counsel should pass over the head of his legal adversary in order to reach the suitor and ask him if he agrees to what his counsel proposes. Such a course as that would tend materially to impair the good relations which we all, I think, desire to cultivate.

MR. TRESCOT :—

I have no intention of saying one word that could disturb the relations that exist between the counsel on either side, and I have no fear that anything could be said on either side that would have such a result. For that reason I don't object, as I perhaps might, to the application which I made yesterday being characterized as a masked request. When I read that document yesterday I had no earthly doubt that every man present knew what I wanted. So far from having any doubt about the matter, I may say that both the Hon. Minister of Marine, who appears to be of counsel with the other side, and the Agent of the British Government, distinctly informed us that they would consent to this petition if we may call it such, provided we would take the proposition submitted by Mr. Thompson. Now there can be no doubt that when that proposal was made they understood what it was we wanted. We stated as distinctly that we declined to accept any such proposition, and that the course they pursued was one that could not meet our approval. All I am anxious to do now is to clear myself of the accusation, for such I think it is, of having submitted a paper which asked for one thing when I wanted the Commission to do another thing.

SIR ALEXANDER GALT :—

I do not think the Commission ever attributed such a design to you

MR. WEATHERBE :—

Will you read the part of the paper presented yesterday which says what you wanted the Commission to do.

MR. TRESCOT :—

It is as follows : "As we understand the wish of both Governments to be," etc.

Now, what does that mean. What can it mean but that when we made an oral argument they would make an oral reply, and when we presented a printed argument their printed argument would be put in? I believe that the matter was so understood, and I have misunderstood the whole scope of the argument this morning if every gentleman who has addressed the Court has not argued upon the request I made. The whole argument on the other side has been for the purpose of showing that we ought not to have what we asked for. Then how can I be told that the learned counsel did not understand what I wanted. I do not know what the practice may be here, but I have never been in a Court in which, if there were several counsel on each side, they did not address the Court alternately, so that each side might possess the argument of the other side,

Mr. WEATHERBE:—

That is not the practice in England.

MR. TRESCOT:—That may be. I only undertake to say what we want and what we consider a fair course to all parties. But I am asked what is the use of such a reply. I answer, just such use as you choose to make of it. We only ask to know your case, and then having met it to the best of our ability, you can reply to our argument as you deem most judicious. Let me illustrate what I mean. You all recollect the testimony as to the Bay de Chaleurs—that fishing was only prosecuted on its shores—that in "the cores of the bay," to use the language of the witnesses, there was no fishing. Now, if this is so, practically the question of the headlands is put aside, for it makes no difference whether we come within the headland line or not. But suppose in reply, we prove that there is fishing within the body of the bay more than three miles from either shore—how then? Recollect that up to this point, although we have been promised your brief on the headland question, we have not had it. Do you mean simply to discuss our testimony, or to maintain the doctrine of the headland line? Under your proposed arrangement we would have to make our argument without the slightest knowledge of what you intended to maintain. Whereas, under our arrangement, we would know exactly what you thought, and although we might attempt an answer, you would have the clear right to meet that answer by your final reply as you thought fit.

But I have no intention of prolonging this argument further. I think we have stated with sincere fairness what we mean, and that it is obvious that the right of final reply is preserved to the counsel on the other side. Their purpose is equally obvious to keep back in their discretion just as much of their case as they do not choose to give us the opportunity to reply to. If this Commission deems such reticence proper we must accommodate our argument to their decision, and be content with having said what we think justice required.

Hon. Mr KELLOGG:—

I should like to say with the permission of the other Commissioners, that I rather expected the motion would have been put in due form last night, but I hope that this delay or omission, which has given rise to a little misunderstanding, will not be a reason for exciting any feeling. I am anxious, for one, that in our proceedings we should observe the kind of conduct that we have observed so far, and I have no idea that any thought of getting any such advantage was entertained when the application was made last night.

I want to observe one thing further, with the leave of the other Commissioners, that in discussing these questions which have arisen, and which may still arise, we should observe due moderation, and not get into personal disputation with one another, but address the tribunal as the one which will settle the matter eventually.

DECISION GIVEN BY THE COMMISSIONERS ON THE 1st DAY OF SEPTEMBER, 1877.

"The Commissioners having considered the motion submitted by Messrs. Dana and Trescot, decided, that—

"Having due regard to the right of Her Majesty's Government to the general and final reply, the Commissioners cannot modify the Rules in such a manner as might impair or diminish such right. Each party will, however, within the period fixed by the Rules, be allowed to offer its concluding argument either orally or in writing, and if orally it may be accompanied by a written resumé or summary thereof, for the convenience of the Commissioners, such resumé or summary being furnished within the said period."

III.

At the Conference held on the 5th of September, 1877.

MR. FOSTER—I will read the motion that was presented on the 1st inst.:—"The Counsel and Agent of the United States ask the Honorable Commissioners to rule declaring that it is not competent for this Commission to award any compensation for commercial intercourse between the two countries, and that the advantakes resulting from the practice of purchasing bait, ice. supplies, &c., and from being allowed to trans-ship cargoes in British waters, do not constitute a foundation for award of compensation and shall be wholly excluded from the consideration of this tribunal."

The object, may it please the Commission, of this motion is to obtain if it be possible and place on record a decision declaring the limits of your jurisdiction, and thus to eliminate from the investigation matters which we believe to be immaterial and beyond the scope of the powers conferred upon you. The 22nd Article of the Treaty of Washington is the Charter under which we are acting, and this provides that

"Inasmuch as it is asserted by the Government of Her Britannic Majesty that the privileges accorded to the citizens of the United States under Article XVIII of this Treaty are of greater value than those accorded by Articles XIX and XXI of this Treaty to the subjects of her Britannic Majesty, and this assertion is not admitted by the Government of the United States, it is further agreed that Commissioners shall be appointed to determine, having regard to the privileges accorded by the United States to the subjects of her Britannic Majesty, as stated in Articles XIX and XXI of this Treaty, the amount of any compensation, which, in their opinion, ought to be paid by the Government of the United States to the Government of Her Britannic Majesty in return for the privileges accorded to the citizens of the United States under Article XVIII of this Treaty."

The subject of our investigation then is, the amount of any compensation which ought to be paid by the United States to Her Majesty in return for the privileges accorded to the citizens of the United States, under article 18 of the treaty, and that is all. The other articles referred to in this section, articles 19 and 21, are set-offs or equivalents, received by her Majesty's subjects for the concession made by Her Majesty's Government to United States citizens under article 18. When we turn to article 18 we find that the high contracting parties agreed as follows; —

"It is agreed by the High Contracting parties that, in addition to the liberty secured to the United States fishermen by the Convention between Great Britain and the United States, signed at London on the 20th day of October, 1818, of taking, curing and drying fish on certain coasts of the British North American Colonies therein defined, the inhabitants of the United States shall have, in common with the subjects of her Britannic Majesty, the liberty for the term of years mentioned in Article XXXIII, of this Treaty, to take fish of every kind, except shell-fish, on the sea-coasts and shores, and in the bays, harbors and creeks of the Provinces of Quebec, Nova Scotia and New Brunswick, and the colony of Prince Edward Island, and of the several Islands thereunto adjacent, without being restricted to any distance from the shore, with permission to land upon the said coasts, and shores and Islands, and also upon the Magdalen Islands, for the purpose of drying their nets and curing their fish; provided that, in so doing, they do not interfere with the rights of private property, or with British fishermen, in the peaceable use of any part of the said coasts in their occupancy for the said purpose. It is understood that the above mentioned liberty applies solely to the sea fishery, and that the salmon and shad fisheries, and all other fisheries in rivers and the mouths of rivers are hereby reserved exclusively for British fishermen."

The concession made to the citizens of the United States is the right to fish inshore without being excluded three miles from the shore, as they were excluded by the renunciation contained in the Treaty of 1818. It gives the further right to land on the coasts and shores and Islands for the purpose of drying nets and curing fish, provided that in so doing they do not interfere with the rights of private property for British fishermen, having the peaceable use of any part of the said coasts in occupancy for the same purpose. The liberty of inshore fishing and that of landing on uninhabited and desert coasts, where no private rights or rights of private property will be interfered with, for the two purposes of drying their nets and curing their fish are all the concessions which article 18 contains. Now, as we understand it, the jurisdiction of this commission extends to appraise these two privileges and nothing more, but the British claim seeks compensation for various incidental advantages, and a variety of other considerations. The inhabitants of the United States traffic with the colonists. They buy ice of them; they buy of them fish for bait, and they buy of them other supplies. They have commercial intercourse with them, they sell to them small codfish better adapted for the British markets than those of the United States. They exchange flour, kerosene, and other necessaries of life with the British fishermen, receiving in return bait and fish. For all these things compensation is demanded at your hands.

In addition to that, every description of damage that has been done or which may be done hereafter by our fishermen, is made the foundation of claims for compensation. The Treaty speaks of compensation to be awarded in return for privileges accorded to the citizens of the United States, while the case made and the evidence offered claims damages as well.

Have any of our fishing vessels lee-bowed—I believe that is the proper phrase—British fishing boats in former years, or are they likely to do it again? Are the fishing grounds hurt by gurry thrown into the water? Have families been alarmed by American fishermen on shore? Every description of injury and outrage, intentional or unintentional, great or small, going back to a period as far as human memory extends, is laid before you as ground for damages. The colonial governments have erected light-houses on their coasts at dangerous points, and the perils of navigation are thereby diminished; so they present an estimate of the cost and a list of the number of the light-houses, and gravely ask you to take these things into consideration in making up your award. Whatever has to do with fishing, or fishermen, or fishing vessels, directly or indirectly, nearly or remotely, is brought before you and made the foundation of a claim. The British case and its evidence seems to me to be a drag-net, more extensive than the purse seine of which we have heard so much, gathering in everything that can be thought of and laying it before you, if by any means; consciously or unconsciously, the amount of such award as you shall render may thereby be affected. Now it seems to us, under these circumstauces, to be a plain duty to ascertain if we can, and to have recorded exactly the grounds of your jurisdiction as in your judgment they exist. We understand; as I have said, that you are simply to determine the value of the inshore fisheries, and the value of the right of landing to cure fish and dry nets where this can be done without interfering with private property or British fishermen drying nets. From the beginning we have protested against any more extensive claim being made—this protest will be found distinctly and unequivocally made on page 8th of the "Answer," where it is said:—

"Suffice it now to observe that the claim of Great Britain to be compensated for allowing United States fishermen to buy bait and other supplies of British subjects, has no semblance of foundation in the Treaty by which no near right of traffic is conceded."

And in the recapitulation at the close of the "Answer," the United States maintain that the various incidental and reciprocal advantages of the Treaty, such as the privileges of trafficking and purchasing bait and other supplies, are not a subject of compensation, because the Treaty of Washington confers no such rights on the inhabitants of the United States, who now enjoy them merely by sufferance, and who can at any time be deprived of them by the enforcement of existing laws or the re-enactment of former oppressive statutes." We say first, that you have no jurisdiction over such matters as a subject of compensation, because the Treaty confers none upon you and nothing of the kind is denominated in the bond. We say secondly, that we have no vested rights under the Treaty, regarding commercial intercourse of this description; and that as regards such intercourse, the inhabitants of the United States stand in the same relation to the subjects of Her Majesty as they did before this Treaty was negotiated. These two points though running somewhat together are nevertheless distinct. And we base our contention upon the plain language of the Treaty, in which not one word can be found relating to the right to buy or sell to traffic or transfer cargoes;—the whole language is limited to the privilege of the inshore fisheries, both in Article 18, where these privileges are conferred and in Article 22, which provides for the appointment of this Commission. Of course, it is not necessary for me to call your attention to the fact that Commissioners, arbitrators, referees and every other description of tribunals, are limited in their powers by the terms of the instrument under which they act; and that if they include in any award, a thing upon which they are not authorized to decide, the entire award is thereby vitiated; and their whole action becomes *ultra vires*, and void. I cannot anticipate that there will be any denial of this plain proposition.

Now, the Commissioners will be pleased to observe, and our friends on the other side to take notice, that the United States utterly repudiate any obligation either to make compensation or pay damages for any of these matters; that they maintain, as they have from the first, that the question submitted here is solely and exclusively the adjustment of equivalents relating to the inshore fisheries; and that the United States will not be under the slightest obligation to submit to an award including anything more than these things. Turning to the Treaty again, we find that there are commercial articles in it, but these are not articles with which this tribunal is concerned. From Article 26th to the 31st, inclusive, various commercial privileges are given to the citizens of the two countries. These articles relate to the navigation of the lakes, rivers and canals, to the conveyance of goods transshipped in bond free of duty, to the carrying trade; and as to them the Treaty of Washington is a Reciprocity Treaty; as to these matters that which is conceded on the one side is an equivalent for that which is conceded on the other; and the mutual concessions are the sole equivalents for each other. Indeed, who ever heard of a treaty of commercial reciprocity where a money payment, to be ascertained by arbitration, was to balance concessions granted by the one side to the other. It is enough to say that in these commercial clauses of the Treaty, as in all other commercial arrangements that have ever been made between the two countries, there is no stipulation for compensation. It may be well to enquire on what footing the commercial relations between the United States and Great Britain do rest. How have they stood for more than a generation past—for nearly a hundred years? My friend Mr. Trescot has investigated the Treaties, and the result, as I understand, it is this —that the Commercial Convention of 1815, originally entered into for four years, was extended during ten years more by the Convention of 1818, and extended again indefinitely in 1827. The last clause of the second Article of the Convention of 1815, after providing as to the duties to be levied on the products of each county, &c., and as to commercial intercourse between the United States and Her Majesty's subjects in Europe, states:—

"The intercourse between the United States and His Britannic Majesty's possessions in the West Indies, and on the Continent of North America, shall not be affected by any of the provisions of this article, but each party shall remain in the complete possession of its rights, with respect to such an intercourse."

Thus the commercial intercourse between the two countries is provided for by the Treaty of 1815, which as I understand it, under its various extensions, is in force to-day. It refers back to former and pre-existing rights, to find which it is necessary to go still further back—to the Treaty of 1794 commonly known as Jay's Treaty. Turning to that we find that the third Article deals with the special relations between the United States and the British North American Colonies. It might be supposed,—and the argument perhaps might be correct, though I do not say, whether this would be the case or not—that the war of 1812 abrogated the provisions of the Treaty of 1794. Were it not that the Commercial Convention of 1815 referring to previous existing rights, quite manifestly, I think, treats as still in force the provisions of this article of the Treaty of 1794. I will not read the whole article, but it stipulates "that all goods and merchandise whose importation into His Majesty's said "territories in America, shall not be entirely prohibited, may freely and for the purposes of Commerce be carried "into the same in the manner aforesaid by the citizens of the United States, and that such goods and merchandise "shall be subject to no higher or other duties than are payable by His Majesty's subjects, on importing the same "into the said territories; and in like manner, that the goods and merchandise whose importation into the United "States shall not be wholly prohibited, may freely for the purposes of Commerce be carried into the same by His "Majesty's subjects, and that such goods and merchandise shall be subject to no higher or other duties than are "payable by the citizens of the United States on importing the same in American vessels into the Atlantic ports of "the said States;"—and, mark this, "that all goods not prohibited from being exported from the said territories respectively, may in like manner, be carried out of the same by the two parties respectively, on paying duty as aforesaid," that is to say, as I understand it, the inhabitants of each country going for the purposes of Commerce to the other country, may export its goods, so long as their exportation is not wholly prohibited, upon the same terms as to export duties as would be imposed on Her Majesty's subjects. Then the article after some other paragraphs closes thus:—"As this article is intended to render, in a great degree, the local advantages of each party, common to both, and thereby to promote a disposition favorable to friendship and good neighborhood, it is agreed that the respective Governments will mutually promote this amicable intercourse, by causing speedy and impartial justice to be done, and necessary protection to be extended to all who may be concerned therein."

Gentlemen,—Such I understand to be the footing on which commercial intercourse stands between the two countries to-day, if there is any Treaty that governs commerce between the British North American Provinces and the United States. And if this is not the case, the relations between the two countries stand upon that comity and commercial freedom which exist between all civilized countries. The effect of these provisions, to employ an illustration, is this:—If the Government of Newfoundland chooses to prohibit its own people from exporting fish for bait, in which export, it is testified, they carry on a trade of £40,000 or £50,000 annually with St. Pierre, it can also, by the same law, prohibit United States citizens from carrying away such articles, but not otherwise. As I understand the effect of this commercial clause, whatever may be exported from the British Provinces by anybody—by their own citizens, by Frenchmen, or by citizens of other nations at peace with them, may also be exported by citizens of the United States on the same terms as to export duty, that apply to the rest of the world. If, then, Newfoundland sees fit to conclude that the sale of bait fish—caplin, or herring, or squid, and ice, is injurious to its interests, and therefore forbid its export altogether, that prohibition may extend to the citizens of the United States; but the citizens of the United States have there the same privileges with the rest

of the world; they cannot be excluded from the right to buy and take bait out of the harbors of Newfoundland, unless the rest of the world is also so excluded. However, this is of remote consequence, and perhaps of no consequence, to the subject under discussion.

The material thing is this: Under the Treaty of Washington we cannot prevent such legislation. The Treaty of Washington confers upon us no right whatever to buy anything in Her Majesty's Dominions. The Treaty of Washington is a treaty relating to fishing and to nothing else. I am aware of the ground taken in the reply filed by the British Agent. It is this:—

"Previous to the date of the Treaty of Washington, American fishermen were, by the 1st Article of the Convention of 1818 admitted to enter the bays and harbors of His Britannic Majesty's Dominions in America for the purpose of shelter and of purchasing wood and of obtaining water and *for no other purpose whatever*."

By the terms of Article 18 of the Treaty of Washington, United States fishermen were granted "permission to land upon the said coasts and shores and islands, and also upon the Magdalen Islands for the purpose of drying their nets and curing their fish."

The words, "*for no other purpose whatever*," are studiously omitted by the framers of the last named Treaty, and the privilege, *in common* with the subjects of Her Britannic Majesty, to take fish and to land for fishing purposes, clearly includes the liberty to purchase bait and supplies, trans-ship cargoes, etc., for which Her Majesty's Government contend it has a right to claim compensation."

Well, as the quotation stands, to my mind it would be a *non sequitur*, but when you turn to the 1st Article of the Convention of 1818, you find that under it the conclusion quoted is a renunciation accompanied by two provisos:—

"And the United States hereby renounce forever any liberty heretofore enjoyed or claimed by the inhabitants thereof to take, dry or cure fish on or within three marine miles of any of the coasts, bays, creeks or harbors of His Britannic Majesty's dominions in America not included in the above mentioned limits."

This was a renunciation of the right to fish inshore, and it is followed by this further proviso:—

"Provided, however, that the American fishermen shall be admitted to enter such bays or harbors for the purpose of shelter and of repairing damages therein, of purchasing wood, and of obtaining water, and for no other purpose whatever."

This coupled the renunciation of the inshore fishery with the proviso, that there may be resort to British waters for shelter and repairs, and for obtaining wood and water. Then it goes on to say:—

"But they shall be under such restrictions as may be necessary to prevent their taking, drying or curing fish therein, or in any other manner whatever abusing the privileges hereby reserved to them."

Whenever American fishermen seek British ports for shelter, or go there to repair damages to their vessels, or for wood and water, they shall be under restrictions to prevent them from taking or curing fish therein. Now it was to remove those restrictions which prevented them from taking, drying and curing fish, that the language framed in the 18th Article of the Treaty of Washington was adopted, which gives the citizens of the United States liberty to take fish and permission to land upon the said coasts and islands, and also on the Magdalen Islands for the purpose of drying nets and curing fish. You will observe that the United States renounced the right to the inshore fisheries in 1818, but these are regained by the provisions of the 18th Article of the Treaty of Washington. The United States retained the right of resorting to British ports for shelter, repairs and purchasing wood and water, subject to such regulations as would prevent their citizens drying fish on the shore; and the object of this Article is to add to the inshore fisheries the right to dry nets and cure fish on the shore, and this super-added right is limited to parts of the coast where it does not interfere with private property or the similar rights of British fishermen. Now, what argument can be constructed from provisions like these to infer the creation of an affirmative commercial privilege or the right to purchase supplies and trans-ship cargoes, I am at a loss to imagine. It seems to me that if I were required to maintain that under the right conceded to dry nets and cure fish on unoccupied and unowned shores and coasts, taking care not to interfere with British fishermen, couched in language like that, the United States had obtained a right to buy what the policy of the British Government might forbid to be sold, I should not have one word to say for myself. I cannot conceive how a commercial privilege can be founded upon that language, or how you can construct an argument upon that language in support of its existence. But, gentlemen, this is not to be decided by the strict language of the Treaty alone. We know very well what the views of Great Britain on such subjects are, and we know what the policy of Her Majesty's Government was just before this Treaty was entered into. On the 16th of February, 1871, Earl Kimberley wrote to Lord Lisgar as follows:—

"The exclusion of American fishermen from resorting to Canadian ports, except for the purpose of shelter, and of repairing damages therein, purchasing wood and of obtaining water might be warranted by the letter of the Treaty of 1818, and by the terms of the Imperial Act 59, Geo. III., Chap. 38, but Her Majesty's Government feel bound to state, that it seems to them an extreme measure inconsistent with the general policy of the empire, and they are disposed to concede this point to the United States Government under such restrictions as may be necessary to prevent smuggling, and to guard against any substantial invasion of the exclusive rights of fishing, which may be reserved to British subjects."

A month later, on the 17th of March, 1871, another letter from Earl Kimberley to Lord Lisgar gives to the Colonial Authorities this admonition:—

"I think it right however to add, that the responsibility of determining what is the true construction of a Treaty made by Her Majesty with any foreign power, must remain with Her Majesty's Government, and that the degree to which this country would make itself a party to the strict enforcement of Treaty Rights may depend not only on the liberal construction of the Treaty, but on the moderation and reasonableness with which those rights are asserted."

In such a spirit, and with these views of commercial policy, the Treaty of Washington was negotiated; and can one believe that it was intended to have a valuation by arbitration of the mutual privileges of international commerce? Gentlemen, suppose that the Canadian representative on the Joint High Commission, when the 18th Article was under consideration, had proposed to amend it by adding in language something like this:—And the said Commissioners shall further award such compensation as, in their judgment, the United States ought to pay for its citizens being allowed to buy ice, and herring, squid and caplin, of Canadians and Newfoundlanders, and for the further privilege of being allowed to furnish them with flour and kerosene oil and other articles of merchandise in exchange for fish and ice, and for the further privilege of being allowed to sell them small codfish; suppose I say that an amendment in these or similar words, had been suggested to the members of the High Joint Commission; fancy the air of well-bred surprise with which it would have been received by Earl Grey and Professor Bernard and others. Imagine England—free-trade England—which forced commercial intercourse upon China with cannon, asking for an arbitration to determine on what price England, that lives by selling, will trade with the inhabitants of other countries.

I venture to express the belief that the ground, which has been taken here is not the ground that will be sustained by the English Government, and that, my friend, the British Agent will receive from Her Majesty's Ministers the same instructions that I shall certainly receive from the President of the United States, viz., that at the time when the Treaty of Washington was negotiated no one dreamed that such claims as I have been referring to would be made, and that neither Government can afford to insist upon or submit to any thing of the kind, because it is contrary to the policy of the British Empire, and contrary to the spirit of civilization. If the language were at all equivocal these considerations would be decisive, but with the express limits to your authority laid down they hardly need to be asserted.

The next question is whether the motion that has been made should be decided by you at the present stage in your proceedings. We have brought it before you at the earliest convenient opportunity.

The case of the British Government was not orally opened, and in our pleadings, we had interposed a denial of the existence of any such jurisdiction. If the matter had been discussed in an opening we might have replied to it, but as it was we could not. The case proceeded with the introduction of evidence:—Now if the evidence offered in support of these claims could have been objected to, we should have interposed the objection, that such evidence was inadmissible; but we could not do that, and why? Because the Treaty expressly requires the Commission to receive such evidence as either Government may choose to lay before it: to avoid the manifold inconvenience likely to result from discussing the admissibility of evidence, it was stipulated and we have allowed —I suppose with the approbation of the Commissioners—every piece of evidence to come in without objection. We conceived that we were under obligation to do so. We could not bring the question up earlier, and we bring it up now, just before our case commences, and say, that we ought to have it now decided—first, as a matter of great convenience, because the course of our evidence will be affected by your decision. There is much evidence, which we shall be obliged to introduce, if we are to be called upon to waive the comparative advantages of mutual traffic, that would otherwise be dispensed with, and that we think, ought to be dispensed with. Moreover, we maintain that we are entitled to have your decision now on grounds of precedent. A precisely similar question arose before the Geneva Arbitration. The United States made a claim for indirect or consequential damages. That claim appeared in the case of the United States, and its evidence which were filed on the 15th of December. The British case was filed at the same time, and on the 15th of the next April Lord Tenterden addressed this note to the Arbitrators:

Geneva, April 15, 1872.

The Undersigned, Agent of Her Britannic Majesty, is instructed by Her Majesty's Goverment to state to Count Sclopis, that, while presenting their Counter-Case, under the special reservation hereinafter mentioned, in reply to the Case which has been presented on the part of the United States, they find it incumbent upon them to inform the Arbitrators that a misunderstanding has unfortunately arisen between Great Britain and the United States as to the nature and extent of the claims referred to the Tribunal by the 1st Article of the Treaty of Washington.

This misunderstanding relates to the claims for indirect losses put forward by the Government of the United States, under the several heads of—(1.) "The losses in the transfer of the American commercial marine to the British flag." (2.) "The enhanced payments of insurance." (3.) "The prolongation of the war, and the addition of a large sum to the cost of the war and the suppression of the rebellion." Which claims for indirect losses are not admitted by Her Majesty's Government to be within either the scope or the intention of the reference to arbitration.

Her Majesty's Government have been for some time past, and still are, in correspondence with the Government of the United States upon this subject; and, as this correspondence has not been brought to a final issue, Her Majesty's Government being desirous (if possible) of proceeding with the reference as to the claims for direct losses, have thought it proper in the meantime to present to the Arbitrators their Counter-Case (which is strictly confined to the claims for direct losses), in the hope that, before the time limited by the 5th Article of the Treaty, this unfortunate misunderstanding may be removed.

But Her Majesty's Government desire to intimate, and do hereby expressly and formally intimate and notify to the Arbitrators, that this Counter-Case is presented without prejudice to the position assumed by Her Majesty's Government in the correspondence to which reference has been made, and under the express reservation of all Her Majesty's rights, in the event of a difference continuing to exist between the High Contracting Parties as to the scope and intention of the reference to arbitration.

If circumstances should render it necessary for Her Majesty to cause any further communication to be addressed to the Arbitrators upon this subject, Her Majesty will direct that communication to be made at or before the time limited by the 5th Article of the Treaty.

The Undersigned, &c. (Signed) TENTERDEN.

Thereupon, after some further fruitless negotiations, the arbitrators, of their own motion, proceeded to decide and declare that the indirect claims made by the United States were not within the scope of the arbitration, thus removing all misunderstanding by a decision eliminating immaterial matters from the controversy. The decision was made and put on record exactly in the method which we ask you to pursue here. We say that we are entitled to have such a decision on the ground of precedent as well as of convenience; and we say further that we are entitled to have it on the ground of simple justice. No tribunal has ever been known to refuse to declare what, in its judgment, was the extent of its jurisdiction. To do so, and receive evidence applicable to the subject as to which its jurisdiction is controverted, and then to make a general decision, the result of which renders it impossible ever to ascertain whether the tribunal acted upon the assumption that it had or had not jurisdiction over the controverted part of the case, would be the extremity of injustice.

If an award were to be made under such circumstances, nobody ever would know whether it embraced the matter respecting which jurisdiction was denied or not. In illustration I may mention the Geneva Arbitration. Suppose that it had gone forward without any declaration by the Arbitrators that they excluded the indirect losses, and then suppose that a round sum had been awarded, would not Great Britain have had a right to assume that this round sum included the indirect claims to which it never meant to submit. So will it be here; unless there is placed upon record the ruling of the Commissioners as to this point, it never will be possible for us to know, or for the world to know, upon what ground you have proceeded;—whether you believe that we are to pay for commercial intercourse or not. No one will know how this is unless upon our motion you decide one way or the other. For our assistance then in conducting the case—for convenience and for the information of our respective Governments, we ask you to make this decision, and it is entirely obvious that if no decision is made it must necessarily be assumed that these controverted claims are by you deemed to be a just ground of award. We never can know the contrary, unless you say so; and if you are to say so, we think that convenience and justice both require that you should say so, at such an early day as to enable us to shape the conduct of our case in conformity with your decision.

Mr. THOMSON—I would like to know whether anything more is to be said on the subject by our learned friends opposite.

Mr. FOSTER—We understand that, as is the case in connection with every other motion, the party moving has the right, in this instance, to open and close the argument.

Mr. THOMSON—I make this observation simply because in the course of the American Agent's remarks, he said that Mr. Trescot had given particular attention to the treaties, and hence, I assumed that he was about to be followed by Mr. Trescot. It would be obviously unjust to the counsel acting on behalf of Her Majesty's Government if they should now be called upon to answer the argument that has been made without hearing all that is really to be said on the other side. I understand that the other side have an undoubted right to reply to anything which we may say, but if Mr. Trescot is afterwards to start a new argument, as I rather infer from Mr. Foster's remarks he will do, this might put another phase on the matter.

MR. TRESCOT:—As I understand the position taken by Mr. Foster, it is very plain, and stated with all the fullness and precision necessary. He takes the ground that the commercial relations between Great Britain and the United States stand either on ordinary international comity or upon Treaty regulations. If upon the latter, then they rest upon the Treaty of 1794, the third permanent article of which did determine the commercial relations which were to exist between the United States and the British North American Colonies; because in 1815 the Commercial Convention, then adopted and extended in 1815 and 1827, renewed that article, even if it should be contended, as I think it never has been before by the British Government, that the permanent articles of the Treaty of 1794 were abrogated by the war of 1812. The negotiators of the Convention of 1815 took the third article of the Treaty of 1794 as a basis, but not being able to agree as to certain modifications, decided to omit the article and to declare that—"The intercourse between the United States and His Britannic Majesty's possessions in the West Indies and on the Continent of North America shall not be affected by any of the provisions of this Article [*i. e.*, the Article of the Convention of 1815 in reference to the commercial relations between the United States and the possessions of His Britannic Majesty in Europe], *but each party shall remain in the complete possession of its rights with respect to such intercourse*," those rights being, as we contend, the old rights established by the Treaty of 1815. But the question has not a very important bearing upon our present contention, and has been suggested simply in reply to what we understand is to be one of the positions on the other side, viz., that if we deny that commercial privileges were granted by the Treaty of 1871, and are not therefore proper subjects of compensation in this award, then we have no right whatever to these commercial privileges; and I can say in reply to the very proper inquiry of my friend Mr. Thomson, that in any remarks I may make, that is the extent of the position which will be taken, but I do not expect to refer to the point at all.

Mr. THOMSON:—In reference to the time at which this motion should be heard, in view of the arguments which the learned agent of the United States has used, I shall not on behalf of Her Majesty's Government call upon this Commision to say this is an improper time for that purpose. We have no objection that this application on the part of the counsel of the United States Government should be heard at length, and so they may be enabled to understand at all times, on all reasonable occasions, the exact ground upon which we stand. There is nothing unreasonable in the view which has been put forward by them in this respect. They are entitled to know whether the Commission is going to take the matter, named in their notice of motion, into consideration or not. We therefore have no objection that your Excellency and your Honors should determine this point at once, and we do not complain of the time at which the motion is made. I shall now come to the substance of the motion. The agent of the United States has travelled out of the record and has referred to light houses and other matters not contained in this motion. He also alluded to the injuries which were committed on our coasts by the American fishermen and he says that we have put them all forward in our case as subjects for compensation. I am not here now to consider the question whether we have done so or not. I at present only intend to discuss whether the matters included in this motion are matters coming within the jurisdiction of this Court or not. I read the motion, it states:—

"The counsel and agent of the United States ask the Honorable Commissioners to rule declaring that it is not competent for this Commision to award any compensation for commercial intercourse between the two countries, and that the advantages resulting from the practice of purchasing bait, ice, supplies, etc., and from being allowed to trans-ship cargoes in British waters do not constitute any foundation for an award of compensation, and shall be wholly excluded from the consideration of this Tribunal."

The tribunal will see that these are the words inviting discussion; and these I am here to answer, and nothing else. Satisfactory answers could be given to the other matters to which Mr. Foster has called attention, if this were the proper time to give them. As to the lighthouses, for instance, it is quite obvious that these make the value of the fisheries themselves very much greater to the Americans than they would be otherwise; but I say again, that I am not going to discuss that question now. If it should arise hereafter, I shall do so. We shall undoubtedly be obliged to discuss it eventually at the end of the case, but the question now is, whether it falls within the jurisdiction of this tribunal to award to Great Britain any pecuniary compensation for the rights which the Americans have undoubtedly exercised since the Washington Treaty was negotiated, of coming into our waters and instead of taking bait with their own lines and nets as by the terms of that Treaty they have a right to do, purchasing it from our citizens, of buying ice here as well, and of getting supplies and trans-shipping their cargoes. It is said in the Reply of Her Majesty, page 8th, I think, that these privileges are clearly incidental; that looking at the whole scope and meaning of the Treaty, it is clear that these are incidental privileges for which the American Government can afford to pay. The words of our Reply read by Mr. Foster are these:—

"By the terms of Article 18 of the Treaty of Washington, United States fishermen were granted permission to land upon the said coasts and shores and islands, and also upon the Magdalen Islands for the purpose of drying their nets and curing their fish. The words *for no other purpose whatever* are studiously omitted by the framers of the last-named Treaty, and the privilege *in common* with the subjects of Her Britannic Majesty to take fish and to land for fishing purposes, clearly includes the liberty to purchase bait and supplies, trans-ship cargoes, &c., for which Her Majesty's Government contend it has a right to claim compensation.

"It is clear that these privileges were not enjoyed under the Convention of 1818, and it is equally evident that they are enjoyed under the Treaty of Washington."

Well, that is the argument which was put forward by Her Majesty's Government, but whether that argument commends itself to the judgment of this Tribunal or not, is not for me to say, though to my mind it is a very strong and very forcible one. Referring to the wording of the Treaty itself, and to the convention of 1818, the first section of the latter states:—

Whereas differences have arisen respecting the liberty claimed by the United States, for the inhabitants thereof, to take, dry and cure fish, on certain coasts, bays, harbors and creeks, of His Britannic Majesty's dominions in America, it is agreed between the high contracting parties, that the inhabitants of the said United States shall have for ever, in common with the subjects of His Britannic Majesty, the liberty to take fish of every kind on that part of the southern coast of Newfoundland

which extends from Cape Ray to the Rameau islands, on the western and northern coast of Newfoundland, from the said Cape Ray to the Quirpon Islands on the shores of the Magdalen Islands, and also on the coasts, bays, harbors and creeks from Mount Joly, on the southern coast of Labrador, and to and through the straights of Belisle, and thence northwardly indefinitely along the coast, without prejudice, however, to any of the exclusive rights of the Hudson's Bay Company. And that the American fishermen shall also have liberty, for ever, to dry and cure fish in any of the unsettled bays, harbors and creeks, of the southern part of the coast of Newfoundland hereabove described, and of the coast of Labrador; but so soon as the same, or any portion thereof shall be settled, it shall not be lawful for the said fishermen to dry or cure fish at such portion so settled, without previous agreement for such purpose with the inhabitants, proprietors or possessors of the ground. And the United States hereby renounce forever any liberty heretofore enjoyed or claimed by the inhabitants thereof, to take, dry or cure fish, on or within three marine miles of any of the coasts, bays, creeks or harbors of His Britannic Majesty's dominions in America, not included in the above-mentioned limits; provided, however, that the American fishermen shall be admitted to enter such bays or harbors for the purpose of shelter and of repairing damages therein, of purchasing wood and of obtaining water and for no other purposes whatever. But they shall be under such restrictions as may be necessary to prevent their taking, drying or curing fish therein, or in any other manner whatever abusing the privileges hereby reserved to them.

Now, in reference to the Washington Treaty you will find this language used in the commencement of the 18th Article :—

"It is agreed by the High Contracting parties that, in addition to the liberty secured to the United States fishermen by the Convention between Great Britain and the United States, signed at London on the 20th day of October, 1818, of taking, curing and drying fish on certain coasts of the British North American Colonies therein defined, the inhabitants of the United States shall have in common with the subjects of her Britannic Majesty, the liberty for the term of years mentioned in Article XXXIII of this Treaty, to take fish of every kind, except shell-fish, on the sea-coasts and shores, and in the bays harbors and creeks of the Provinces of Quebec, Nova Scotia and New Brunswick and the Colony of Prince Edward Island, and of the several islands thereunto adjacent, without being restricted to any distance from the shore, with permission to land upon the said coasts and shores and Islands, and also upon the Magdalen Islands, for the purpose of drying their nets and curing their fish; provided that in so doing they do not interfere with the rights of private property, or with British fishermen, in the peaceable use of any part of the said coasts in their occupancy for the said purpose. It is understood that the above-mentioned liberty applies solely to the sea fishery and that the salmon and shad fisheries, and all other fisheries in the rivers and mouths of rivers are hereby reserved exclusively for British fishermen.

I call attention to the fact that in this very Treaty of Washington, the framers have made as the basis of it, not only the Convention of 1818, but the 1st section of it, and in that section are contained the strong and positive declaration that the Americans shall have the right, (and only that right)—of coming into British waters, for the purposes of obtaining shelter, repairing damages, and of securing wood and water, and *for no other purpose whatever*. I will now read article 18 of the Washington Treaty, and the argument, I wish to found upon it, is this :—That the High Contracting Parties, or rather the High Commissioners had before them, when they framed that Treaty, the Convention of 1818, the first Article of which contains these words :—

"That the American Fishermen shall be admitted to enter such bays or harbors for the purpose of shelter and of repairing damages therein, of purchasing wood, and of obtaining water, and *for no other purpose whatever*."

One would suppose that under ordinary circumstances, it would have been sufficient to have stopped with the statement, that they should be admitted "for the purpose of shelter, &c., and of obtaining water," but the framers of the Convention of 1818 were particular to add,—"and for no other purpose whatever."

They not only so restricted the Americans by affirmative words, but also by negative words. The High Contracting parties having this before them, gave the Americans the liberty of coming upon our shores to fish on equal terms with our fishermen, and to take bait, &c. To my mind, the High Commissioners considered that the framers of the Convention of 1818 deemed it necessary to insert the words, "and for no other purpose whatever," to make it absolutely certain that the Americans could only come in for shelter, repairs, wood, and water, and should enjoy no rights as incidental to that privilege, and that they purposely omitted those words in the Treaty of Washington. It may therefore be well supposed, that if the Americans were to be restricted to the very letter of the Treaty, the same negative words would have been used, and undoubtedly had those words been used in the Treaty, there would be an end of the argument. If that had been the intention of the High Commissioners, they would have gone on in this Treaty to state in Article 18th,—

"It is agreed by the High Contracting Parties that, in addition to the liberty secured to the United States' fishermen by the Convention between Great Britain and the United States, signed at London on the 20th day of October, 1818, of taking, curing, and drying fish on certain coasts of the British North American Colonies therein defined, the inhabitants of the United States shall have, in common with the subjects of Her Britannic Majesty, the liberty for the term of years mentioned in Article XXXIII, of this Treaty, to take fish of every kind, except shell-fish, on the sea-coasts and shores, and in the bays, harbours, and creeks of the Provinces of Quebec, Nova Scotia, and New Brunswick, and the colony of Prince Edward Island, and of the several islands thereunto adjacent, without being restricted to any distance from the shore, with permission to land upon the said coasts, and shores, and islands, and also upon the Magdalen Islands, for the purpose of drying their nets and curing their fish, and *for no other purpose whatever*." But these words were not used.

Now these are the words which the learned agent of the United States, and the learned counsel who are associated with him, seek in my judgment, to interpolate into this Treaty. The framers of the Convention of 1818, were very cautious as to its wording; the framers of the Treaty of Washington had that Convention before them, and it must, therefore, I think, be fairly assumed that if it had been the intention of either of the high contracting parties, in this instance, that the Americans should simply have the bare rights named in the Treaty and nothing else, they would have followed the example set before them by the Convention of 1818 and used these strong negative words, "and for no other purpose whatever." I say that this argument is a fair and just one, of course its weight is to be determined by this tribunal.—I am by no means putting it forward as a conclusive argument, but still the fact that they did not do so is of great weight in my mind, though to what extent its weight will affect the decision of this tribunal is not for me to say, but it does appear to me to be a very strong argument indeed. Had it been intended to restrict the United States fishermen, and, to use the language of Mr. Foster, confine them merely to what was mentioned in the bond, the High Commissioners would have added "and for no other purpose whatever;" and therefore their leaving that language out is open to the construction that the Americans were entitled to all the incidental advantages which that Treaty would necessarily be understood to confer.

Is it not a rather extraordinary argument on the part of the United States that this privilege of theirs, related only to their right of coming in and fishing on equal terms with our citizens, and to landing and to drying their nets and curing their fish, and that the moment they had dried their nets and cured their fish they were forthwith to take to their boats and go back to their vessels, and that by landing for any other purpose whatever—they are clearly liable for infraction of the provisions of this Treaty. It is certainly a curious view which Mr. Foster presents with regard to their mode of bartering along the coast when he intimates that they land merely to exchange a gallon or two of kerosene oil or a barrel of flour for fish, and in effect declares—for this is the result of his argument—that for so doing the Americans are liable to punishment.

Mr. FOSTER :—I said that they could be excluded by statute.

MR. THOMSON—I will show you before I am through that these American fishermen can by no possibility whatever come into our waters, without incurring the risk of forfeiture, if Mr. Foster's reading of this Treaty be accepted as correct. This would be the result of his argument: if you confine them to the very terms of the bond, to use the language of Mr. Foster, then it is clear that if they land for the purpose of giving a barrel of flour in exchange for fish, or of purchasing fish, at that moment their vessels are liable to forfeiture. This is a strange construction to put upon the Treaty, and these are the strange results which will necessarily follow if this tribunal adopt the view presented by the American Agent.

But there is another matter to be considered, and it is this:—In 1854 the Reciprocity Treaty was passed, and under that Treaty the Americans came in to fish on our coasts generally. They exercised the same rights as they do now, and no person then ever complained of them for buying bait under the terms of that Treaty, though it did not in express terms authorize their purchase of bait or their getting supplies of any kind on our shores; still they did so. By a kind of common consensus of opinion, it was understood that they had a right to do so, and no person complained of it. And in view of the course which then was pursued, this Treaty was framed. Mr. Foster has put this case: Suppose that when the Joint High Commissioners were sitting, the British representative had proposed that the value of the rights of trans-shipment, and of buying bait, and of having commercial intercourse with our people, should be taken into consideration by this Tribunal,—then, had this been the case, it would have been met by a well-bred shrug from the Earl of Ripon, and Prof. Bernard. This may possibly be so; but I can say, I think it would have been very strange indeed if our Commissioners had said to the American Commissioners:—Under the Treaty which we propose you shall have the right to fish in our waters on equal terms with our fishermen, and have the right to land and cure your fish, and the right also to dry your nets on the land, but the moment that you take one step farther,—the moment that you buy a pound of ice, and the moment that you presume to buy a single fish for the purpose of bait in our waters, and the moment you attempt to exercise any commercial privilege whatever, and above all, the moment you undertake to trans-ship one single cargo, that moment your vessel will be forfeited, and the cargo as well, I think that if this had been stated, there would have been something more perhaps than a well-bred shrug from the American Commissioners? I think, therefore, it may fairly be contended, in view of the wording of the two Treaties, that these are privileges, which, it was intended, that this Commission should take into consideration, when they came to adjudicate respecting the value of our fisheries:—and after all, is not the value of our fisheries to these people, enhanced by the way in which they use, them, and in which they generally have been using them—by coming into our harbors to purchase bait and ice. Because it takes a long time to catch the bait for themselves, and they save time, and money therefore—time and money being in such case equivalent terms—by buying their bait. And why is this not to all intents and purposes a privilege under this Treaty? I fail to see that it is not. Why when it is necessary to preserve bait in ice, and as has been shewn by all the witnesses that the Americans cannot procure bait and ice except on our shores,—should this not be considered an incidental right? It appears to me that this view must be taken. The argument put forward on behalf of the United States demanding a contrary construction is almost suicidal. Moreover I think I can establish that this latter view is not taken by the Americans on this subject. On page 467 of Mr. Sabine's report, the following language is used:—"It is argued that if the liberty of landing on the shores of the Magdalen Islands"—Your Excellency and your Honors will recollect that while the Americans have the right to fish around the Magdalen Islands, they have no right to land on these shores, though our evidence has shown that, as a rule, they have landed on these Islands, both before and since the negotiation of this Treaty, and have dragged their nets on the shore, and fished for bait in this way. Mr. Sabine states:—

"It is argued that, 'if the liberty of landing on the shores of the Magdalen islands had been intended to be conceded such an important concession would have been the subject of express stipulation,' &c., it may not be amiss to consider the suggestion. And I reply that, if 'a description of the inland extent of the shore over which' we may use nets and seines in catching the herring if necessary it is equally necessary to define our rights of drying and curing the cod elsewhere, and as stipulated in the convention. Both are *shore* rights, and both are left without condition or limitation as to the quantity of beach and upland that may be appropriated by our fishermen. It was proclaimed in the House of Commons, more than two centuries ago, by Coke—that giant of the law—that 'FREE FISHING' included 'ALL ITS INCIDENTS.' The thought may be useful to the Queen's advocate and Her Majesty's attorney general when next they transmit an opinion across the Atlantic which is to affect their own reputation and the reputation of their country. The right to take fish 'on the shores of the Magdalen Islands,' without conditions annexed to the grant, whatever these profoundly ignorant advisers of the crown of England may say to the contrary, includes, by its very nature and necessity, all the 'incidents' of a 'free fishery,' and all the privileges in use by and common among fishermen, and all the facilities and accommodations, on the land and on the sea, which conduce to the safety of the men employed in the fishery, and to an economical and advantageous prosecution of it."

Now, it may be said that this is not the opinion of a person entitled to weight, but, at all events, it had sufficient weight to induce the Legislature of the United States to republish this report in a volume, which contains the sessional papers of the House of Representatives of the 42nd Congress, second session. The Legislature of the United States, therefore, thought it proper and of sufficient importance to publish it; and I believe that the report was published more than once. At all events, it is from their own state papers that I quote it. The language employed is very forcible. It is very often the case, when our friends across the border are arguing matters that nearly or closely affect them, they couch their arguments in strong and uncomplimentary language to those who differ from them; and so, of course, when Mr. Sabine writes, "that it would be well for those profoundly ignorant law-officers to govern themselves in future as to their opinions," &c., we can understand that language as being used, perhaps, in the American sense of the term, and certainly not in the offensive sense in which such words would be construed here or in England.

MR. FOSTER:—It is used in the Pickwickian sense.

MR. THOMSON:—I was about to say so. I trust that it was employed in that sense. Here is a construction which the American nation can put forward as the true construction of this Treaty for the purpose of obtaining the right to land on the Magdalen Islands, and the moment the shoe pinches on the other side, they want to have the strict letter of the law, and nothing else,—they then do not wish to go a single step beyond that, though the moment when it becomes necessary to extend their rights, they want to obtain a liberal construction of its terms. I do not think myself that the United States can always claim to come before any tribunal and say that they have, where it suits their purpose to do so, been very liberal in their construction of treaties. In regard to this very treaty itself, your Excellency and your Honors are aware, that it certainly was an extraordinary construction on the part of the United States Government when a duty was by them placed on the tin packages in which free fish entered into the United States. I wish to shew what necessarily would be the result, if the United States' contention in this matter were right, but before doing so, it may be proper for me to notice an argument, which Mr. Foster drew from the Convention of 1815, to which he called your attention, and part of which he read. He says, that inasmuch as the Convention referred to previous privileges, which the United States had abandoned as against Great Britain, and as those privileges must have been granted by the Treaty of 1794—that therefore the war of 1812 did not abrogate those privileges, and that this was a distinct admission on the part of Great Britain that the Treaty mentioned was not abrogated, and that the privilege conferred by that Treaty had been in no way interfered with. I altogether deny the conclusion he thus draws; but it is not now necessary for the purpose of my argu-

ment to answer that statement, farther than to say that the mention of those privileges had reference to ordinary commercial relations existing between the traders of the two nations. These traders are a well-known class of persons. They are merchants and ship owners, who send their ships to sea. These vessels have registers, clearances, manifests, &c., for the purpose of shewing the nationality of their vessels, and these papers also shew the voyage, which the vessels have undertaken to prosecute,—what they have on board and everything about them. If they are on a trading voyage, this states their object. But fishing vessels have no such papers except registers. They come without clearances, and if I understand the question at all, they are a separate and distinct class of vessels, and as a separate and distinct class, they have always been treated by both nations. The 1st section of the Convention of 1818 had reference to ordinary traders, and to them solely. Let it be admitted for the sake of argument, that Mr. Foster is right in his construction of the effect of the language used in the Convention of 1815 to which he refers—though this I, in fact, utterly deny—but still admitting that the words to which he has directed attention, in fact declared that the war of 1812, had no practical effect whatever upon the Treaty of 1794, —supposing that this were so, what do we find? We find, that in 1818 a distinct and separate Treaty is framed, referring to this very class respecting whose rights, your Excellency and your Honors, are now sitting in judgment —the fishermen engaged in the prosecution of the fisheries of the United States. The Convention of 1818 was made altogether with reference to them; was it not? What does the 1st section of that Convention of 1818 say? It is this :—

"Art. 2. Whereas differences have arisen respecting the liberty claimed by the United States, for the inhabitants thereof, to take, dry and cure fish, on certain coasts, bays, harbours and creeks, of his Britannic majesty's dominions in America, it is agreed between the high contracting parties, that the inhabitants of the said United States shall have for ever, in common with the subjects of his Britannic majesty, the liberty to take fish of every kind on that part of the southern coast of Newfoundland which extends from Cape Ray to the Rameau islands, on the western and northern coast of Newfoundland, from said Cape Ray to the Quipron islands on the shores of the Magdalen islands, and also on the coasts, bays, harbours and creeks, from Mount Joly, on the southern coast of Labrador, to and through the Straights of Belleisle, and thence northwardly indifinitely along the coast, without prejudice however to any of the exclusive rights of the Hudson's Bay Company. And that the American fishermen shall also have liberty, for ever, to dry and cure fish in any of the unsettled bays, harbours and creeks, of the southern part of the coast of Newfoundland hereabove described, and of the coast of Labrador; but so soon as the same, or any portion thereof shall be settled, it shall not be lawful for the said fishermen to dry or cure fish at such portion so settled, without previous agreement for such purpose, with the inhabitants, proprietors, or possessors of the ground. And the United States hereby renounce for ever, any liberty heretofore enjoyed or claimed by the inhabitants thereof, to take, dry, or cure fish, on or within three marine miles of any of the coasts, bays, creeks or harbours of his Britannic majesty's dominions in America, not included within the above-mentioned limits: provided, however, that the American fishermen shall be permitted to enter such bays or harbours, for the purpose of shelter and of repairing damages therein, of purchasing wood, and of obtaining water, and for no other purpose whatever. But they shall be under such restrictions as may be necessary to prevent their taking, drying, or curing fish therein, or in any other manner whatever abusing the privileges hereby reserved to them."

Now, I want to say, may it please your Excellency and your Honors, I think it most extraordinary that the learned Agent of the United States, and a man of his high standing and great ability, should take this matter up and distinctly assert that what took place in 1815 had the slightest bearing on the subsequent agreement which was made with reference to the particular class mentioned—the fishermen—between these two nations. I must confess I cannot see the slightest bearing it has on the convention of 1818: I deny that the construction urged by the Agent of the United States is correct; and if it were necessary to do so, I think I would be able to convince this Tribunal that the contention of Mr. Foster is entirely erroneous. Still, I put it out of consideration altogether, as being in no way connected with the matter at present at issue. What have you to do with it? We stand here by the Treaty of 1818, which was a definite treaty affecting the fishermen of the United States and the fisheries on the shores of these Provinces. By the terms of that treaty the fishing vessels of the United States and their fishermen were prohibited from coming within three miles of our shores, and of all our bays, for any purpose whatever, with three exceptions—that is to say, they might resort to our harbors for the purpose of shelter in case of storms, to make repairs in case of necessity, and to procure wood and water, and if they went into these places for any other purpose whatever, their vessels were liable to forfeiture; yet though this was the case, as my learned friend on the other side well knows, they incurred that liability time and again. Vessel after vessel of theirs was condemned from the making of this Treaty up to the present time; and has that treaty ever been abrogated? There is no pretence for saying that this is the case. That Treaty stands in as much force to-day as it did in the year 1819, the year after which it was passed, with one exception only—except in so far as it is interfered with by the Treaty of Washington. Now let me turn your attention to what the Treaty of Washington says on this point, because so far as any privileges were renounced by the United States in the Treaty of 1818, they have been conferred on the United States by the Treaty of Washington. The 18th Article of the Treaty of Washington declares :—

"Art. XVIII. It is agreed by the High Contracting Parties that, in addition to the liberty secured to the United States' fishermen by the Convention between Great Britain and the United States, signed at London on the 20th day of October, 1818, of taking, curing, and drying fish on certain coasts of the British North American Colonies therein defined, the inhabitants of, the United States shall have, in common with the subjects of Her Britannic Majesty, the liberty for the term of years mentioned in Article XXXIII. of this Treaty, to take fish of every kind, except shell-fish, on the sea-coasts and shores, and in the bays, harbours, and creeks of the Provinces of Quebec, Nova Scotia, and New Brunswick, and the colony of Prince Edward's Island, and of the several islands thereunto adjacent, without being restricted to any distance from the shore, with permission to land upon the said coasts, and shores, and islands, and also upon the Magdalen Islands, for the purpose of drying their nets and curing their fish; provided that, in so doing, they do not interfere with the rights of private property, or with British fishermen, in the peaceable use of any part of the said coasts in their occupancy for the same purpose. It is understood that the above-mentioned liberty applies solely to the sea fishery, and that the salmon and shad fisheries, and all other fisheries in rivers and the mouths of rivers are hereby reserved exclusively for British fishermen."

The only privileges which the American fishermen had in British waters are received in the convention of 1818; and as to all other privileges, they expressly excluded themselves by their renunciation forever. Now, in this Treaty, Great Britain says, it is expressly agreed by the High Contracting Parties, that in addition to the privileges which the Americans enjoy under the Convention of 1818—that is, in addition to the privileges which they have of fishing on the southern coast of Labrador, and on the shores of the Magdalen Islands, and around the shores of the Magdalen Islands :—

"The citizens of the United States shall have, in common with the subjects of Her Britannic Majesty, the liberty for the term of years, mentioned in Article XXXIII of this Treaty, to take fish of every kind, except shell-fish, on the sea coasts and shores, and in the bays, harbors, and creeks of the provinces of Quebec, Nova Scotia, and New Brunswick, and the colony of Prince Edward Island, and of the several islands thereunto adjacent, without being restricted to any distance from the shore."

Can anything be plainer than this? Whereas, before this Treaty, Great Britain says to the United States—you could only fish around the Magdalen Islands, but not land on these Islands; by this Treaty, however, all these restrictions are taken away from you; and in addition to that, the restrictions which were imposed preventing you

from fishing within three miles of the shores of Nova Scotia, New Brunswick, Quebec and Prince Edward Island, are removed, and besides the right of fishing there, you also have the right to land and dry your nets on these coasts. Is not that plain? The Convention of 1818 clearly stands untouched except in so far as it is restricted by the Treaty of 1871. Now, what follows from this, if the Agent of the United States is correct in his contention—and I presume, that my learned friends opposite have weighed it carefully. This follows:—These American fishermen having then—as I have shewn—no right to enter our harbors by any commercial treaty. They are governed by the Convention of 1818. Their rights are defined by that Convention, and extended by the agreement and Treaty of 1871. This being the case, what have they a right to do?—if the contention of my learned friend on the other side is correct? They have a right,—and that under this Treaty,—to fish within three miles of the shore in common with the inhabitants of these colonies, and there to take fish of every kind, shell-fish excepted, and to land for the purpose of drying their nets and curing their fish and nothing more:—that is the "Bond."

That is the bond says Mr. Foster. That is all they have a right to do. If it is, then what follows. Then all other privileges save those of taking fish within three miles of the shore, landing on the coast for the purpose of drying nets and curing fish, are governed by the Convention of 1818. And if that is the case then when they do enter for the purpose of purchasing bait, they enter for another purpose than that of obtaining wood and water, securing shelter, etc., and they become liable to forfeiture. If they come in for the purpose of buying ice they are in the same predicament, they have not entered for the purpose of buying wood or obtaining shelter,—they have come in for the purpose of buying ice, which is wholly foreign to the provisions of the treaty of 1818. They could not under the treaty of 1818 enter for that purpose and the position assumed by the learned Agent and Council for the United States is that that privilege is not conferred by the Treaty of Washington. If so they have'nt got it, and every time they come in for other purposes than those mentioned in the treaty of 1818, they are liable to forfeiture. The surprise with which I, as Counsel, heard that contention will, I have no doubt, be only exceeded by that of the fishermen of the United States when they find that that is the construction placed on the treaty by the Government of the United States as represented by their Agent before this Commission. If this argument applies to buying bait and ice, a *fortiori*, it applies to the privilege that they now enjoy of landing and trans-shipping cargoes. Under the plain reading of the Treaty, there is no doubt about it, and if it does not come within the incidental privileges, I admit that, as a lawyer, I cannot contend for one moment that the privilege of buying bait, or at all events of buying ice, whatever may be said about bait, as to which there may be a particular construction, to which I will refer presently. I admit frankly that I cannot see that the privileges of buying ice or of trans-shipping cargoes are conceded unless they are to be considered as necessarily incidental. If it is denied that they are conceded incidentally, then the moment a vessel lands for any of those purposes, a forfeiture is worked immediately.

There is just this distinction with reference to the taking of bait. It has been shown by numerous witnesses before this tribunal that these men come in and employ our fishermen to get bait for them, and then pay the fishermen for doing so. Now I wish to be distinctly understood upon this point. I submit, without a shadow of doubt,—I don't think it will be controverted on the other side,—at all events it will not be successfully controverted, that if those fishermen, having a right to come in and fish, as they undoubtedly have under the Treaty, choose to hire men to catch bait for them, they are catching that bait themselves. There is a legal maxim put in old Latin, *qui facit per alium facit per se*, what a man does by an agent he does by himself Therefore, in all these instances where it has come out in evidence, that they come in and get our fishermen to catch bait for them and pay them for doing so, in all such cases the act is that of the United States fishermen themselves. On the other hand, if the fishermen upon the coast keep large supplies of bait for the purpose of selling to such persons as come along, then under the construction of the Treaty contended for by the learned Agent of the United States Government, whenever bait is purchased in that way, that is a purpose for which it is unlawful to enter our ports under the Treaty of 1818, and the act works a forfeiture of the vessel and cargo. That is a startling proposition.

In reference to bait there is another consideration I throw out. I do not know whether it will be dissented from or not by the learned Counsel on the other side, but this Treaty does give them this power, that they shall, in common with the subjects of Her Britannic Majesty, have the liberty, for the term of, etc., to take fish. May not buying fish be a *taking of fish* within the meaning of the Treaty?

It does not say to *catch fish*. The words are not "to fish," but "to take fish." It simply uses the word "take." The term is a wide one, and I am not by any means prepared to say that by a strict legal construction these people, finding the fish caught here, have not a right to take it from the fishermen, I say that is possibly a fair construction of the Treaty. In that case they do "take fish," and that is all. The contention on the other side, I suppose, will be to narrow that word "take" down to mean the actual taking of fish by the citizens of the United States from the water by means of nets and other appliances. If that be the construction, then it follows as a necessary consequence, that in taking bait from our fishermen they infringe the Treaty of 1818. I wish to make myself distinctly understood on that point. By the Convention of 1818 the American fishermen could not enter our harbors at all except for the three purposes of obtaining shelter, to get wood and water, and to make repairs in case of necessity. Entrance for any other purpose was made illegal. Any privileges which they had under that Convention remained. Any restrictions that they labored under after that Convention still remained, except in so far as they have been removed by the Washington Treaty, and if the construction be true, as contended for by the learned Agent of the United States Government, then the restriction as to landing for the purposes I have mentioned, are not removed. The purchasing of bait and ice and the trans-shipping of cargoes, are matters entirely outside of the Treaty and unprovided for. Under the Treaty of 1818, vessels entering for any other purposes than the three provided for in that Treaty can be taken. As was put forward in the American answer, any law can be passed. An inhospitable law they will say, by which the moment they do any of those acts they will become liable to forfeiture.

I do not presume that the remarks of the Agent of the United States, in which he speaks of instructions possibly coming from his Government or from the Government of Great Britain, should be taken into consideration, or that they can properly be used as arguments to be addressed to this tribunal, because, as the learned agent very properly says, the authority of this tribunal is contained in the Treaty. If the Treaty gives you authority you have sworn to decide this matter according to the very right of the matter, and I presume you will not be governed by any directions from either Government. Nothing of that sort can be made use of as an argument, and you will determine the matter conscientiously, I have no doubt, upon the terms of the Treaty itself. Now Her Majesty's Government does not object to your deciding in so many words that these things are not subjects of compensation, if that be the judgment of the Court. I have advanced very feebly the views which I think ought to govern your decision upon the point, namely: that these are incidental privileges which may fairly be constructed, in view of the way in which this Treaty is framed, and as inseparable from the right given to the Americans under the Treaty of Washington. But I confess that I shall not be at all dissatisfied should this tribunal decide otherwise. If it be the desire of the American Government that this tribunal shall keep within the very letter, and disregard what I have argued is the spirit of the Treaty, and determine just merely the value of the fisheries themselves, and of landing on the shores to dry nets,—very well,—I have no objection and we will accept such a decision. But Her Majesty's Government wish it to be distinctly under-

stood that that is not the view they have held or wish to be compelled to hold of this Treaty. If, however, pressed as you are to determine the question in this way by the Government of the United States, and in view of the declaration you have made to determine it according to the very right of the matter, you can conscientiously arrive at the conclusion for which they ask, we shall not regret it at all.

Mr. DOUTRE:—I would desire to add to what has been so well said by my learned friend, that the interpretation which Her Majesty's Government has put upon the Washington Treaty, has received the consecration of the whole time that the Reciprocity Treaty was in operation by the course of dealing between the two Governments with reference to that Treaty. The Reciprocity Treaty was in exactly the same terms as the Washington Treaty, and under it the Americans have been admitted to purchase bait, trans-ship their cargoes, and do all those things mentioned in the motion. I think that this interpretation cannot be lightly set aside to adopt the construction now sought to be put upon the Treaty by our learned friends on the other side. And to show that the several Provinces have not been indifferent to these matters, I would refer the Commission to a petition sent to the Queen by the Legislature of Newfoundland on the 23rd of April, 1853, which is to be found on page 12 of the official correspondence which has been filed on our side.

TO THE QUEEN'S MOST EXCELLENT MAJESTY.

May it please Your Majesty:—

We, Your Majesty's loyal subjects, the Commons of Newfoundland, in General Assembly convened, beg leave to approach Your Majesty with sentiments of unswerving loyalty to Your Gracious Majesty's person and throne, to tender to Your Majesty our respectful and sincere acknowledgments for the protection afforded by the Imperial Government to the fisheries of this Colony and Labrador during the last year, and to pray that Your Gracious Majesty will be pleased to continue the same during the ensuing season.

May it please Your Majesty:—

The illicit traffic in bait carried on between the inhabitants of the western part of this Island and the French has proved of serious injury to the fisheries generally, as the supply enables the French Bankers to commence their voyage early in Spring, and thereby prevent the fish from reaching our coasts. We therefore most earnestly beseech Your Majesty graciously to be pleased to cause an efficient war steamer to be placed in Burin during Winter, so that by being early on the coast she may avert the evil of which we so greatly complain.

Passed the House of Assembly April 23d, 1853.

(Signed) JOHN KENT, Speaker.

I think that every other Province would have made the same complaint in a different shape, but I quote this to show that the Provinces have never been indifferent to the matter of selling bait to the Americans by Canadian subjects.

This is about all that I wish to add to what has been said, except that I do not know if I have well understood Mr. Foster in reference to a class of argument which he has used. I repeat, I am not very certain that I have understood him well, that if the construction put by the American side upon this article were not admitted, the American Government might repudiate the award made by the Commission.

Mr. FOSTER:—Oh no. I said that if the award included matters not submitted to the tribunal, the principles of law would render it void. I did not say what my government would do under any given circumstances, nor am I authorised to do so.

Mr. DOUTRE:—There is no authority to decide as to the legality of the award made by the Commissioners, there is no other right than might. However if this argument has not been used I have nothing to add to what has been said by my learned friend. If it had been, I should have found it necessary to address some observations which are rendered needless by the fact that I have misunderstood my learned friend.

Mr. WEATHERBE: Owing to our adherence, until quite recently, to the arrangement entered into to argue this morning a preliminary question, and considering the sudden determination of counsel on behalf of Her Majesty's Government to enter upon the main question, and considering also that we are to be followed by counsel of very great ability, I trust the imperfections of what few suggestions I have to offer may be excused. For my own part I am much in favor of written argument before this Tribunal whenever that is practicable. For example, it seems we quite misunderstood the learned agent and counsel for the United States, Mr. FOSTER. This may have occurred in other respects. Were written arguments to be submitted, and, after examination, replied to in writing, all that would be avoided. The other side will probably admit their written argument would have been different from what has fallen from the lips.

Mr. FOSTER: I hope it would be very much better.

Mr. WEATHERBE: And yet an advantage of oral discussion was very forcibly stated by Mr. DANA the other day—namely, the privilege of asking at the moment for explanation for obscure and ambiguous expressions; and hence just now, in reply to my friend Mr. DOUTRE in regard to his interpretation—in which I must say I concurred—as to the declaration by the agent of the United States of what his Government would do in case of an adverse decision on the point under discussion, an explanation has followed. The words, as we took them, would certainly form an unjustifiable mode of argument.

Treaties between the United States and Great Britain have been referred to—the old treaties—and I have just examined the passages cited. But I understood the learned counsel to admit that the argument relative to these was too remote or of no consequence in relation to this discussion. (Mr. TRESCOT—That is correct.) So then I may pass over my notes on that subject.

Mr. FOSTER, representing the United States before this Tribunal, says that a formal protest against the claim of Her Majesty's Government for these incidental advantages—the purchase of bait and supplies, trans-shipment and traffic—for which we are here claiming compensation under the Treaty of Washington, is to be found in the Answer of the United States. He calls it a protest. I do find it in the Answer, but I find something more. I think this highly important. Of course this Answer on behalf of a great nation is carefully prepared to express the views of the United States. We all weigh well—we have never ceased to weigh well these words—and we have within the prescribed time, many weeks ago, prepared and filed our Reply. These are the words to which the Agent and Counsel of the United States refer:—

"Suffice it now to be observed, that the claim of Great Britain to be compensated for allowing United States fish-
"ermen to buy bait and other supplies of British subjects finds no semblance of foundation in the Treaty, by which
"no right of traffic is conceded."

The Answer does not stop there. It goes further:—

"The United States are not aware that the former inhospitable statutes have ever been repealed."

Neither does it stop here, but continues:—

"Their enforcement may be renewed at any moment."

Here are three distinct grounds taken by the United States in their formal Answer to the Case presented by Great Britain—and the claim for the right of bait, supplies, and trans-shipment, &c. First: there is no right to the enjoyment of these privileges secured by the Treaty. Secondly: there are statutes unrepealed, by which it is rendered illegal to exercise these fishing privileges. Thirdly: such statutes may be enforced.

Therefore we understand the contention of the United States to be not only that this claim for incidental advantages—the incidents following necessarily, the right given in express terms by the Treaty to take fish—not only do the United States say there is no semblance of authority for the Tribunal to consider these things in awarding compensation, but that in point of fact these acts on the part of United States fishermen have been and are now illegally exercised on our shores. In dealing with that part of the United States' Answer, which I have read, this is the language used in the Reply, printed and filed on behalf of Her Majesty's Government:—

"The advantages so explicitly set forth in the case, of freedom to trans-ship cargoes, outfit vessels, obtain ice, "procure bait, and engage hands, &c., are not denied in the Answer. Nor is it denied that these privileges have been "constantly enjoyed by American fishermen under the operation of the Treaty of Washington. Neither is the conten- "tion on the part of Her Majesty's Government that all these advantages are necessary to the successful pursuit of the "inshore or outside fisheries attempted to be controverted. But it is alleged in the 3rd Section of the Answer, that "there are Statutes in force, or which may be called into force, to prevent the enjoyment by American fishermen of "these indispensable privileges."

Here in the case prepared and filed and presented before this tribunal on behalf of Her Majesty, it is alleged that these incidents are absolutely essential to the successful prosecution of the fishery, and that they are enjoyed under and by virtue of the acceptance of the Treaty of Washington. Here in the 3rd Section of the answer presented before this Commission to become matter of record and history, it is alleged that there are Statutes now in existence or that may be called into force to preclude the enjoyment by the fishermen of the United States of these necessary incidental advantages. Substantially that is the only ground taken in the Answer, and I do not hesitate for a moment to say that providing it is correct, it is a reasonable answer. If Great Britain may after the award of this tribunal shall have been delivered—if the Government of Great Britain or Canada may afterwards call into force those Statutes which we contend are at present suspended and raise the question for the decision of the Court of Vice-Admiralty here in Halifax, or elsewhere, as it has been formerly raised and settled here, and if the decision of such questions must necessarily lead to the confiscation of the vessels attempting to avail themselves of these supposed privileges, then this is certainly a matter of great concern to the United States, and a matter of great responsibility to those in whose hands her great interests are for the time committed. In this view I do not wonder that this answer is so much insisted on. In this view—if these results are imminent there is ground for careful deliberation. If these results are inevitable, this answer, respecting the enforcement of Statutes is a complete and full answer—and that far the cause is ended and the court is closed.

It is admitted, I suppose, that the fishermen of the United States sail from their own shores, enter these waters, and annually, monthly, daily, practically, enjoy these advantages since the Treaty of Washington. They never contended for a right to enjoy them previously. All the witnesses unite in saying that they have been shipping crews, purchasing and cutting and shipping ice, trans-shipping cargoes of mackerel—that they have been in the full and absolute enjoyment of every incident necessary to the successful prosecution of the fisheries. But it is now put forward and urged on the part of the Government and nation of these foreign fishermen that they have enjoyed these privileges without the sanction of the Treaty and in violation of the laws of the land, which could be at any moment enforced against them; that there was and is no semblance of authority to enjoy these rights under the Treaty of Washington; that they were and are exercised in the face of existing statutes and at the peril of the United States fishermen, and the risk of loss of their vessels, property and earnings. If you will look at the Treaty—the learned Counsel says in effect—you will find its articles do not permit the trans-shipment of mackerel, or the hiring of crews, or obtaining ice and bait—that we may land and dry fish, but we cannot trans-ship—that we can take fish out of the water and land them on deck, but we must stop there—and the Treaty in no manner annuls the disabilities under which we labored, and none of the various things necessary to carry on the business of fishing is permitted—that you have statutes which you have enforced before, and which you can and will enforce again. This, then, is an important inquiry. I quite admit that much.

It was on consideration of the importance of this question as regarded by the United States, as I understand—this is the view of Counsel representing Her Majesty's Government—that it was considered quite reasonable a discussion should be entered upon, and it was decided not to resist the argument raised by the United States, whose Agent and Counsel claim the advantage to be obtained by reducing the compensation in this manner.

I understand the learned Agent and Counsel, Mr. Foster, now to say, that if an award should be made including any compensation for these advantages—I presume it is meant as well the enjoyment of them in the past, as prospectively Great Britain could not expect to receive payment for such award—that is, that they would not be paid. There is no kind of argument in this, and for my part I am at a loss to understand why it should be offered.

If Great Britain were obliged to admit that an award contained anything by which it appeared on its face to be *ultra vires*, the United States could not be called on for payment. But I submit to the learned Agent whether he would or ought to declare in the name of the great nation he represents, that if an award were made, including compensation for the privileges already enjoyed, even although under misapprehension—the United States would repudiate that. They would hardly, I humbly submit, in the face of the world, repudiate payment of such a sum as might be awarded for those privileges of the past, because the danger of confiscation had passed away. And we are safe in believing that if the United States were assured in any way that no proceedings would ever be taken—but the privileges in question could be secured throughout the continuance of the Treaty to the fishermen of the United States, that nation would promptly pay any sum that might be awarded. Moreover, if this Tribunal had the power—if authority had been delegated and were to be found in the Treaty to set questions of this kind at rest, and in making their award of compensation, if the Commissioners could secure these privileges—if not already secure—I think then, also, no objection would be taken to their being considered by the Tribunal But it is because it is contended that the enjoyment of these necessary incidents is insecure—because the power of the Tribunal is limited—because the matter will, it is said, be left in a state of uncertainty hereafter—because questions may arise over which the Government may have little control—because the international relations of the future are unforseen and cannot be anticipated that the claim to compensation is resisted. This seems to me to be the condition of the question, and this I gather and have observed in the Answer, from the first, is the manner in which the subject has been regarded by the Agent representing the United States. And so regarding it, an anxiety to prevent compensation incommensurate with the privileges understood to be settled and secure beyond all question seems perfectly reasonable.

But I think there are objections to attacking the claim set up here on behalf of Her Majesty's Government in detail A reason stated by the learned Agent of the United States for asking for the decision of this question now is that the matter should become a record of the Commission; and if the Commissioners come to the conclusion that the right to trans-ship and obtain ice and bait and men and supplies for the fishery are necessary incidents to the right to "take fish," and arise therefore by necessary implication from the very terms of the Treaty, and that they can be properly considered in making up the award, it should be known and read hereafter. And I can understand if an award were to be paid out of the United States Treasury, and in that sum was included an amount for these already specified rights, and if any doubts existed as to whether they were secured to the fishermen, those doubts should be set at rest upon such payment. It will, however, hardly be contended that this Tribunal should be asked to give the

grounds. It would be utterly impossible to give such grounds on each branch of the case. Take the argument of the counsel in relation to light houses. The representative of the United States, it appears, now thinks that the evidence in regard to light houses was irrelevant—that is to say, if we had no light houses at all our fisheries would be just as valuable as they are now, and that if we had ten times as many as we have, no compensation should be allowed in consequence of the efficiency of that service. I don't know how it may strike others, but it seems to me just as reasonable—with the exception already mentioned, about which I cannot conceive any cause of anxiety—that a motion should be made to obtain a decision in advance, for the information of the United States, as to whether that nation was, in paying for the use of Canadian fisheries, paying in any indirect way, and to what extent, for the support of the lights to guide the United States in common with British fishermen through the ocean storms. It is a matter entirely for the honorable Commissioners whether they are content to give their award piecemeal—whether they are to state prematurely the grounds—one ground to-day, another to-morrow—upon which their award is to be made.

It seems to me unfortunate that this question should not have been raised earlier. One thing will be admitted: If this question had been submitted at the outset—if this Tribunal had undertaken to hear argument, and if the decision had been adverse to us, a very large amount of time would have been saved in the mode of submitting the testimony. We should have had this advantage, that we might have fortified our case on matters where the quantity of evidence is small. The learned counsel on the other side have listened to a large mass of testimony which they now say is irrelevant. Suppose it should be so decided, the United States is in this position—a large portion of time allotted to them will be saved. A great deal of time may be economised which otherwise would have been occupied in meeting claims supported in our case. Having succeeded in a matter of strict law, after our time has been occupied in submitting a very large mass of evidence on questions now sought to be excluded, the United States may now concentrate their testimony upon points which are held to be before the Commission, and at the close it will be contended that their evidence on these points greatly preponderates.

Mr. FOSTER:—We will give you more time.

Mr. WEATHERBE:—Well, we have pretty well arranged our programme, and I think it is highly undesirable that the time should be lengthened. I don't wish it to be inferred at all that it is intimated in the slightest degree that there was any such motive governing the selection of the time to make this motion.

The Answer of the United States, at pages 8 and 9, 14 and 15, 18 and 19, claims on the part of the United States consideration in estimating the amount to be awarded for Canada of the advantages arising to Canadians on the coast, from the admission of United States fishermen into our waters. In effect the Commission is asked in this document first to estimate the value of the privileges accorded to the United States by the terms of the Treaty of Washington in giving up to them the fisheries, and then, although there is nothing whatever in the Treaty to justify it, they are required to reduce that sum by deducting therefrom the value to a certain class residing on our shores, of the right to trade with United States fishermen, including the supply of this very bait in question. The Commissioners will find on the pages mentioned very clear language to shew how reasonably we can claim for the privileges now sought to be excluded.

Mr. FOSTER:—I don't believe you remember just the view we take of that. We say:

"The benefits thus far alluded to are only indirectly and remotely within the scope and cognizance of this Com-
"mission. They are brought to its attention chiefly to refute the claim, that it is an advantage to the United States
"to be able to enter the harbors of the provinces, and traffic with the inhabitants."

I say it lies out of the case on both sides, and that is what our motion says.

Mr. WEATHERBE:—That is an admission that incidental privileges are within the scope and cognizance of the Commission. But there is other language which has been assigned to other counsel to cite. There are ample quotations from the arguments of Canadian statesmen advocating remote and incidental privileges in Parliament as arguments in favor of the adoption of the Treaty. If the Agent and learned counsel for the United States succeed in this motion they do more than exclude from the consideration of the case compensation for the right of procuring bait and ice by purchase and the other incidents to a successful prosecution of the fisheries. And as the Answer stands evidence may be offered on other points unless other motions follow the present for excluding matter from the consideration of the Commission. I think it can be shown that if this matter is not within the jurisdiction of the Commission, and had not been so considered when the Answer was drawn up, a great modification of that Answer would have been made.

Mr. FOSTER:—It is quite capable of being very much improved, if I had more time.

MR WEATHERBE:—I am however only turning the attention of the tribunal to the deliberate and solemn admissions and declarations of the Answer which bind now and hereafter. Whatever may be the argument of the United States for the present moment, these must remain, and they point to the true intention to be gathered from the language of the Treaty of Washington as understood by both the great parties to that compact.

The simple question we are now discussing is this: whether certain things are to be taken into consideration as incidental to the mere act of taking fish out of the water. What I understand the argument of the United States to be now is that by the Treaty of Washington the American fishermen have the right of taking fish out of British waters, and landing to dry their nets and cure their fish, and nothing else. The right to land to dry their nets and cure their fish they admit are subjects for compensation. But what does taking fish mean? It means taking them out of the water and landing them on the deck, and nothing more, it is contended. We contend that by a fair and reasonable construction of the words, the United States have obtained the privilege of *carrying on the fishery*. Can it be doubted that this was the intention when the words were adopted. Are we asking for any strained construction by the tribunal? I think not.

By the Convention of 1818 the United States renounce for ever thereafter the liberty to United States fishermen of fishing in certain British waters, or ever entering these waters, except for shelter, and for wood and water. "*For no other purpose whatever*" is the sweeping language of the Treaty. I presume we are to have very little difference of opinion as to the intention of the clause containing these words. That clause of the Convention of 1818 was fully considered by the Joint High Commission, who framed the Treaty of Washington. What do those Commissioners say? That language has been cited. In addition to the liberty secured by that Convention, the privilege is granted of taking fish. The Treaty of Washington permits the liberty of taking fish, and of landing to dry nets and cure fish. This Tribunal is invited to decide that it is not competent for them to award anything in relation to the incidental and necessary requirements to carry on the fisheries.

Is it contended there was an oversight in framing the Treaty of Washington? Is there an absence of words necessary to secure the full enjoyment of our fisheries to United States fishermen? Was that absence intentional? The learned Counsel for the United States have not stated their views upon this point. Can it be possible that those who represented the United States in framing the treaty of Washington, intended the result which would follow the success of the present motion. Can it be possible both parties intended that result? If this is an oversight who are to suffer? The compensation is to be reduced we are told. But if the United States Treasury is to be saved are the United States fishermen to suffer? Or is the award to be reduced for the want of privileges and the fishermen to continue illegally to enjoy all the privileges? This matter has not been fully explained. I must admit if there has been an

oversight here—if so great an error has occurred the tribunal is powerless to correct the error or to grant full compensation.

But the learned agent and counsel who support the motion did not state fully to the Commission,—did not give to the Commission a full explanation this morning. The Answer states the matter more fully than the application for the motion. The Commissioners are entitled to know fully and distinctly what view is taken by the United States. Nothing was said as to the statutes to be enforced against United States fishermen in case the motion should be successful. In that event it would be too late to deny the right to enforce the statute. This would be unfortunate for American fishermen, as it formerly was. Is the success of the motion to open old sores and awaken the very troubles the treaty was made to set at rest? There is no escape, it appears to me.

I submit that our construction is the reasonable, fair and legitimate one. The words of the treaty are sufficient to secure all the privileges and preclude the enforcement of statutes. The words are sufficient to justify the awarding of full compensation. Our argument is that the right to "take fish" carries with it the right to prepare to fish, and the words are sufficient to secure to American fishermen those rights of which they were deprived, until secured by treaty. We submit the matter with full confidence to this honorable Commission, regretting that any intimation should have been offered on the other side as to the improbability of payment of any award, unless the judgment of Commissioners should be favorable. I think I am obliged to admit on our side that we have no alternative,—that for, us on this question of reducing the amount of compensation, the decision, even if adverse, must prevail; and I beg to say I trust whatever it may be, it will be accepted in the proper spirit.

Mr. WHITEWAY:—I was rather taken by surprise when I learned but just now that the main question in this proposition was this day to be discussed, and not the preliminary question as to whether the main question should be argued at the present time, or as part of the final argument. I have now only a few observations to make in addition to those that have been so strongly put by the learned counsel who have preceded me. It seems to me that the position taken by the learned counsel on the opposite side to-day differs materially, and in fact is diametrically opposed to that taken by them in their Answer. In their Answer they not only allege on the part of the United States that they have a right to those incidental advantages which may accrue from the concession of a right to fish; but they go further, and they allege that they have a right to claim for the incidental benefits which may flow to the subjects of her Britannic Majesty from traffic with American fishermen, and they allege this as a specific ground for the reduction of the amount claimed on behalf of Great Britain. Now at page 13, part IV. of the answer, they say:—

"It is next proposed to consider the advantages derived by British subjects from the provisions of the Treaty of "Washington.

"In the first place, the admission of American fishermen into British waters is no detriment, but a positive ad- "vantage to colonial fishermen; they catch more fish, make more money, and are improved in all their material cir- "cumstances by the presence of foreign fishermen. The large quantities of the best bait thrown over from American "vessels attract myriads of fish, so that Canadians prefer to fish side by side with them; and when doing so, make "a larger catch than they otherwise could. The returns of the product of the British fisheries conclusively show that "the presence of foreign fishermen cannot possibly have done them any injury.

"Secondly. *The incidental benefits arising from traffic with American fishermen are of vital importance to the "inhabitants of the British Maritime Provinces*"

The incidental benefits arising from traffic therefore are, according to the contention of our learned friends, to be taken into consideration, and to have weight with the Commissioners in reducing those damages which they may award to the British Government. Now, all that has been contended for on the part of Great Britain up to the present time is that the value of the incidental advantages which necessarily arise from the concession of the right to take fish within the three mile limit, and to land for the purpose of curing, should be taken into consideration by the Commission.

On page 9 of the Answer they say:—

"It is further important to bear in mind that the fishery claims of the Treaty of Washington have already been "in formal operation during four years,—one-third of the whole period of their continuance, while practically both "fishing and commercial intercourse have been carried on *in conformity with the Treaty* ever since it was signed, "May 8, 1871."

Here they say that practically both fishing and commercial intercourse has been carried on in conformity with the Treaty ever since 1871. Now then if you turn to the same Answer, page 13, they say:—

"The United States call upon the British agent to produce, and upon the Commissioners to require at his hands, "tangible evidence of the *actual practical value of the privilege of fishing, by Americans, in British territorial "waters, as it has existed under the Treaty for four years past, as it exists to-day; and as judging of the "future by the past, it may reasonably be expected to continue during the ensuing eight years embraced in the "Treaty.*"

We have met their views, and given evidence of the actual practical value of the privilege of fishing and its incidents of commercial intercourse as actually carried on in conformity with the Treaty.

Now, your Excellency and your Honors, it appears to me very unfortunate as regards our present position that this Commission did not sit immediately after the treaty was entered into. If it had sat,—if the construction put upon the treaty was to the effect that the Commission had no jurisdiction to take into consideration the incidental advantages of which evidence has been given, then, as has been put by my learned friend, Mr. Thomson, no traffic would have taken place from American fishing vessels coming into our harbors for the purpose of buying bait, for they would have been liable to be confiscated forthwith. But this treaty having existed four years, the fishermen of the United States and of Great Britain have solved practically the question of the construction of the treaty themselves. The fishermen of the United States have found it more to their convenience, and speedy bairing, to employ British fishermen to take bait for them, and in some instances, to buy it from them, believing that the right of traffic was conceded by this treaty, and thence the traffic has arisen. No such traffic would have arisen had this question been determined at the outset, in accordance with the views contended for by the counsel for the United States, but because that traffic has arisen, and the question has been solved by the people themselves; therefore they now say we are precluded from recovering any compensation for it. It has been shown here by clear, indisputable evidence, that the bank fisheries off the coasts of the Dominion and Newfoundland could not be carried on to advantage by American fishermen without obtaining the bait upon our coast, which they have done. It is admitted that this is a subject for consideration, and that this is a question they have to pay for; but now, forsooth, because this Commission has not sat, and four years have elapsed and the fishermen of the two countries have practically solved the question for themselves, we are to be precluded from obtaining compensation for the advantages that would otherwise have to be paid for.

Again, in the Answer of the United States, at page 18, it is stated: "The benefits alluded to (that is, the incidental advantages) are only indirectly and remotely within the scope and cognizance of this Commission." Here my learned friends show that they were clearly of the opinion at the time they penned this Answer, that these were

matters that were within the scope of the Commission, and within their jurisdiction. And without objection on their part, we have throughout the whole conduct of our case, adduced evidence to support the position we now contend for.

Mr. TRESCOT:—What I have to say I shall say very briefly, for my purpose is rather to express my assent to what has been said, than to add anything to what I consider the very complete argument of my colleague, Mr. Foster.

If I understand the British counsel correctly, they admit that the construction for which we contend is a fair construction. They seem to think that a broader and more liberal interpretation would be more in conformity with what they consider to be the spirit of this discussion, but all of them appear to admit that if we choose to stand on that language we have the right to do it, and they do not object that it should be enforced. They seem to think, however, that certain consequences would follow, of which they have apprehensions for us. That is our matter. The consequences that flow from the interpretation will be confined to us, and are matters we must look to. At present the only question is, whether we have the right to say to your Honors that you are limited in your award to a certain and specific series of items. I think, honestly, we have drifted very far from the common-sense view of this case. As to the technical argument, if we are to go into it, it might be insisted, first: That, under the Treaty of 1818, if a fisherman went into a colonial port and bought a load of coal for his cabin stove he violated the Treaty, because it only gave him the right to go in and buy wood; or when a fisherman bought ice, he was only buying water in another shape, and therefore that when he had the right to buy water he had the right to buy ice. I do not, however, suppose that this is the kind of arguments your Honors propose to consider. It appears to me that if we look at the history of this negotiation we see with perfect distinctness what the Commission is intended to do. When the High Commission met, and the question of the fisheries came up, what was the condition of the facts? We were annoyed and worried to death by our fishermen not being allowed to go within three miles of the Canadian shore, and by their being watched by cutters. The idea of not being allowed to buy bait, fish, and ice, which we had done ever since the fisheries existed, never crossed our minds. We knew what had been the established custom for over half a century, from the earliest existence of the fisheries. We read your advertisements offering all these things for sale as an inducement to come into your ports. We had the declaration of Her Majesty's Colonial Secretary, that whatever might be the technical right, he would not consent to Colonial Legislation, which deprived us and you of this natural and profitable exchange, and we knew that in the extreme application of your laws you had not attempted to confiscate or punish United States fishermen for such purchases. It never occurred to us that this was a question in discussion. What we wanted to do was to arrange the question as to the inshore fisheries. That was the only question we were considering, and so far from raising any question about, it what is the instruction of the British Government to their negotiators? It was as follows:—

"The two chief questions are: As to whether the expression "three marine miles of any of the coasts, bays, creeks, or harbors of Her Britannic Majesty's dominions" should be taken to mean a limit of three miles from the coast line or a limit of three miles from a line drawn from headland to headland; and whether the proviso that "the American fishermen shall be admitted to enter such bays or harbors for the purpose of shelter, and of repairing damages therein, of purchasing wood, and of obtaining water, and for no other purpose whatever," is intended to exclude American vessels from coming inshore to traffic, trans-ship fish, purchase stores, hire seamen, &c.

"Her Majesty's Government would be glad to learn that you were able to arrive at a conclusive understanding with the Commissioners of the United States upon the disputed interpretation of the Convention of 1818; but they fear that you will find it expedient that a settlement should be arrived at by some other means, in which case they will be prepared for the whole question of the relations between the United States and the British possessions in North America, as regards the Fisheries, being referred for consideration and inquiry to an International Commission, on which two Commissioners to be hereafter appointed, in consultation with the Government of the Dominion, should be the British Representatives."

Now, what was that but an instruction not to trouble themselves with the very questions we are arguing here to-day, but to go and settle the question on some basis which would not involve any such discussion. And what did we do? We said: "The question is between two inshore fisheries. We think our inshore fishery is worth something; you think your inshore fishery is worth something. We give you leave to fish in ours, and we will admit fish and fish oil free of duty, and make the matter pretty much on equality. If that is not sufficient, take three honest-minded gentlemen and convince them that your fisheries are worth a great deal more than ours, and we will pay the difference," and so we will, without any hesitation, if such shall be the award upon a full hearing of all that you have to say and all that we have to say. That is the whole question we have to decide. Take the fishery question as it stands. If you will demonstrate and prove that when we go into the Gulf of St. Lawrence to fish, the privilege is worth a great deal more to us to be allowed to follow a school of mackerel inshore and catch them than is the privilege accorded to you to come into our inshore fisheries: if, after comparing our fisheries with yours, this tribunal entertains the honest opinion that an amount should be paid by the United States, the award will be paid, and no more words said about it. What is the use of importing into this subject, difficulties and contentions of words which do not mean anything after all. The question is, whether the Canadian inshore fisheries are worth more to us than our inshore fisheries are to the Canadians, with the free import of fresh fish, and if, after the examination of witnesses, this tribunal holds that our inshore fisheries are worth a great deal more than the inshore fisheries of the Dominion, then we will not pay anything. But the question submitted to this tribunal is not one that requires a great deal of discussion about treaties or a very close examination of words. If we are to go into that examination one of the first things to determine is, what sort of a treaty are we dealing with? Because if it is a commercial treaty, an exchange of commercial rights, it is one of the principles of diplomatic interpretation that cannot be contradicted, that runs through every modern reciprocity treaty, that commercial equivalents are absolute equivalents, and do not admit of money valuation by an additional money compensation. For instance, suppose England should make a treaty with France, and England should say: "We will admit your wines free of duty if you will admit certain classes of manufactures free of duty." The treaty then goes into operation. Suppose for some reason or other there were no French light wines drunk in England for ten years, and the French took a large quantity of English manufactured goods, at the end of ten years it might turn out that England had made several millions of dollars by that treaty, while France had made nothing But you cannot make any calculation as to compensation; the whole point is that it is reciprocity—the right to exchange. Just so is it in regard to the question of fisheries and their values. Suppose from the right to import fish into the United States the Canadians make $500,000 a year, and from our right to import fish into the Dominion we do not make $500, what has that to do with this question? The reciprocity, the right of exchange, is the principle. And this is why it is that all reciprocity treaties are temporary treaties; because the object of such treaties is, regarding the general principle of Free Trade as beneficial to all people, to open the results of the industries of nations to each other.

The men who made the Treaty may have miscalculated the industries affected by it. It may occur that on account of a want of adaptation on the part of the people or ignorance of the markets, the Reciprocity Treaty

does not turn out advantageous, and therefore such a Treaty is only made for a short term of years. But if it is a Reciprocity Treaty giving extended commercial facilities, you have to put every one as an equivalent against another. If you put the Washington Treaty on that footing then our right to use your inshore fisheries is balanced by your right to use our inshore fisheries, and the advantages are equal. That is the only way in which you can deal with the question if you view the Treaty as one of Reciprocity. But if you consider the Treaty as an exchange to a certain extent of properties, then I understand that you can apply another principle. For example, if I were to exchange with some one a farm in Prince Edward Island for a house in Halifax, and agreed to submit to a Board of Arbitration the question of the difference in value, that Board could meet and ascertain the market value of the land and house respectively and decide the question. But according to the theory of the British counsel, whenever we got before the Board of Arbitration Mr. Thomson would say; "now, this house is valuable as a house and it is also valuable as a base of operations, for if you did not have the house and there was bad weather you would have to stay out in it; consequently that point has to be taken into consideration." The reply would be, "when I bought the house I bought it for these things." So when we come to calculate the value of the fisheries, we expect that all these incidental advantages go along with the calculation.

Mr. THOMSON:—That is what we are contending.

Mr. TRESCOT:—I beg your pardon, that is just what you do not do. You just make an elaborate calculation of the value of your fisheries as fisheries, then you add every conceivable incidental or consequential possible advantage, whether of the fisheries or our enterprise in the use of them, and add that estimate to the value. You contend that we shall pay for the house, and then pay you additionally for every use to which it is possible to put the house.

Mr. THOMSON:—Do you admit that the value of the fisheries is enhanced by those advantages.

Mr. TRESCOT;—I do not. I do not believe that your alleged advantages are advantages at all. We can supply their places from our own resources as well and as cheaply. Now, with regard to the Treaty itself there are only two points which I propose to submit to the Commission. I contend in the first place, that if the interpretation for which the British counsel contend is true, viz., that by the Treaty of 1818 we were excluded from certain rights, and by the Treaty of 1871 we were admitted to them, then we must find out from what we were excluded by the Treaty of 1818 and to what we were admitted by the Treaty of 1871. I contend that the language of the Treaty of 1818 is explicit. (Quotes from Convention.)

Now, I hold that that limitation, that prohibitive permission to go into the harbors was confined entirely to fishermen engaged in the inshore fishery That Treaty had no reference to any other fishery whatever It was a Treaty confined to inshore fishermen and inshore fisheries, and we agreed that we should be allowed to fish inshore at certain places, and if we would renounce the fishery within three miles at certain places, we should enter the ports within those three-mile fisheries, which we agreed to renounce, for the purpose of getting wood, water, &c. The limitation and permission go together, and are confined simply to those engaged in the three-mile fishery. I contend that to-day, under that Treaty, the bankers are not referred to, and they have the right to enter any port of Newfoundland and buy bait and ice and trans-ship their cargoes without reference to that Treaty. I insist that it is a Treaty referring to a special class of people, that those people are not included who are excluded from the three-mile limit, and if they are not so included, they have the right to go to any port and purchase the articles they require. In other words, while the British Government might say that none of the inshore fishermen should enter the harbors except for wood and water, yet the bankers from Newfoundland had a perfect right to go into port for any reason whatever unless some commercial regulation between the United States and Great Britain forbade them. With regard to the construction that is to be placed upon the articles of the Treaty of 1871, Mr. THOMSON seems very much surprised at the construction we have put upon it. Here is the arrangement:—(Quotes from Convention of 1818 and Treaty of 1871.

Does that take away the prohibition? Surely if it had been intended to remove that prohibition it would have been stated. In addition to your right to fish on certain coasts and enter certain harbors only for wood and water, that Treaty says you shall have the right "To take fish of every kind, except shell-fish, on the sea coasts and shores and in the bays, harbors and creeks of the Provinces of Quebec, Nova Scotia and New Brunswick, and the colony of Prince Edward Island and of the several islands thereto adjacent without being restricted to any distance from the shore, with permission to land upon the said coasts and shores and islands, and also upon the Magdalen Islands, for the purpose of drying their nets and curing their fish." "Drying their nets and curing their fish." That is all—that is the whole additional Treaty privilege, and I can see no power of construction in this Commission, by which it can add to Treaty stipulation the foreign words "and buy ice, bait, supplies, and trans-ship." And yet the British counsel admit that without these words our interpretation is indisputable. We had a certain right and certain limitations of that right by the Treaty of 1818, and the Treaty of 1871 says in addition we give you the further right to take, dry and cure fish, and nothing else. The reason is very obvious. It is very evident that when the Treaty was drawn, for every advantage outside of that clause we were to be called on according to the theory of the British counsel, to pay compensation. We never had been called on to pay for the privilege of buying bait and ice, and we had received no notice from the Colonial Government of any intention to make such claim, which was contrary to the whole policy of Great Britain, and would not be sustained. Why should we have to pay for that privilege? We did not insert it in the Treaty, because we did not intend to pay for it; that is the reason it is not there.

I leave any further reply to the learned Counsel who will follow me.

I am anxious as to your decision. I have not desired to conceal, and I have not concealed the fact that the people and Government of the United States regard this claim of $15,000,000 as too extravagant for serious consideration. I know at the same time that they sincerely wish for a final settlement of this irritating controversy. And therefore I earnestly hope that you will be able to reach a decision which will limit, within reasonable proportions, a claim which, as it stands, it is simply idle to discuss.

You start from a point we can never reach. A day or two ago, during the session, I happened to go into the Commission Consulting Room and found on the table a copy of Isaac Walton's Complete Angler, a very fit book for the literary recreation of such an occasion. On the page which was turned down I found a reference to some South Sea Islanders, I believe, who had such a gigantic inshore fishery that "they made lumber of the fish bones." I am afraid that the British Counsel have been consulting this book as an authority.

Mr. DANA:—May it please your Excellency and your Honors, the question now before the tribunal is, whether you have jurisdiction to ascertain and declare compensation because of American fishermen buying bait, ice and supplies and trans-shipping cargoes within British territory. Your jurisdiction, as has been well said, finds its charter in the Treaty of Washington. Without re-reading the words, which have been read, *usque ad nauseam*, I think I give truly the substance and meaning of them when I say that there having been mutual cessions relating to fisheries, and one side claiming that it has ceded more than it has received in value, it is agreed that your Honors shall determine strictly this, whether Great Britain has ceded more valuable rights to the United States than the United States has ceded to Great Britain. Your Honors are not to determine or to enquire what rights Great Britain has permitted the United States to exercise independently of the Treaty, however nearly they may be connected with the fisheries, and however important they may be to fishermen. It must be something which Great Britain has ceded by the

Treaty of 1871, or you have nothing to do with it; whatever was done, at however great a loss to Great Britain, and however great a benefit to the United States, you have but to compare the two matters which have been ceded by each side in the Treaty of 1871, and find whether one is more valuable than another, and if so, how much more valuable. Therefore we are brought to this question. Does the Treaty of 1871 give to the United States the right to buy bait, ice, provisions, supplies for vessels, and to trans-ship cargoes within British dominions. If the Treaty of Washington does give that to us, then it is an element for you to consider in making up your pecuniary calculation. If the Treaty of Washington does not give that to us, then I congratulate this high tribunal that it may put these matters entirely out of mind, and save many days of examination and cross-examination, and some perplexity of mind. Because your Excellency and your Honors will remember that if you are to fix a value upon them, that is the value to the United States of the right to buy bait, ice, and provisions, and to trans-ship cargoes, that will not be all you will have to do. You will have also to ascertain the value to the Provinces of the corresponding right which they would have in the United States, and you will have still further difficulty, I think, to ascertain what benefit this American commerce is to British subjects, and deduct that. The task before you would be a very undesirable one. Having ascertained the pecuniary value of these rights to the United States, your Honors will have to ascertain the pecuniary value that British subjects derive from this common trade and barter, because we ought not to pay for the privilege of putting money into the hands of British subjects. We ought not to pay for the privilege of enfranchising a whole class of fishermen who have been held in practical serfdom by the merchants. It is an exceedingly difficult subject of computation, and one which, I think, you are persuaded already was never intended by the Governments of the United States and Great Britain to be submitted to your Honors for decision. I say, then, the Treaty of Washington has not given us these rights. To what does the Treaty of Washington relate? Without the necessity of reading it to you, I can say that the language is in substance: Whereas, you have certain advantages given to you relating to the inshore fisheries, under the Treaty of 1818, in regard to catching fish, drying your nets, and curing your fish on certain shores, we will extend territorially these same privileges. And I have the honor to contend that the Treaty of Washington is simply *a territorial extension of certain specific rights* —the right to catch fish, dry nets, dry fish and cure fish. The subject matter of that part of the Treaty of Washington is the catching fish inshore, within the three mile limit. Before the Treaty of Washington, this right of catching fish within three miles of shore, and of landing to dry and cure fish, and dry nets, was confined to certain regions. In other places we could not fish or land within the three mile limit. The Treaty of Washington extends territorially these rights over all British America, and there the Treaty of Washington ends, so far as the fisheries are concerned. There is not one word in it of the creation of new rights. It is a territorial extension of long known specified rights

It does not say that whereas by the Treaty of 1818 you renounced the right to fish within the three-mile limit, provided however that you can go in to buy wood and get water, we add to those rights the right to buy ice, bait, and other supplies. If there had been the least intention by either party to extend the rights to new subjects, it would certainly have been stated in the treaty. If when the representatives of Great Britain and the United States had come together, the Joint High Commission had understood that we should not enter British American ports except those we were allowed to enter under the Treaty of 1818 for any purpose except for shelter, and to buy wood and water, and the British nation had proposed to add to these subjects so as to include the right to buy bait and ice and to trans-ship cargoes, why inevitably they would have said so; inevitably the new rights would have been specifically included in the matters on which your Honors were to base your calculations. England might have said to the United States (I deny the position, but England might have taken the position), that American fishermen have no right to enter our waters except under the Treaty of 1818, and then not to buy anything but wood and water, and now we are opening to them the great privilege of buying bait, ice and supplies, and trans-shipping cargoes which will add immensely to the value of their fisheries. The argument would have been made, which has been made here, in the form of questions put to expert witnesses: "Is not all that essential to American fisheries?" But, on the contrary, the Treaty says nothing about it. We hear of it for the first time when the counsel of the British Government are getting up their case for damages. We immediately protest against it, as something not included in the jurisdiction of this Court, and our Agent, Mr Foster, on page 32 of the Answer, distinctly states:—

"That the various incidental and reciprocal advantages of the Treaty, such as the privileges of traffic, purchasing bait and other supplies are not the subject of compensation, because the Treaty of Washington confers no such rights on the inhabitants of the United States, who now enjoy them merely by sufferance, and who can at any time be deprived of them by the enforcement of existing laws or the re-enactment of former oppressive statutes. Moreover, the Treaty does not provide for any possible compensation for such privileges; and they are far more important and valuable to the subjects of Her Majesty than to the inhabitants of the United States."

The passages which the British counsel have referred to as an argument that the Agent of the United States had admitted that those privileges came by Treaty, all refer to something quite different. A passage on page 9 of the answer of the United States has been quoted:

"* * While practically both fishing and commercial intercourse have been carried on in conformity with the Treaty ever since it was signed, May, 8, 1871."

That "commercial intercourse" means the free importation on each side of the articles of commerce, the only articles of commerce the Treaty refers to,—fish and fish oil. On page 14, section 2 of the answer, it is stated:

"The incidental benefits arising from traffic with American fishermen are of vital importance to the inhabitants of the British Maritime Provinces."

These are benefits which the British people get from us, and they are said to be only incidental, and are only introduced as a set-off, if Great Britain claimed to have the right to receive compensation for the privilege of trading in bait, &c., with her people.

May it please your Honors, it is clear to our minds that the Treaty of Washington does not give us those advantages. That subject has been elaborated by the Agent of the United States and by my learned friend (Mr. Trescot). In the first place, it has been said in answer to that contention, or rather it has been suggested for it was not said with earnestness as if the Counsel for the Crown thought it was going to stand as an argument,—that those were Treaty gifts to the United States, and though they could not be found in any Treaty, yet they were necessarily implied in the Treaty of Washington. Take the Treaties of 1783, 1818, 1854, and 1871, and they are nowhere referred to according to any ordinary interpretation of language. The only argument I can perceive is this,—You have enjoyed those rights. They do not belong to you by nature or by usage, and must therefore be Treaty gifts;—though we cannot find the language, yet they must have been conferred by the Treaty of 1871 and the Treaty of 1854. May it please this learned tribunal, we exercised all those rights and privileges before any Treaty was made, except the old Treaty which was abolished by the war of 1812. Almost the very last witness we had on the stand told your Honors that before the Reciprocity Treaty was made we were buying bait in

Newfoundland, and several witnesses from time to time have stated that it is a very ancient practice for us to buy bait and supplies and to trade with the people along the shore, not in merchandise as merchants, but to buy supplies of bait and pay the sellers in money or in trade as might be most convenient. Now, that is one of those natural trades that grow up in all countries; it is older than any Treaty, it is older than civilised States or statutes. Fisheries have but one history. As soon as there are places peopled with inhabitants, fishermen go there. The whale fishermen of the United States go to the various islands of the Pacific which are inhabited and get supplies. To be sure the whale fishery does not need bait, but the fishermen get supplies for their own support and to enable them to carry on the fishery; and they continue to do so until those islands come to be inhabited by more civilised people. So it is with the Greenland fisheries. Then come restrictions, more or less, sometimes by Treaty and sometimes by local statutes, which the Foreign Governments feel themselves obliged to respect; if they do not, it becomes a matter of diplomatic correspondence, and might be a cause of war.

The history of this matter is that the custom for fishermen to obtain supplies and bait from countries at various stages of civilization is most ancient, most natural, most necessary, most humane, and one for which no compensation has ever been asked by any civilized nation, because it is supposed to be for mutual benefit. It is for the benefit of the fisherman to get his supplies, but the Islanders would not sell them unless they thought it was also beneficial to themselves. So statutes do not create the right, but only regulate it. So do treaties. They regulate and sometimes limit the rights, but they seldom if ever enlarge them. In looking at this subject your Honors will find such has been the history of the fisheries on the north-east coast of America. The fishermen began long before these islands were well settled, even before they had recognized Governments upon them, to exercise all the privileges and rights which belong to fishermen in all parts of the world where they are not limited by statutes or treaties. It was a case altogether *sui generis*. Fishing is an *innocent passage* along the coast. It is an *innocent use*; and an *innocent use and transit* are always allowed. The French claimed and the British claimed the Newfoundland fisheries, and at last a treaty settled their claims. It did not give rights, but adjusted them. And so it was with us. While we were part of Great Britain, we had all the privileges of British subjects; but the British in Newfoundland had very few claims which were not contested, and some were entirely in the hands of the French. When we were severed from the Crown, the question arose, whether there was any reason why we should not continue to fish where we had always fished. We did not seek to make any claim in regard to property in the islands; we did not ask for any privilege not a fishing privilege. The question arose whether we had not still the right to fish as an innocent pursuit, even though within the limits of three miles; and the three-mile limit and what it meant was not then settled. We must not, however, discuss this subject as if there had always been an exact law, from the time of Moses down, relating to the three-mile limit and what the powers were. All this has grown up within very recent times, and indeed there are very few persons now who know what is meant by it. It was long contended that the right of all States over the three miles was for fiscal purposes and purposes of defence only, and as the subject has been very fully argued in a recent case in England, nothing can probably be added to the reasons given on each side. The matter continued in that position. We fished without reference, and thought we had the right to do it. We knew it did no harm. The fishermen are by the law of nations a peculiar class, having special privileges. Their status is different in time of war from that of a merchantman or man-of-war. Having this question of the three-mile limit to deal with, one which was long disputed between the United States and Great Britain, and one which was always looked upon as disputed, which had had a slow and steady growth for many years, and about which no one can dogmatize, they have endeavored to arrange it as best they could. Your Honors will find that in the very first Treaty, that of 1783, it is stated:—

"It is agreed that the people of the United States shall *continue to enjoy* unmolested the right to take fish of every kind on the Grand Bank and on all the other Banks of Newfoundland; also in the Gulf of St. Lawrence and at all other places in the sea where the inhabitants of both countries used at any time heretofore to fish."

That was looked upon as dealing with existing rights, the exact limitations of which must rest solely in agreement. It was not a gift, as the French gave Dunkirk to England, or as Mexico gave California to the United States. It was like an adjustment of disputed territory. The only question settled in the first Treaty, that of 1783, was that we should fish as before; nothing was said about the three mile line. When we come to the Treaty of 1818 we find it stated:—

"Whereas differences have arisen, &c.

By that Treaty it is agreed that on certain parts of the coast we shall have the right to take fish, that on certain parts we shall have the right to dry and cure fish, and that at other parts we shall not have such rights. Then came the Treaty of 1854, which said nothing about any of those rights of which I am speaking, but merely dealt with the question of our right to fish within three miles, where we could exercise it and where not, and our right to cure and dry fish and to dry nets. In Article 18 of the Treaty of 1871, the question is taken up again in the same way:—

"It is agreed by the high contracting parties that in addition to the liberty secured to United States fishermen by the Convention between the United States and Great Britain, signed at London on 20th October, 1818, for taking, curing and drying fish on certain coasts of the British North American colonies therein named, the inhabitants of the United States shall have in common with the subjects of Her Britannic Majesty, the liberty, for the term of ten years mentioned in Article 33 of this Treaty, to take fish of every kind, except shell-fish, on the sea coasts and shores, in the bays, harbors and creeks of the Provinces of Quebec, Nova Scotia and New Brunswick, and colony of Prince Edward Island and the several islands thereunto adjacent, without being restricted to any distance from the shore, with permission to land upon the said coasts, shores and islands, and also upon the Magdalens, for the purpose of drying their nets and curing their fish."

Then it is stated that whereas it is claimed that Great Britain thereby has given the United States more valuable fisheries than they had before, there is something to be paid. Now, if the Treaty did not give us the right to do so, how came we to be buying bait? Why, we have always done it. From the time there was a man there with bait to sell, there was an American to buy it from him. We have never asked for the right to buy bait. You cannot find a diplomatic letter anywhere in which we have complained that we were prohibited from buying bait. After the Treaty of 1854 had expired, it is true the Canadians, who felt sore about the matter, undertook to say we should not buy any bait, that if we did, we would be punished therefor. They were immediately stopped by Great Britain, who, without saying in terms that the Americans had a right to buy bait by the Treaty of 1818 or irrespective of all Treaties, declared it to be against the policy of the nation to prohibit it; and they stopped this petty persecution of American fishermen. I care not what line of reasoning induced the British Government to take that course with their Canadian subjects. I do not care whether they considered that the Treaty of 1818 gave it to us (I do not see how they could) or whether, as is more probable, they, being large-minded men, who had studied the subject, considered it something which, not being prohibited, belonged to us, and they did not intend to prohibit it.

Now, who are the men who buy the fish for bait? They are not the men who fish within the three mile limitation. We do not buy bait here to catch mackerel. The bait we buy is for the Banks and deep sea codfishery. There is no pretence from any evidence that our mackerel fishermen come here to buy bait; it is only the Bank codfishermen who do so. I respectfully submit to this learned Tribunal that it can have nothing to do with how the fishermen on the Banks see fit to employ themselves. The Treaties of 1818, 1854 and 1871 related solely to fishing within the three miles. The Treaty of 1783 *recognises* the right of American fishermen to fish on the Banks, on the high seas, a right which had always belonged to American fishermen, never ceded to them by any Treaty, but which they hold by the right of common humanity. These men come into Canadian ports to buy bait. What has this Tribunal to do with them?

Have not American fishermen fishing on the high seas the right to run into British ports by comity, by the universal law of nations, if they are not specially excluded on some ground which the United States admits to be proper and right. Have they not the right to come in and buy bait and other necessaries? Great Britain possesses the power to put any regulation on them it pleases, to require them to enter at the Custom House, to be searched to see whether they are merchants in disguise, and to levy duties upon them; but in the absence of a prohibition, there is no right to prevent those fishermen buying bait or supplies

I next come to the question of shelter, repairs, purchasing ice and other articles, and trans-shipping cargoes. I do not propose to admit that we have not these rights, or that we are exercising them simply because we are not punished for doing so, or that because the treaties of 1818 or 1871 have not given them to us, we do not possess them, and that it is within the power of the provinces to exclude us from them altogether. That depends upon considerations, which are not necessary for us to take in view. If your Honors should decide that you have no right to recognise, among the elements of compensation, those rights of which I speak; then if the Colonies should pass a law which should punish every American fisherman from the Grand Banks or inshore fisheries who should buy bait or ice or refit is guilty of an offence, it would then be a question for Her Majesty's Governor General to determine whether that was not an Imperial question, and if so, to refer it to Her Majesty in Council to determine. I have no fear that any such statute would be passed, because the number of persons interested in that traffic with American fishermen is very great, and they are voters; they have even in Newfoundland broken their chains and become a sober and saving people since they came to have cash of their own, from their trading with Americans.

I doubt whether the Canadian Government will be encouraged, however strong may be the wave of politics, to meet the people of the various constituencies and insist on this American traffic being entirely cut off. If they do it, I doubt whether Great Britain would sanction it, and if Great Britain did allow it, then it becomes at once a question between the two Governments. Is that a course fair and right, in accordance with the comity of nations, in accordance with practices which are earlier than when the first Disciples threw their nets into the sea of Galilee—is not such a course an interference with a right practiced from earliest times, and without good reason for the prohibition? You may put regulations on us so that our fishermen shall not be smugglers in disguise, and so that merchants shall not come in the disguise of fishermen; but to prohibit American fishermen from purchasing bait and supplies, not in case of necessity merely, but as part of the plan of their trade, and trans-shipping cargoes, would be a violation of the spirit which has governed the commercial relations between the two empires.

I would therefore present a summary of the matter thus: The only matter of dispute between Great Britain and the United States in the Treaty of 1783 related to the inshore fisheries, I mean the right to catch fish more or less near the British coast, and in addition to that to cure and dry fish. The Treaty of 1783 acknowledged the general right.

The Treaty of 1818 gave us certain places which were named where we could exercise those fishing rights, and stated certain places where we could not exercise them; but it did not undertake to deal with the commercial side of the fisheries question. The Treaty of 1854 was the same—it gave a general right to fish within these Dominions, and to land and dry them in certain places. The only question of late has been whether Great Britain has the right, without any Treaty, to exclude us from three miles of the coast. That was Mr. Adams' famous argument with Earl Bathurst. We said in the Treaty of 1818 that, as a right, we no longer claimed it. That is the meaning of the Treaty—that having claimed it as a right inherent in us, either because we did not lose it at the time of the Revolution, or from the nature of fisheries, or on some other ground, we no longer claimed it as a right which cannot be taken away from us but at the point of the bayonet. But while we say we will not go within the three miles to fish without permission, it must not be held that vessels cannot go there for shelter and repairs and for wood and water, but may be put under such regulations as will prevent us from doing anything further. It is entirely a matter for Great Britain to determine what regulations we should be placed under, in these respects, and she has seen fit to make none. The Statute 59, George III., passed to carry out the Treaty of 1818, prohibited fishing or preparing to fish in certain boundaries. A decision has been rendered in one Province that buying bait was "preparing" to fish. In another Province a decision was rendered directly the other way.

That, however, is a local matter altogether. The decision rendered in New Brunswick was that the prohibition of "preparing to fish" must apply only to those who intended to fish within the prohibited degree; that the buying of bait, whether it was a step in preparing to fish or not, was not an offence unless the fishing itself would be an offence If an Amerian bought bait here to go off to Greenland or to the Mediterranean to fish, it could not be considered an offence. Great Britain cannot make a statute which would alter our rights under this Treaty nor revive an old statute to do so. The learned judge was careful to say that he did not mean to apply his decision one step beyond the point of taking bait for the purpose of fishing within prescribed limits.

Sir ALEXANDER GALT:—I desire to ask the learned counsel (Mr. Dana) if I understood him to say that no seizure or confiscation of American fishing vessels took place before 1854. I think there were confiscations, and I should like to know whether those confiscations were confined to vessels catching fish and that alone, within the three-mile limit.

Mr. DANA:—So far as I am concerned, I assume that there has been no condemnation for "buying bait."

Sir ALEXANDER GALT:—I do not refer specially to the purchase of bait, but to anything except catching fish.

Mr. THOMSON:—There have been several convictions for catching bait.

Mr. FOSTER:—I never had my attention called to any conviction, or attempted conviction, except for fishing inside, the case of the *Nickerson*, before Sir Wm. Young, at Halifax, in 1870, and still later the decision in New Brunswick in the case of the *White Fawn*.

The first was the only case I have heard of, in which there was a conviction for "preparing to fish."

SIR ALEXANDER GALT:—I do not specially refer to "preparing to fish," because there are other offences created by the statute.

MR. FOSTER:—I have here a list of vessels seized up to 14th December, 1870, and the following are entered as their offences:—

"Actively fishing, the men on board in the act of hauling in their lines." "At anchor preparing to fish, and a quantity of fresh caught herring in the hold; taken on the spot, having been previously warned off." "Smuggling." "Fishing seven days in Gaspe

Harbor, and preparing to fish at time of seizure." "At anchor, lines set, on which were six halibut." "Throwing out bait, and crew casting their fishing lines." "Smuggling." "Having fished in the Cove, and actually found with mackerel wet and dripping, and hooks baited with fresh bait; also fresh fish blood and mackerel offals on deck." "Smuggling." "Having fished at three islands, Grand Manan." "Preparing to fish at Head Harbor, Campo Bello."

The last was the case in regard to preparing to fish, and where the learned Judge discharged the vessel in opposition to the decision of Sir William Young in the case of the *Nickerson*.

MR. THOMSON :—In the case of the *White Fawn*, decided at St. John, the decision, as I understand it, is not in conflict with that of Sir William Young. Sir William Young condemned the *Nickerson*, because it was fishing or preparing to fish within the prescribed limits. In the St. John case the libel was framed expressly for buying bait within the harbour, with the intention of fishing. It was shown that the fisherman had purchased bait, but evidence that he went in there with the intention of fishing was wanting.

MR. THOMSON :—The question is, whether there has ever been a conviction of an American vessel for taking bait. I call your attention to the fact that the *Java*, *Independence*, *Magniola*, and *Hart*, were convicted in 1839 of being within the prescribed limits, and cleaning fish on deck. In 1840 the *Papineau*, *Alms*, and *Mary*, were seized and sold for purchasing bait on shore.

MR. TRESCOTT :—The judgment went by default, there was no defence made.

THURSDAY, Sept. 6.

The Conference met.

Argument resumed.

Mr. DANA—Mr. Foster will state the results of inquiries made respecting the condemnation of American vessels.

Mr. FOSTER—The substance of the facts, as we understand them, will be found in a despatch from Judge Jackson to Hon. Bancroft Davis, dated March 11, 1871, which is as follows:—

UNITED STATES CONSULATE AT HALIFAX, NOVA SCOTIA,
11th March, 1871.

HON. J. C. BANCROFT DAVIS,
Assistant Secretary of State, Washington, D. C.

SIR,—

I have the honor to inform you that, after examination and enquiry, I have not been able to find a single adjudicated case in this Province which can be cited as legal authority, arising under the Treaty of 1818, which declares the right, either under the Treaty or the Statutes enacted for its enforcement, to confiscate American fishing vessels for purchasing supplies in colonial ports.

The vessels referred to in a pamphlet (page 12) published at Ottawa, under the direction of the Canadian Minister of Marine and Fisheries, entitled "A Review of President Grant's Message," as having been seized for a violation of the Fishery Laws, namely, the schooners Java, Independence, Magnolia, and Hart, in 1839, and schooners Papineau and Mary in 1840, were condemned by the Vice-Admiralty Court in *default of the appearance* of defendants upon exparte *affidavits*.

From the small sums for which the vessels sold, it is not improbable that they were bought in for the benefit of the owners.

Although it is stated in the affidavits on the files of the Court that the Masters of some of the vessels had purchased bait, yet it is specially noticeable that the charge made against the schooners Java, Independence, Magnolia, and Hart, by the Seizing Officer, Captain J. W. E. Darby, as the ground of such seizure, was in the following language:—"The deponent saith that he believes the *the sole object of the Masters of the said vessels was to procure fish*, and that they were, at the time of their seizure, preparing to fish."

In the case of the schooners Papineau and Mary, seized in June, 1840, for a violation of the Fishery Laws, the same seizing officer set forth in his affidavit, as the grounds of the seizure of these vessels, that "the deponent verily beleived that the said vessels were frequenting the coast of this Province *for the purpose of fishing there* and for *no other purpose whatever*"

The seizure and condemnation of these several vessels—four in 1839 and two in 1840—cited in the pamphlet referred to, in support of the unusual and extreme measures of last summer, in relation to American fishing vessels, afford, as will be seen from the facts here stated—no legal justification for such measures, and cannot be regarded in any respect, authoritative adjudications upon the points in controversy between the United States and Great Britain respecting the fisheries.

I have the honor to be, Sir,

Your obedient servant,

Sgd. M. M. JACKSON,
U. S. Consul.

Referring to the paper which was put in by the British counsel, on page 12 of Document No. 31, there is a memorandum of all the vessels seized and condemned by the Vice-Admiralty Court of Prince Edward Island, and it is stated at the end of each case: "I cannot find from any papers in this case, at present in the registry of this Court, that this vessel was ever interfered with by Government officers for trans-shipping fish or purchasing supplies." As to the New Brunswick cases, of which there is a statement at the top of page 10, document 21, I am not able to ascertain because we have not access to the papers. There were not many cases in New Brunswick; seven between 1822 and 1852. There is also at the foot of page 6, document No. 15, a record of the cases condemned at Halifax. Mr. J. S. D. Thompson has made a memorandum of each of those cases, and there is no case where a vessel was forfeited for buying bait or other supplies, or for trans-shipping cargo. The statement of 59 George III is the same in substance with the Colonial statute. By that statute vessels are libelled and forfeited in the Admiralty Court for no other offence than that of being found fishing, or having fish on board, or preparing to fish. The fourth article imposes a penalty of £200, recoverable by action at common law on a fisherman refusing to depart from the territorial waters when warned by the party authorized to do so. Among the Halifax cases it will appear that some are marked as restored, and two others at least were restored upon payment of the expenses, namely, the *Shetland* and *Eliza*. The *Washington* was paid for; and in no instance, as I am informed, was there a condemnation for anything except fishing or preparing to fish; and acts indicative of preparing to fish are always shown to be some acts of immediate preparation, like having bait ready on board. Then we come in 1871 to Sir William Young's decision, where he forfeited a vessel for buying bait, holding that buying bait was a preparation to fish. That was the case of the *Nickerson*. The vessel was seized in 1871, and forfeited the following year. About the same time a similar case was tried in New Brunswick by Judge Hazen, who held the reverse of Sir William Young's decision. Judge Hazen held that the purchase of bait, unless it was proved to have been purchased to use in illegal fishing, was not a preparation to fish illegally, and that a vessel that came into Halifax or St. John to buy bait to fish on the Banks of Newfoundland, was not violating any Treaty. It was always felt by the United States that the distinguished Judge, Sir William Young, had overlooked the fact that in the case before him the vessel that bought the bait did not buy it to fish for mackerel in territorial waters, but on the coast of Newfoundland. There is that one authority for holding that it was contrary to law to come in here for cod and buy bait for outside fishing, and so far as I am aware, there are only these two cases on the question, and opinions are equally balanced.

MR. THOMSON—In the case of the *White Fawn*, tried by Judge Hazen, the vessel was libelled for taking bait in our waters, with the intention of fish there. She was not charged with the offence against the Treaty of purchasing bait within three miles of the shore, but she was distinctly charged with obtaining bait with the view of fishing there, and Judge Hazen held—and I apprehend properly held—for he is an able lawyer and sound judge, that the evidence did not support the allegation. The evidence probably showed that the intention was to take the vessel and fish on the Banks of Newfoundland, where it had no doubt a right to fish, and therefore the case failed, because while the offence was complete, the allegation did not support it.

Mr. FOSTER asked for further explanations.

Mr. THOMSON—What I say is this: that while this was a distinct offence under the Treaty, and while the statute expressly covered that offence, and while a vessel could be libelled and condemned for buying bait on our shores, yet the framer of the libel had been pleased to frame it not simply for the offence of buying bait, which he might have done and had the vessel condemned, but for buying bait with the intention to fish in these waters, and he failed to prove the latter allegation.

Mr. FOSTER: Our answer to that contention would be that there is no statute. There is a statute to cover the cases of vessels fishing and preparing to fish.

"II. And be it further enacted, That from and after the passing of this Act it shall not be lawful for any Person or Persons, not being a natural born Subject of His Majesty, in any Foreign Ship, Vessel or Boat, nor for any person in any Ship, Vessel or Boat, other than such as shall be navigated according to the Laws of the United Kingdom of Great Britain and Ireland, to fish for, or to

take, dry or cure any Fish of any kind whatever, within three marine miles of any Coasts, Bays, Creeks or Harbours whatever, in any part of His Majesty's Dominions in America, not included within the limits specified and described in the First Article of said Convention, and hereinbefore recited; and that if any such Foreign Ship, Vessel or Boat or any Persons on board thereof, shall be found fishing, or to have been fishing, or preparing to fish within such distance of such Coasts, Bays, Creeks or Harbours within such parts of His Majesty's Dominions in America out of the said limits as aforesaid, all such Ships, Vessels, and Boats, together with their cargoes, and all Guns, Ammunition, Tackle, Apparel, Furniture and Stores, shall be forfeited."

To come within the statute the fisherman must either be fishing or preparing to fish within three miles of the coast.

Mr. THOMSON: It is a question of construction. It is preparing to fish or fishing within these waters. The preparing to fish is a complete offence in itself, and it is by no means necessary to fish in these waters.

Mr. FOSTER: The expression is "within that distance." You think the "preparing to fish" is preparing to fish within the limits or anywhere.

SIR ALEXANDER GALT: The reason I made the inquiry was with regard to the argument of the learned counsel (Mr. Dana) who was holding, as I understood him, that no interference had been made upon these fishing grounds with American fishermen. It was because I was under the impression that the official correspondence would show that vessels had been seized and condemned that I made the inquiry.

Mr. DANA: After the long time given me yesterday, I feel I ought to do no more than to give a summary of the points upon which I suppose this question will be determined. In the first place, then, this tribunal, in computing compensation, can only take into consideration the value of what is accorded to the United States by the Treaty of 1871, and by the 18th section of that Treaty. Then the Tribunal shall take into consideration the value of what is accorded to Great Britain by the 19th and 21st sections, debiting the United States with the value of what she gains under the 18th section and crediting the United States with what she accords under the 19th and 21st sections. The Court will perceive how very close and fine this arrangement was made.

This Tribunal is not to ascertain what the United States possessed by Treaty or otherwise in 1870, and charge us for what we have gained in addition thereto, by whatever means, or to draw general inferences from the whole Treaty, what we may have got and Great Britain may have given; but your Honors are to assess the value of specific liberties and rights accorded by the 18th Section, and charge them to the United States; and assess the pecuniary value of certain specific rights and privileges accorded in the 19th and 21st Sections, and credit us with them.

Moreover, it must be something accorded to us in addition to what we had under the Treaty of 1818. Under that Treaty, the United States had the right to fish, and to land and dry nets on certain portions of the coast of Newfoundland; on the shores of the Magdalene Islands; on the coasts, bays, harbors and creeks in certain parts of Labrador, and to land and cure fish in any of the bays, &c. in Nefoundland and Labrador. The Treaty of 1871 simply gives a territorial extension to those rights. It adds no new rights either in terms or by implication. No doubt this Tribunal will be exceedingly careful not to assess compensation for any right or privilege which is not clearly so given, and which, after compensation has been assessed, may be matter of dispute between the two Countries.

If there has been a want of clearness as to what has been conceded to Great Britain or conceded to us, neither side can expect to obtain compensation for matters left in doubt. No Treaty ever made between the United States and Great Britain on the subject of the fisheries has noticed the purchasing of anything by the fishermen, except it be the Treaty of 1818, which says American fishermen shall have the right to *purchase* wood and *procure* water. I suppose the reason why the clause was inserted in that form was to show it was not intended that we should have the right to cut wood. If your Honors will examine the Treaties from that of 1783 to that of 1871, you will find they never had for their scope or purpose any provisions regarding trading or purchasing, but related solely to the right to fish, and to use the shores for the purpose of drying and curing. In framing the Treaty of 1871 care was taken to name the rights. It gave the right to fish. What kind of fish? Not shellfish, nor salmon, nor river fish. Care is taken also to describe for what purpose American fishermen may land. It is to dry nets, cure and dry fish. There is no reference to purchasing anything except in the Treaty of 1818, in regard to purchasing wood, and that subject has been intentionally left out of all Treaties, or it would be more accurate to say that to include such matters in a Treaty was never considered as apposite. The Treaty of 1871, as I have said, grants a territorial extension of specified, long-existing rights, and the only question in dispute between the United States and Great Britain has always been as to the territorial extent of the right of fishing.

The question arose, can we fish on the Grand Banks? England said "No," but she gave up that contention in 1783. Then England said that American fishermen could not fish within three miles of its coasts from a line drawn from headland to headland. Dispute arose again as to the correctness of that territorial designation, but the subject matter was the drawing of fish from the sea At last it became settled that we should not fish within the three miles unless with the consent of Great Britain expressed through a Treaty or otherwise. Then occurred the question as to what constitutes three miles—three miles from what? Always the dispute was as to the territorial extent of a specified right, the right to fish, and all the treaties were made for that purpose. Incidentally there was always brought in the question of places, not being private property, where the fishermen could land for the purpose of drying nets and curing and drying fish. These were the subject matters of every Treaty, the occasion of every dispute, and these were all that were settled by the Treaty of Washington. Great Britain gave to the United States an extended territoriality, up to the very banks, up to high water mark everywhere; and the United States gave the same extended territoriality to Great Britain, to fish in the United States northward of 39th parallel. Then there were certain extensions of territory for the curing and drying of fish. By Article 21 the United States gives to Great Britain, and she accords to us, the right of free trade, reciprocity, in fish and fish oil. That is purely a commercial clause. It might have been made a Treaty by itself. It has no connection with fishing or the curing and drying of fish. When your Honors come to estimate the pecuniary valuation of the concessions on each side, we contend that the pecuniary value of that concession made by the United States to Great Britain, which is purely fiscal, is very great.

It is conceded by the British counsel, I believe, that those rights of which I speak were not given in the terms of the Treaty of Washington, and cannot be found there. The only argument on the side of the Crown—and I think I state it fairly and with its full force—is this: "You have those rights now; you did not have them before the Treaty, therefore you must have got them by the Treaty. You did not have them until 1854, and you possessed them from 8154 to 1866 under the Reciprocity Treaty. You did not have them during the interval. They were revived in 1871, and you have had them since. Their history shows they must have come by Treaty." Instead of the word "have," I would substitute the word "exercise," and say we exercised those rights. We exercised them long before that period. Evidence has been adduced before the Commission which has shown that those rights were exercised by the United States entirely irrespective of Treaties.

Before the Treaty of 1854, when we had nothing but the Treaty of 1818 to stand upon, which as a Treaty certainly did not give us any of those rights, we exercised them. We exercised them also irrespective of and never by virtue of the Treaty of 1854. We exercised them in the interval between 1866 and 1871, as we are exercising them now. The Court will not be able to find any connection between the Treaties and the exercise of those rights. They have never been exercised the more or the less by reason of any Treaties. It is not incumbent upon us to show why we are in the exercise of those rights. It is rather a speculative inquiry on the part of the British counsel as to where we got them, or whether we have them at all. Suppose I were to concede that we had no right to buy bait or ice or supplies, or trans-ship cargoes anywhere on these coasts, certainly that ends the argument, because we cannot be called upon to pay for something which we have not got. If the proper construction of the Treaty of 1818 is that fishermen have no right as fishermen and by the general law, irrespective of the consent of the Crown, to buy bait, ice, and supplies, and trans-ship cargoes in British dominions, then I concede that as regards American fishermen fishing within the three-mile limit, we have not those rights. Why are we, then, in the exercise of them? In that case, by the concession of the Crown. There is, however, no statute against fishermen buying bait, obtaining supplies, bartering, or trans-shipping fish, if they comply with the fiscal regulations of the Government regarding all trade and commerce. If a fisherman has violated no statute or rule respecting trade, commerce, and navigation in this realm, there is no statute which can condemn him, because he is a fisherman, for having bought bait and supplies and trans-shipped cargoes. So long as there is no statute prohibiting it, our fishermen have gone on exercising that privilege, not believing they were excluded from it by the Treaty of 1818, whether they were correct or not. It is in that view only that the facts regarding seizures are of any importance; but yet we may make our answer at once and say, whether we have the right to do those things or not, we do not pretend that it was given to us by the Treaty of 1871. Your Honors will not be able to find it included under Article 18 of that Treaty. But it is ever satisfactory to be able to account for all the surrounding circumstances of any question. It seems there was a statute passed in 1819, 59 George III, generally against foreign vessels which shall be found fishing or be found having fished, or be found preparing to fish within the prescribed limits. The statute reaches before and after the act. It is not necessary that fishermen should be taken in the act of fishing. That would be a statute very difficult to interpret and very easy to evade which required that fishermen should be taken in the act of fishing. So the statute says, if a foreign fisherman is found having fished, or in the act of fishing, or preparing for the act of fishing within the prescribed waters, he is to be treated as an offender. We see no objection to that statute. The preparing to fish is a step in the process of fishing.

But the true construction of that statute is of very little importance. Yet certainly it must be meant that the act prepared for must have been illegal, for it cannot be supposed for one moment that Great Britain intended to say that no foreign vessels, French or American, should come in to the Provinces and buy bait for the purpose of fishing off the Grand Banks or the coast of Greenland. If this Province got a reputation for having some bait which certain kinds of fish off Greenland swallow with eagerness, and a Danish vessel should come here and buy it in the market, complying with all the regulations of the market and fiscal laws and then set sail for Greenland, surely that vessel could not be seized and condemned.

I have put the argument of the counsel for the Crown as strong as I could put it; they say you exercise that right now and you did not exercise it before. Our answer is simply that we have always exercised it and that we have done it irrespective of the Treaty of 1854 or of the Treaty of 1878. We have never been interfered with in exercising it. There is no case of condemnation of a vessel for exercising that right, and if there had been a good many, it would have made no difference to your Honors, because the judgments would have been simply the provincial interpretation of the Treaty given *ex parte*, and it is certain that no act of Great Britain has ever sanctioned the position that the United States had not this right, irrespective of Treaties. Then, as has been suggested by my colleagues, and I follow the suggestion merely, the whole correspondence between the Governor General and the head of the Colonial Office, and between the United States Government and the British Government, shows that Great Britain never intended that American fishermen should be excluded from the use of those liberties or rights, whatever be our claim to them or whether we had them as of right or not. These privileges are those which fishermen have always exercised, and it has only been as population has increased and fiscal laws have become important and the inhabitants have become more apprehensive in regard to vessels hovering about the coast, that nations have enacted laws restricting persons in the exercise of those rights. The learned counsel in support of his argument cited *Phillimore, I*, page 224, *Kent's Commentaries*, vol. 1, pages 32 to 36; and *Wheaton's Int. Law* (Dana's ed.), sections 167. 169 and 170.

I have read these passages, Mr. Dana continued, not that they distinctly assert or indeed that they take up the very question I am presenting before this Tribunal; but they show the general principles upon which the great writers on International law, the Governments themselves, and the people have acted with regard to fishermen and their right especially of supplying their wants from time to time, in the ports and harbors of all countries. These rights have been recognized as incidental to the nature of man and the nature of the earth he occupies. However boastful we may be of ourselves, we are such feeble creatures that we cannot subsist many hours without food, shelter and clothing, and fishermen and sailors must get these where they can. Laws respecting pure commerce, that is the right to go with a cargo to sell and turn it into the great body of the property of the country, rest on other grounds; but the right to exercise the industry by which men live, as fishermen do by fishing, should be extended as far as possible, and originally had no limit. It passed within the category of those imperfect rights such as innocent transit and innocent use of waters. These rights have been exercised for the reasons there assigned, which are deeper as well as older than all Treaties, Conventions, and Statutes.

As the Treaties stand, fishing is an innocent use of all the waters of the Dominion. Great Britain has never prohibited the exercise of those rights. She may find it expedient to do so, or the policy of the Dominion or perhaps some excited political feeling or hostility against the United States for some wrong, real or supposed, may lead it to do so; but it has never been done, and that is the reason why we have always been in the exercise of those rights. When the Provincial Government undertook to exclude us from those privileges, they were taken to account at once, and their action was stopped by the British Government.

We are now brought to the last question, and that is, did we renounce those rights, the right to purchase bait, ice, supplies, and to trans-ship, by clauses in the Treaty of 1818? For the purpose of this argument, I am perfectly indifferent which way your Honors shall construe these clauses. The Government of the United States does not interpret them as a renunciation of these rights. I do not believe, I cannot believe, that the Treaty had any such reference. But it is certain that nothing therein refers to the purchasing of cargoes of frozen herring, which has been often referred to before the Commission. That is a purely mercantile enterprise. A Boston vessel comes to this coast with a manifest, and equipped in every respect as a trader, though a fisherman at all other times, and after satisfying the Custom House authorities, she purchases a cargo of frozen herring, and proceeds with them to the Boston market. That is a mercantile enterprize; it is not anything that is renounced by fishermen, as such, in the exercise of his rights to fish. Suppose a merchant at Newfoundland should take a fishing vessel not employed at that time, and load her with frozen herring, and send her to Boston, where, after she had been entered at the Custom House, and satisfied all the fiscal regulations, her cargo would be sold. Would any one pretend that her

right to do that was derived from the Treaty giving a right to fish within three miles of the American coast, and land and dry their nets? Certainly not. Therefore we may cut off at once all reference to that. If your Honors shall say that by the Treaty of 1818 the United States did not renounce those rights, and did not notice them one way or another, that is sufficient for us. If your Honors shall decide that so far as fishing within three miles is concerned, the United States renounced the right to purchase anything except wood, then we submit that the right of purchasing anything else has not been granted to us by the Treaty of 1871, and therefore we cannot be called upon to make any compensation.

We are satisfied that the United States are permitted by the British Government to do those acts, whether it be from comity, from regard to the necessities of fishermen, from policy, or from some other reason, I know not, and so long as we are not disturbed, we are content. If we are disturbed, the question will then arise, not before this Tribunal, but between the two nations, whether we are properly disturbed by Great Britain; and if we should come to the conclusion on both sides, that there being a dispute on that subject which should be properly settled, then it is hoped that the Governments will find no difficulty in settling it; but this Tribunal will discharge its entire duty when it declares that under Article 18 of the Washington Treaty, no such rights or privileges are conceded to the United States.

Mr. THOMSON—I do not propose to answer Mr. Dana's argument at present, but I will call the attention of the Commission to the fact that it was an original argument and not a reply. In view of the fact that there are a number of witnesses waiting to be examined and the short time the Commission has to sit before it takes an adjournment, I do not propose now to offer any observations in reply to the learned counsel, but no doubt before the case is through, previous to that time, I will take occasion to answer the arguments.

Mr. DANA said the announcement of the learned counsel seemed as if he assumed the right to make an indefinite adjournment of the hearing, and at some future day to reply to the arguments.

Mr. THOMSON said he did not desire to interfere with an immediate decision, and his remarks were made simply that Mr. Dana's argument might not be considered as having been passed on the part of the counsel for the Crown *sub silentio*.

Mr. FOSTER asked for an early decision on the motion.

The Commission retired to deliberate, and on their return, the President read the following Decision:

"The Commission having considered the motion submitted by the Agent of the United States at the Conference held on the 1st "instant, decide:

"That it is not within the competence of this Tribunal to award compensation for commercial intercourse between the two Coun- "tries, nor for the purchasing Bait, Ice, Supplies, &c., &c., nor for the permission to trans-ship Cargoes in British waters."

SIR ALEXANDER T. GALT—Mr. President, as this Commission has been unanimous on this question, I desire with the permission of my colleagues, but without committing them to the same line of argument which has convinced myself, to state the grounds upon which I feel it my duty to acquiesce in the decision. I listened with very great pleasure to the extremely able arguments made on both sides, and I find that the effect of the motion, and of the argument which has been given upon it, is to limit the power of this tribunal to certain specified points. This definition is undoubtedly important in its consequences. It eliminates from the consideration of the Commission an important part of the case submitted on behalf of Her Majesty's Government: and this is undoubtedly the case so far as this part forms a direct claim for compensation; but at the same time, it has the further important effect that it defines and limits the rights conceded to the citizens of the United States under the Treaty of Washington. Now, I have not been insensible to the importance of the considerations that have been addressed to us by the counsel for the Crown in reference to the inconvenience that may arise from the decision at which this tribunal has arrived. I can foresee that, under certain circumstances, those inconveniences may become exceedingly great, but I cannot resist the position taken by the counsel of the United States in stating that if such inconveniences arise they are matters which properly fall within the control and judgment of the two Governments and not within that of this Commission. On the other hand, I cannot fail to see that while this is admitted a remote and contingent inconvenience, a very important difficulty, and one of a very serious character, would arise if from any cause this Commission were to exceed the powers which are given to the Commissioners under the Treaty of Washington.

The difficulty would at once arise, that any award whatever which it made, be it good or bad, be it favorable to the one party or to the other, would have been vitiated by our having acted *ultra vires*. I do not find either that there would be any ready escape from such a position. The Treaty affords no machinery by which this question in regard to the fisheries can be adjudicated upon, if this Commission should from any unfortunate cause be allowed to lapse; therefore with regard to the two inconveniences in question the one which strikes at the root of the whole Treaty is that which ought to weigh with me, if I were placed in such a position as to be obliged to weigh such inconveniences; but as I shall state before I conclude, there are other and stronger considerations present to my mind. I have in common with my colleagues entered into a solemn obligation to decide judicially upon all questions coming before this Tribunal; and I feel it incumbent upon me therefore to give every possible weight, every due weight to whatever may be said on either side, and I certainly have hitherto endeavored to do so, and I have done so in this case. I shall endeavor to pursue the same course, acting under the same considerations in the future. At the same time, I confess to a great feeling of disappointment that such an important part of the question connected with the settlement of the fisheries dispute should apparently be removed, or partly removed, from the possible consideration and adjudication of this tribunal, and I am bound to say that my conviction of the intention of the parties to the Treaty of Washington is that this was not their purpose at the time.

I have listened with very great attention to the arguments presented on behalf of the United States, but I do not think that they have correctly stated the position of the two parties at the time when the Treaty of Washington was entered into. The history of this case begins, as has been stated by counsel, as far back as 1783, but by common consent the Convention of 1818 is the Treaty by which the fishery rights of the two countries have subsisted. Under the Convention of 1818 certain things were forbidden to the United States fishermen, and the United States renounced the right to do anything except what they were permitted to do by the words of that Treaty. They renounced for ever any liberty of taking, drying or curing fish, etc., "provided that the American fishermen shall be permitted to enter the said bays or harbors for the purpose of shelter, and of repairing damages therein, of purchasing wood and obtaining water, and for no other purpose whatever." By the Imperial Act 59, George the Third, Chapter 38, and by several colonial statutes, restrictions and definitions were imposed or were established with regard to offences arising from infringements of those privileges conferred upon American citizens, though it has not been shown that the seizures which took place prior to 1854 were for trading or for obtaining supplies, or for any other benefit referred to in the motion, still it is undoubted that arising out of this legislation great irritation arose between the two countries, and this resulted in the adoption of what is known as the Reciprocity Treaty in 1854. That the Reciprocity Treaty was understood to have removed all those restrictions is unquestionably shown to be the case to my mind by the action taken by Great Britain and the Colonies when the Treaty came into force.

Immediately afterward all statutes, which had operated against the American fishermen, were suspended, and the greatest possible freedom of intercourse existed during the continuation of that Treaty. At the termination of the Reciprocity Treaty, and in support of the view that it was supposed to have given those privileges, we find the whole of these enactments revived, and we also find that subsequently more stringent statutes were passed by the Dominion of Canada in this relation. Now, it is important in the history of this case to consider what effect was produced by those statutes; and we find in a most important public document, that is the annual message of President Grant to Congress in 1870, that this legislation on the part of the colonies, was made the subject of the gravest possible complaint. The President states that:

"The course pursued by the Canadian authorities towards the fishermen of the United States during the last season has not "been marked by a friendly feeling. By the first article of the Convention of 1818, between Great Britain and the United "States, it was agreed that the inhabitants of the United States should have for ever, in common with British subjects, the "right of taking fish in certain waters therein defined. In the waters not included in the limits named in the Convention, "within three miles of parts of the British coast, it has been the custom for twenty years to give to intruding fishermen of "the United States a reasonable warning of their violation of the technical rights of Great Britain. The Imperial Government "is understood to have delegated the whole, or a share of its jurisdiction or control of these inshore fishery grounds to the "Colonial Authority, known as the Dominion of Canada, and this semi-independent but irresponsible agent, has exercised its "delegated powers in an unfriendly way—vessels have been seized without notice or warning, in violation of the custom previously prevailing, and have been taken into the Colonial ports, their voyages broken up, and the vessels condemned. There "is reason to believe that this unfriendly and vexatious treatment was designed to bear harshly upon the hardy fishermen of "the United States, with a view to political effect upon the Government."

That is not all: the President went further, and made a second complaint in this language:—

"The Statutes of the Dominion of Canada assume a still broader and more untenable jurisdiction over the vessels of the United States; they authorize officers or persons to bring vessels hovering within three marine miles of any of the coasts, bays, "creeks, or harbors of Canada into port, to search the cargo, to examine the master on oath touching the cargo and voyage, "and to inflict upon him a heavy pecuniary penalty if true answers are not given, and if such a vessel is found preparing to "fish within three marine miles of any of such coasts, bays, creeks, or harbors, without a license, or after the expiration of "the period named in the last license granted to it, they provide that the vessel with her tackle, etc., shall be forfeited. It is "not known that any condemnations have been made under this Statute. Should the authorities of Canada attempt to "enforce it, it will become my duty to take such steps as may be necessary to protect the rights of the citizens of the "United States."

The President further goes on to say:—

"It has been claimed by Her Majesty's officials that the fishing vessels of the United States have no right to enter the "open ports of the British possessions in North America, except for the purpose of shelter and repairing damages, of purchasing wood and obtaining water, that they have no right to enter at the British Custom houses, or to trade there, except for "the purchase of wood or water, and that they must depart within twenty-four hours after notice to leave. It is not known "that any seizure of a fishing vessel carrying the flag of the United States has been made under this claim."

These were complaints which were made in the annual message of President Grant in 1870; and he concludes by suggesting to Congress the course that should be taken in reference to this matter, in the following words:—

"Anticipating that an attempt may possibly be made by the Canadian authorities in the coming season to repeat their unneighborly acts towards our fishermen, I recommend you to confer upon the Executive the power to suspend by proclamation "the operation of the laws authorising the transit of goods, wares and merchandise in bond across the territory of the United "States to Canada; and further, should such an extreme measure become necessary, to suspend the operation of any laws whereby the vessels of the Dominion of Canada are permitted to enter the waters of the United States."

It is, therefore, plainly evident that disagreements were in existence at that time with regard to the fisheries, and that the fear that they would produce serious complications between the two countries, was present in the minds of the President and Government of the United States. Well, the history of the case goes on to show that these complaints made by President Grant were the foundation of the negotiations which led to the adoption of the Washington Treaty; and it is important to observe, on examining that Treaty, that the means whereby President Grant proposed to Congress to insure the repeal of these so-called unfriendly acts on the part of Canada, Canada, by repealing the Bonded System, and by putting on other restrictions, which President Grant proposed to apply to that particular purpose, are, by the Clauses of the Washington Treaty, dealt with for the term of that Treaty in another way, and for other considerations; therefore, to my mind, it leaves me in this position, in endeavoring to interpret the intentions of the parties to the Washington Treaty—that it must necessarily have been supposed that, as in the case of the Reciprocity Treaty, so in the case of the Washington Treaty, the rights of traffic and of obtaining bait and supplies were conferred, being incidental to the fishing privilege. It could scarcely be otherwise, because in the case of the Reciprocity Treaty commercial advantages were the compensation which the United States offered to Great Britain for the concession of the privilege of fishing in her waters, while by the Washington Treaty, compensation in money, exclusively of the free admission of fish, is to be made the measure of the difference in value; therefore I quite believe that the intention of the parties to the Treaty was to direct this tribunal to consider all the points relating to the fisheries, which have been set forth in the British case. But I am now met by the most authoritative statement, as to what were the intentions of the parties to the Treaty. There can be no stronger or better evidence of what the United States proposed to acquire under the Washington Treaty, than the authoritative statement which has been made by their Agent before us here, and by their counsel. We are now distinctly told that it was not the intention of the United States, in any way, by that Treaty, to provide for the continuation of these incidental privileges, and that the United States are pre-

pared to take the whole responsibility, and to run all the risk of the re-enactment of the vexatious statutes, to which reference has been made.

I cannot resist the argument that has been put before me, in reference to the true, rigid and strict interpretation of the clauses of the Treaty of Washington. I therefore cannot escape by any known rule concerning the interpretation of treaties from the conclusion that the contention offered by the agent of the United States must be acquiesced in.

There is no escape from it. The responsibility is accepted by and must rest upon those who appeal to the strict words of the Treaty as their justification. I therefore, while I regret that this tribunal does not find itself in a position to give full consideration to all the points that may be brought up on behalf of the Crown, as proof of the advantages which the United States derive from their admission to fish in British waters, still feel myself, under the obligation which I have incurred, required to assent to the decision which has been communicated to the Agents of the two Governments by the President of this tribunal.

No. IV.

CLOSING ARGUMENT OF HON. DWIGHT FOSTER,

ON BEHALF OF THE UNITED STATES.

Gentlemen of the Commission:—It becomes my duty to open the discussion of this voluminous mass of evidence, which has occupied your attention through so many weeks. It is a satisfaction to know that many topics, as to which numerous witnesses testified, and over which much time has been consumed, have been eliminated from the investigation, so that they need not occupy the time of counsel in argument, as they are sure not to give any trouble to the Commissioners in arriving at their verdict. The decision of the Commission, made on the 6th of September, by which it was held not to be competent for this tribunal to award compensation for commercial intercourse between the two countries, or for purchasing bait, ice, supplies, etc., or for permission to tranship cargoes in British waters, is based upon the principle—the obvious principle, perhaps I may properly say—that no award can be made by this tribunal against the United States, except for rights which they acquire under the Treaty; so that, for the period of twelve years, they belong to our citizens, and cannot be taken from them. For advantages conferrred by the Treaty, as vested rights, you are empowered to make an award, and for nothing else.

The question before you is whether the privileges accorded the citizens of the United States by the Treaty of Washington are of greater value than those accorded to the subjects of Her Britannic Majesty, and if so, how much is the difference, in money? The concessions made by each government to the other in the Treaty were freely and voluntarily made. If it should turn out (as I do not suppose it will), that in any respect the making of those concessions has been injurious to the subjects of Her Majesty, you are not on that account to render an award of damages against the United States. The two governments decided that they would grant certain privileges to the citizens of one and the subjects of the other. Whether those privileges may be detrimental to the party by whom they have been conceded is no concern of ours. That was disposed of when the Treaty was made. Our case before this tribunal is a case, not of damages, but of an adjustment of equivalents between concessions freely made on the one side and on the other. It follows from this consideration, gentlemen, that all that part of the testimony which has been devoted to showing that possibly, under certain circumstances, American fishermen, either in the exercise of their Treaty rights, or in trespassing beyond their rights, may have done injury to the fishing grounds, or to the people of the Provinces, is wholly aside from the subject-matter submitted for your decision. The question whether throwing over gurry hurts fishing grounds,—the question whether vessels lee-bow boats,—and all matters of that sort, which at an early period of the investigation loomed up occasionally, as if they might have some importance, may be dismissed from our minds; for, whether the claims made in that respect are well founded or not, no authority has been vested in this tribunal to make an award based upon any such grounds. That which you have been empowered to decide is the question, to what extent the citizens of the United States are gainers by having, for the term of twelve years, liberty to take fish on the shores and coasts of Her Majesty's dominions without being restricted to any distance from the land. It is the right of inshore fishing. In other words, the removal of a restriction by which our fishermen were forbidden to come within three miles of the shore for fishing purposes; and that is all. No rights to do anything upon the land are conferred upon the citizens of the United States, under this Treaty, with the single exception of the right to dry nets and cure fish on the shores of the Magdalen Islands, if we did not possess that before. No right to land for the purpose of seining from the shore; no right to the "strand fishery," as it has been called; no right to do anything except, water-borne on our vessels, to go within the limits which had been previously forbidden.

When I commenced the investigation of this question, I supposed that it was probable that an important question of international law would turn out to be involved in it, relative, of course, to the so-called headland question, which has been the subject of so much discussion between the two governments for a long series of years; but the evidence that has been introduced renders this question not of the slightest importance, and inasmuch as it is a question which you are not empowered, except incidentally, to decide, a question eminently proper to be passed upon between the governments directly, I presume you will rejoice with me in finding that it is not practically before us, and that we need not trouble ourselves concerning it. If it had appeared in this case that there was fishing carried on to any appreciable extent within the large bays, more than six miles wide at the headlands, and at a distance of more than three miles from the contour of the shores of those bays, the United States would have contended that their citizens, in common with all the rest of mankind, were entitled to fish in such great bodies of water as long as they kept themselves more than three miles from the shore. In short, they would have contended, as it has been contended in the brief filed in this case, that where the bays are more than six miles in width, from headland to headland, they are to be treated in this respect, for fishing purposes, as parts of the open sea; but the evidence, as I said before, has eliminated all that matter from the inquiry. The only bodies of water as to which any such question can arise are, in the first place, the Bay of Fundy. Now, the right of American fishermen to enter and fish in that bay was decided by arbitration in the case of the schooner *Washington*, and Her Majesty's government have uniformly acquiesced in that decision. So, as to that body of water, the rights of the citizens of the United States must be regarded as *res adjudicata*. In addition, however, it turns out, that within the body of the Bay of Fundy there has not been any fishing more than three miles from the shore for a period of many years. One of the British witnesses said that it was forty years since the mackerel fishery ceased in the Bay of Fundy. At all events, there is no evidence in this case of fishing of any description in the body of the Bay of Fundy more than three miles from the shore, and this fact, in addition to the decision in the *Washington* case, disposes of that.

The next body of water is the Bay of Miramichi; as to which it will turn out by an inspection of the map on which the Commissioners, appointed under the Reciprocity Treaty, marked out the lines reserved from free

fishing, on the ground that they were mouths of rivers, that the mouth of the River Miramichi comes almost down to the headlands of the bay You will remember that the report of the Commission on the Reciprocity Treaty is referred to in the Treaty of Washington, and that the same places excluded by their decision remain excluded now. What is left? The narrow space below the point marked out as the mouth of the River Miramichi, and within the headlands of the bay, is so small that there can be no fishing there of any consequence, and no evidence of any fishing there at all has been introduced. So far as the Bay of Miramichi goes, therefore, I cannot see that the headland question need trouble you at all.

Then comes the Bay of Chaleurs, and in the Bay of Chaleurs, whatever fishing has been found to exist seems to have been within three miles of the shores of the bay, in the body of the Bay of Chaleurs. I am not aware of any evidence of fishing, and it is very curious that this Bay of Chaleurs, about which there has been so much controversy heretofore, can be so summarily dismissed from the present investigation. I suppose that a great deal of factitious importance has been given to the Bay of Chaleurs from the custom among fishermen, and almost universal a generation ago, of which we have heard so much, to speak of the whole of the Gulf of St. Lawrence by that term. Over and over again, and particularly among the older witnesses, we have noticed that when they spoke of going to the Gulf of St. Lawrence, they spoke of it by the term "Bay of Chaleurs," but in the Bay of Chaleurs proper, in the body of the bay, I cannot find any evidence of any fishing at all. I think, therefore, that the Bay of Chaleurs may be dismissed from our consideration.

There are two or three other bodies of water as to which a possible theoretical question may be raised, but their names have not been introduced into the testimony on this occasion from first to last. The headland question, therefore, gentlemen, I believe may be dismissed as, for the purpose of this inquiry, wholly unimportant, and although I am not authorized to speak for my friend, the British agent, and to say that he concurs with me, yet I shall be very much surprised if I find any different views from those that I have expressed taken on the other side. If in argument other views should be brought forward, or if it should seem to your Honors, in considering the subject, that the question has an importance which it has not in my view, then I can only refer you to the brief that has been filed, and insist upon the principles which the United States have heretofore maintained on that subject. For the present, I congratulate you, as I do myself, that no grave and vexed question of international law need trouble you in coming to a conclusion.

I think it is necessary to go somewhat, yet briefly, into the historical aspects of the fishery question, in order to see whether that which has been the subject of diplomatic controversy and of public feeling in the past, is really the same thing which we have under discussion to-day. The question has been asked, and asked with some earnestness, by my friends on the other side, "If the inshore fisheries have the little importance which you say they have, why do your fishermen go to the Gulf of St. Lawrence at all?" And again it has been asked, "If the inshore fisheries are of such insignificant consequence, why is it that the fishermen and people of the United States have always manifested such a feverish anxiety on the subject?" Those questions deserve an answer, and unless an answer can be made, you undoubtedly will feel that there must be some unseen importance in this question, or there would not have been all the trouble with reference to it heretofore. Why do the fishermen of the United States come to the Gulf of St. Lawrence at all? Why should they not come here? What men on the face of the earth have a better right to plow with their keels the waters of the Gulf of St. Lawrence than the descendants of the fishermen of New England, to whose energy and bravery, a century and a quarter ago, it is chiefly owing that there is any Nova Scotia to-day under the British flag? I am not going to dwell upon the history of the subject. It is well known, that it was New England that saved to the crown of England these maritime provinces; that to New England fishermen is due the fact that the flag of Great Britain flies on the citadel, and not the flag of France, to-day.

Early in the diplomatic history of this case, we find that the Treaty of Paris in 1763 excluded French fishermen three leagues from the coast belonging to Great Britain in the Gulf of St. Lawrence, and fifteen leagues from the island of Cape Breton. We find that the treaty with Spain, in the same year, contained a relinquishment of all Spanish fishing rights in the neighborhood of Newfoundland. The crown of Spain expressly desisted from all pretensions to the right of fishing in the neighborhood of Newfoundland. Those are the two treaties of 1763,—the treaty of Paris with France and the treaty with Spain. Obviously, at that time, Great Britain claimed for herself exclusive sovereignty over the whole Gulf of St. Lawrence, and over a large part of the adjacent seas. By the treaty of Versailles, in 1783, substantially the same provisions of exclusion were made with reference to the French fishermen. Now, in that broad claim of jurisdiction over the adjacent seas, in the right asserted and maintained to have British subjects fish there exclusively, the fishermen of New England, as British subjects, shared. Undoubtedly, the pretensions that were yielded to by those treaties have long since disappeared. Nobody believes now that Great Britain has any exclusive jurisdiction over the Gulf of St. Lawrence, or the Banks of Newfoundland, but at the time when the United States asserted their independence, and when the treaty was formed between the United States and Great Britain, such were the claims of England, and those claims had been acquiesced in by France and by Spain. That explains the reason why it was that the elder Adams said he would rather cut off his right hand than give up the fisheries at the time the treaty was formed, in 1783; and that explains the reason why, when his son, John Quincy Adams, was one of the Commissioners who negotiated the treaty of Ghent, at the end of the war of 1812, he insisted so strenuously that nothing should be done to give away the rights of the citizens of the United States in these ocean fisheries. Those are the fisheries which existed in that day, and those alone. The mackerel fishery was unknown. It was the cod fishery and the whale fishery that called forth the eulogy of Burke, over a hundred years ago. It was the cod fishery and whale fishery for which the first and second Adams so strenuously contended; and inasmuch as it was found impossible in the treaty at the end of the war of 1812 to come to any adjustment of the fishery question, all mention of it was omitted in the treaty; the treaty was made leaving each party to assert his claims at some future time. And so it stood, Great Britain having given notice that she did not intend to renew the rights and privileges conceded to the United States in the treaty of 1783, and the United States giving notice that they regarded the privileges of the treaty of 1783 as of a permanent character, and not terminated by the war of 1812; but no conclusion was arrived at between the parties. What followed? The best account of the controversy to be found is in a book called "The Fisheries and the Mississippi," which contains John Quincy Adams' letters on the subject of the Treaty of Ghent, and the Convention of 1818. Mr. Adams in that book says that the year after peace was declared, British cruisers warned all American fishing vessels not to approach within sixty miles from the coast of Newfoundland, and that it was in consequence of this that the negotiations were begun which led to the Convention of 1818; and the Convention of 1818, in the opinion of Mr. Adams, conceded to the United States all that they desired. He believed and asserted, that Great Britain had claimed, and intended to claim, exclusive jurisdiction over the Gulf of St. Lawrence, and over the Banks of Newfoundland, and he considered and stated that the Treaty of 1818, in setting at rest forever those pretensions, obtained for the United States substantially what they desired. A passage is quoted in the reply of Her Majesty's government to the United States' answer, from this book, in which Mr. Adams says: "The Newfoundland, Nova Scotia, Gulf of St. Lawrence and Labrador fisheries, are in nature and in consideration both of their value and of the right to share in them *one* fishery. To be cut off from the enjoyment of that right would be to the people of Massachusetts similar in kind and

comparable in degree with an interdict to the people of Georgia and Louisiana to cultivate cotton or sugar. To be cut off even from that portion of it which was within the exclusive British jurisdiction in the *strictest sense* within the Gulf of St. Lawrence and on the coast of Labrador would have been like an interdict upon the people of Georgia or Louisiana to cultivate cotton or sugar in three-fourths of those respective States." But he goes on to speak of the warning off of American vessels sixty miles from Newfoundland, and then says: "It was this incident which led to the negotiations which terminated in the Convention of the 20th of October, 1818. In that instrument, the United States *renounced forever* that part of the fishing liberties which they had enjoyed or claimed in certain parts of the exclusive jurisdiction of the British Provinces, and within *three marine miles* of the shores. *This privilege, without being of much use to our fishermen*, had been found very inconvenient to the British; and in return, we have acquired an enlarged liberty, both of fishing and drying fish, within other parts of the British jurisdiction forever."

Fishing for mackerel in ten fathoms of water off the bight of Prince Edward Island was not the thing then taken into consideration. There was no mackerel fishery till many years after. This controversy was caused by a claim on the one hand and a resistance on the other with reference to the ocean fisheries, to the cod-fishery, the whale-fishery, the deep-sea fishery, three leagues, fifteen leagues, sixty miles from the shore; and after the Convention of 1818 had been formed, if it had been construed as the British government construe it to-day, there would have been no more controversy on the subject. The controversy that arose after the Convention of 1818 sprang from the unwarrantable and extravagant pretensions, not so much of Her Majesty's home government, as of the Colonial authorities. In order to understand the importance that has been attributed to this subject, it is indispensibly necessary that you should know what was claimed to be the intepretation of the Convention of 1818 down to a very recent day. The Provincial authorities claimed, in the first place, to exclude United States vessels from navigating the Gut of Canso. Nobody makes that claim now. In the second place, they claimed the right to exclude them from fishing anywhere in the Bay of Fundy. That claim was insisted upon until, on arbitration, is was decided against Her Majesty's government. Not only was the headland doctrine asserted as to the great bays, but under its guise, the Provincial authorities claimed the right to draw a straight line from East Point to North Cape of Prince Edward Island, and make the exclusion three miles from that point. I have had marked on the map annexed to the British case two or three of the principal lines of exclusion as they were then insisted upon, that you may know what it was that our people regarded as important. The claim to treat East Point and North Cape as headlands, and to exclude us a distance of three miles from a line drawn between them is a notion that has not departed from the popular mind to the present day.

The affidavits from Prince Edward Island were drawn upon the theory that that is the rule, and in two or three of them, I have found it expressly stated, "that all the mackerel were caught within the three mile line; that is to say, within a line three miles from a straight line drawn from East Point to North Cape." Now, those affidavits are all in answer to one set of questions, they are all upon one model, and it is quite obvious that they were all of them colored by that view of the three mile limit, as two of them expressly say that they were. At all events, that was the claim that was made down to a very recent period. The claim also was made to exclude United States fishermen from Northumberland Strait. In the case of the *Argus*, seized by British cruisers, the ground of seizure was, that a line was to be drawn from Cape North to the northern line of Cow Bay in Cape Breton. It is marked there in red on the map. The evidence of that claim, which was the basis of the seizure of the *Argus*, is to be found in the correspondence between Mr. Everett and Lord Aberdeen on the subject. See Mr. Everett's letter to Lord Aberdeen, quoted from in the United States brief, on page 21. They likewise claimed to draw a line from Margaree to Cape St. George. You will find that down there. Those claims were not merely made on the quarter deck, but they were made, some of them, in diplomatic correspondence, some of them in resolutions of the Nova Scotia Legislature. They were made, and they were insisted upon, and understanding this, I think you will be prepared to understand why it was that exclusion from such limits was regarded as important to our fishermen. You will remember that one of our oldest witnesses, Ezra Turner, testified that the captain of the cruiser "told me what his orders were from Halifax, and he showed me his marks on the chart. I well recollect three marks. One was from Margaree to Cape St. George, and then a straight line from East Point to Cape St. George, and then another straight line from East Point to North Cape The captain said, "If you come within three miles of these lines, fishing, or attempting to fish, I will consider you a prize." And a committee of the Nova Scotia Legislature, as late as 1851, in their report, say: "The American citizens, under the Treaty, have no right, for the purposes of the fishery, to enter any part of the Bay of St. George, lying between the headlands formed by Cape George on the one side and Port Hood Island on the other."

Such were the claims made, and how were those claims enforced? They were enforced by the repeated seizure of our vessels, their detention until the fishing season was over, and then their release. It appears by the returns that have been made in how many instances our fishing vessels were released without a trial after they had been detained until their voyages were ruined, and as our skippers said in their testimony, it made no difference whether the seizure was lawful or unlawful, the voyage was spoilt, and the value of the vessel almost entirely destroyed. There were repeated instances of which you have testimony of cruisers levying black mail upon skippers, taking a portion of their fish by way of tribute from them, and letting them go on their way.

Mr. THOMSON—Instead of seizing the whole.

Mr. FOSTER—Yes, instead of seizing the whole. No doubt the poor and ignorant skippers were thankful to escape from the lion's jaws with so little loss as that. Let me give an instance. There is a letter from Mr. Forsyth, the United States Secretary of State, to Mr. Fox, the British Minister at Washington, dated the 24th of July, 1859, in which Mr. Forsyth requests the good offices of Her Majesty's Minister at Washington with the authorities at Halifax, to secure to a fisherman too poor to contend in the Admiralty Court, the restoration of ten barrels of herrings taken from him by the officer who had seized his vessel and withheld the herring after the vessel itself was released.

Well, what were the laws enacted to enforce these pretensions? A Nova Scotia statute of 1836, after providing for the forfeiture of any vessel found fishing, or preparing to fish, or to have been fishing within three miles of the coasts, bays, creeks or harbors, and providing that if the master, or person in command, should not truly answer the questions put to him in examination by the boarding officer, he should forfeit the sum of one hundred pounds, goes on to provide that if any goods shipped on the vessel were seized for any cause of forfeiture under this Act, and any dispute arises whether they have been lawfully seized, the burden of proof to show the illegality of the seizure shall be on the owner or claimant of the goods, ship, or vessel, and not on the officer or person who shall seize and stop the same. The burden of proof to show that the seizure was unlawful was on the man whose schooner had been brought to by the guns of the cutter. He was to be taken into a foreign port, and there required affirmatively to make out that his vessel and its contents were not liable to forfeiture. If he attempted any defence, he was not permitted to do so until he had given sufficient security in the sum of sixty pounds for the costs. He must commence no suit until he had given one calendar month's notice in writing of his intention to do so, in order that the seizing officer might make amends if he chose; and he must bring his suit within three months after the cause of action accrued, and if he failed in the suit, treble costs were to be awarded against him; while, if he succeeded in the suit, and the presiding Judge certified that there was probable cause for the seizure, he was to be entitled to no costs, and the officer

making the seizure was not to be liable to any action. That Act, only very slightly modified, but with most of its offensive provisions still retained, was found on the Statutes of Nova Scotia as late as the year 1868, and I am not aware that it has been repealed to-day. The construction put upon it in this Province was, that a man who came into a British harbor to buy bait with which to catch fish in the deep sea, was guilty of "preparing to fish," and that it was an offence under the Act to prepare within British territorial waters to carry on a deep sea fishery.

Such, gentlemen, was the condition of things which led the fishermen of the United States to attribute so much importance to the three-mile restriction. We know to-day that all this has passed away. We know that such pretensions are as unlikely ever to be repeated as they are sure never again to be submitted to. And why do I refer to them? Not, certainly, to revive any roots of bitterness; not, certainly, to complain of any thing so long gone by; but because it is absolutely indispensible for you to understand the posture of this question historically, in order that you may be aware how different the question we are trying to-day is from the question which has had such importance heretofore.

If the three-mile limit off the bend of Prince Edward Island, and down by Margaree, where our fishermen sometimes fish a week or two in the autumn (and those are the two points to which almost all the evidence of inshore fishing in this case relates),—if the three-mile limit had been marked out by a line of buoys in those places, and our people could have fished where they had a right to, under the law of nations and the terms of the Convention of 1818, nobody would have heard any complaint. Certainly it is most unjust, after a question has had such a history as this,—after the two nations have been brought to the very verge of war with each other, in consequence of disputes based upon such claims as I have referred to,—certainly, now that those claims are abandoned, it is most unjust to say to us, "Because you complained of these things, therefore you must have thought the right to catch mackerel in ten or fifteen fathoms of water, within three miles of the bight of the island, was of great national importance." We are not prepared to enter fairly into a discussion of the present question until it is perceived how different it is from the one to which I have been alluding. Of course, our fishermen were alarmed and excited, and indignant, when the things were done to which I have referred. Of course it was true, that if such claims were to be maintained, they must abandon fishing in the Gulf of St. Lawrence altogether, and not only did they feel that there was an attempt, unjustly and unlawfully, to drive them out of a valuable fishery which had belonged to them and their forefathers ever since vessels came here at all, but there was also, with reference to it, a sense of wrong and outrage, and the fishermen of New England, like the rest of the people of New England, although long-suffering and slow to wrath, have ever been found to be a race "who know their rights, and knowing, dare maintain." But when these chains are abandoned, as they have been now, there remains simply the question, what is the value of fishing within three miles of the shore of the British territories? And this brings me to some of the immediate questions which we have to discuss.

In the first place, I suppose I may as well take up the case of Newfoundland. The case of Newfoundland, as I understand it, is almost entirely eliminiated from this controversy by the decision which was made on the 6th of September. The claim, as presented in Her Majesty's case, is not one of compensation for fishing within the territorial waters of Newfoundland, but it is one of enjoying the privileges of commercial intercourse with the people of that Island. Of territorial fishing in Newfoundland waters, there is hardly any evidence to be found since the first day of July, 1873, when the fishery clauses of the Treaty of Washington took effect, with one exception, that I will allude to hereafter. There is certainly no cod fishing done by our people in the territorial waters of Newfoundland; none has been proved, and there is no probability that there ever will be during the period of the Treaty, or afterwards. The American cod fishery is every where deep sea fishing. There is a little evidence of two localities in which a few halibut are said to have been taken in Newfoundland waters,—one near Hermitage Bay, and one near Fortune Bay. But the same evidence that shows that it once existed, shows that it had been exhausted and abandoned before the Treaty of Washington was made. Judge Bennet testified that

"The halibut fishing on the Newfoundland coast is a very limited one, so far as I am aware. It is limited to the waters between Brunet Island in Fortune Bay, and Pass Island in Hermitage Bay. It is conducted close inshore, and was a very prolific fishery for a number of years. Our local fishermen pursued it with hook and line. I think about eight years ago, the Americans visited that place for the purpose of fishing, and they fished it very thoroughly. They fished early in the season, in the month of April, when halibut was in great demand in New York market. They carried them there fresh in ice, and I know they have pursued that fishery from that time to within the last few years. I believe they have about exhausted it now."

Another witness testified that some years ago the halibut fishery was pursued in that vicinity, but he went on to say that

"American fishermen do not now fish for halibut about Pass Island as they formerly did, because I believe that that fishery has been exhausted by the Americans. I know of no United States fishing vessels fishing within three miles of the shore, except at and about Pass Island, as already stated."—*Affidavit of Philip Hubert, p. 54, British Affidavits.*

John Evans, p. 52 British Affidavits, says:—

"The halibut fishery followed by the United States fishing vessels about Pass Island has been abandoned during late years. I have not heard of American fishing vessels trying to catch fish on the Newfoundland inshore fishery."

There has been a little evidence that occasionally, when our vessels go into harbors to purchase bait at night, some of the men will jig a few squid, when they are waiting to obtain bait.

All the evidence shows that they go there not to fish for bait, but to buy it. It shows also that when they are there for that purpose, the crews of the vessels are so much occupied in taking on board and stowing away the fish bought for bait, that they have no time to engage much in fishing; but one or two witnesses have spoken of a little jigging for squid by one or two men when unoccupied at night. As to the rest, all the fishing in the territorial waters of Newfoundland is done by the inhabitants themselves.

The frozen herring trade, which was the ground of compensation chiefly relied upon in the Newfoundland case, has been completely proved to be a commercial transaction. The concurrent testimony of the witnesses on both sides is, that American fishermen go there with money, they do not go there provided with the appliances for fishing, but with money, and with goods. They go there to purchase and to trade, and when they leave Gloucester, they take out a permit to touch and trade, that they may have the privileges of trading vessels. Perhaps it may be said that the arrangement under which this bait is taken is substantially a fishing for it. I have heard that suggestion hinted at in the course of our discussions, but plainly, it seems to me, it cannot be sound. We pay for herring by the barrel, for squid and capelin by the hundred, and the inhabitants of the Island will go out to sea as far as to the French Islands, there to meet American schooners, and to induce them to come to their particular localities that they may be the ones to catch the bait for them. It is true that the British case expresses the apprehension that the frozen herring trade may be lost to the inhabitants of Newfoundland in consequence of the provisions of the Treaty. It is said that "it is not at all probable that, possessing the right to take the herring and capelin for themselves on all parts of the Newfoundland coast, the United States fishermen will continue to purchase bait as heretofore, and they will thus prevent the local fishermen, especially those of Fortune

Bay, from engaging in a very lucrative employment, which formerly occupied them during a portion of the Winter season, for the supply of the United States market." One of the British witnesses, Joseph Tierney, whose testimony is on page, 371 in speaking of this matter of getting bait, says, in reply to the question, "How do you get that bait?" "Buy it from persons that go and catch it and sell it for so much a barrel. The American fishermen are not allowed to catch their own bait at all. Of course, they may jig their own squid around the vessel." And in reply to my question, "What would be done if they tried to catch bait?" the answer is, "They are pretty rough customers. I don't know what they would do." So it appears that American fishermen not only do not catch bait, but are not allowed to catch it. They buy the bait, and that, to my mind, is the end of the question. So far as the herring trade goes, we could not, if we were disposed to, carry it on successfully under the provisions of the Treaty, for this herring trade is substantially a seining from the shore,—a strand fishing, as it is called,—and we have no right anywhere conferred by this Treaty to go ashore and seine herring any more than we have to establish fish traps. I remember Brother Thomson and Professor Baird were at issue on the question whether we had a right to do this. Brother Thomson was clearly right and Professor Baird was mistaken. We have not acquired any right under the Treaty to go ashore for any purpose anywhere on the British territories except to dry nets and cure fish. I do not think that I ought to spend more time over the case of Newfoundland than this, except to call your attention to the circumstance, that in return for these few squid jigged at night, the islanders obtain an annual remission of duties averaging upwards of $50,000 a year.

We have been kindly furnished, in connection with the British affidavits, upon page 128, Appendix A, with a statement showing the duties remitted upon exports from Newfoundland to the United States, since the Treaty of Washington, and their annual average is made out to be $50,940.45. I submit to the Commission whether we do not pay, upon any view of political economy, a thousand fold for all the squid that our people jig after dark.

Let it not, however, for a moment be supposed that because I took up the case of Newfoundland for convenience sake, as it is presented separately, that I regard it as a distinct part of the case. The United States has made no treaty with the Island of Newfoundland, which has not yet hoisted the flag of the "Lone Star." When she does, perhaps we shall be happy to enter into treaty relations with her; but we know at present only Her Majesty's Government. We are dealing with the whole aggregate of concessions, from the one side to the other, and Newfoundland comes in with the rest.

Leaving, then, the Island of Newfoundland, I come to the question of the value to the citizens of the United States of the concessions as to inshore fisheries in the territorial waters of the Dominion of Canada; that is, within three miles of the shore, for the five annual seasons past, and for seven years to come. In the first place, there is the right conceded to our fishermen to land in order to cure fish and dry nets,—to land on unoccupied places, where they do not interfere with private property, nor with British fishermen exercising the same rights. In one of the oldest law reports. Popham's, an ancient sage of the law, Mr. Justice Doddridge remarks: "Fishermen, by the law of nations, may dry their nets on the land of any man." Without asserting that as a correct rule of law, I think I may safely assert that it has been the practice permitted under the comity of nations from the beginning of human history, and that no nation or people, no kingdom or country, has ever excluded fishermen from landing on barren and unoccupied shores and rocks, to dry their nets and cure their fish. If it was proved that the fishermen of the United States did use privileges of this kind, under the provisions of the Treaty of Washington, to a greater extent than before, I hardly think that you would be able to find a current coin of the realm sufficiently small in which to estimate compensation for such a concession. But, in point of fact, the thing is not done; there is no evidence that it is done. On the contrary, the evidence is that this practice belonged to the primitive usages of a bygone generation. Seventy, sixty, perhaps fifty years ago, when a little fishing vessel left Massachusetts Bay, it would sail to Newfoundland, and after catching a few fish, the skipper would moor his craft near the shore, land in a boat and dry the fish on the rocks; and when he had collected a fare of fish, and filled his vessel, he would either return back home, or, quite as frequently, would sail on a commercial voyage to some foreign country, where he would dispose of the fish and take in a return cargo. But nothing of that sort has happened within the memory of any living man. It is something wholly disused, of no value whatever. And it must not be said that under this concession we acquire any right to fish from the shore, to haul nets from the shore, or to fish from rocks. Obviously, we do not. I agree entirely with the view of my Brother Thomson, as manifested in his conversation with Prof. Baird on that subject.

We come, then, to the inshore fishing. What is that? In the first place, there has been some attempt to show inshore halibut fishing in the neighborhood of Cape Sable. It is very slight. It is contradicted by all our witnesses. No American fisherman can be found who has ever known of any halibut fishing within three miles of the shore in that vicinity; and our fishermen all say that it is impossible that there should be halibut caught in any considerable quantities in any place where the waters are so shallow. There is also some evidence that up in the Gulf of St. Lawrence there was once a small local halibut fishery, but the same evidence that speaks of its existence there, speaks of its discontinuance years ago. The last instance of a vessel going there to fish for halibut that has been made known to us, is the one that Mr. Sylvanus Smith testifies about, where a vessel of his strayed up into the Gulf, was captured, and was released, prior to the Treaty of Washington. As to the inshore halibut fishery, there has been no name of a vessel, except in one single instance, when a witness did give the name of the *Sarah C. Pyle*, as a vessel that had fished for halibut in the vicinity of Cape Sable. We have an affidavit from the captain of that schooner, Benjamin Swim, saying that he did not take any fish within many miles of Cape Sable. He says he has been engaged in cod-fishing since April of this year, and "has landed 150,000 pounds of halibut, and caught them all, both codfish and halibut, on Western Banks. The nearest to the shore that I have caught fish of any kind this year, is, at least, 40 miles." (*Affidavit No.* 242.)

So much for the inshore halibut fishery. I will, however, before leaving it, refer to the statement of one British witness, Thomas R. Pattilo, who testified that occasionally halibut may be caught inshore, as a boy may catch a codfish off the rocks; but, pursued as a business, halibut are caught in the sea, in deep water. "How deep do you say?" "The fishery is most successfully prosecuted in about 90 fathoms of water, and, later in the season, in as much as 150 fathoms."

So much for the inshore halibut fishery; and that brings me to the inshore codfishery, as to which I am reminded of a chapter in an old history of Ireland, that was entitled, "On Snakes in Ireland," and the whole chapter was, "There are no snakes in Ireland." So there is no inshore codfishery pursued as a business by United States vessels anywhere. It is like halibut fishing, exclusively a deep-sea fishing. They caught a whale the other day in the harbor of Charlottetown, but I do not suppose our friends expect you to assess in this award against the United States any particular sum for the inshore whale fishery. There is no codfishery or halibut fishery inshore, pursued by our vessels, any more than there is inshore whale fishery. We know and our witnesses know where our vessels go. If they go near the British shores at all, they go to buy bait, and leave their money in payment for the bait. Will it be said that the codfishery is indirectly to be paid for, because fresh bait must be used, and the codfishery cannot profitably be pursued without fresh bait; and because we are hereafter to be deprived of the right to buy bait by laws expected to be passed, and then shall have to stop and catch it, so that by-and-by, when

some new statutes have been enacted, and we have been cut off from commercial privileges, we may be forced to catch bait for codfishing in British territorial waters? I think it will be time enough to meet that question when it arises. Any attempt to cut us off from the commercial privileges that are allowed in times of peace, by the comity of civilized nations, to all at peace with them, would of course be adjusted between the two governments in the spirit that becomes two imperial and Christian powers. I do not think that, looking forward to some unknown time when some unknown law will be passed, we need anticipate that we are to be cut off from the privilege of buying bait, and therefore you should award compensation against us for the bait which we may at that time find occasion ourselves to catch. But if it is worth while to spend a single moment upon that, how thoroughly it has been disposed of by the evidence, which shows that this practice of going from the fishing grounds on the Banks into harbors to purchase bait is one attended with great loss of time, and with other incidental disadvantages, so that the owners of the vessels much prefer to have their fishermen stay on the Banks, and use salt bait, and whatever else they can get there. St. Pierre and Miquelon are free ports, commercial intercourse is permitted there; bait can be bought there, and as the British witnesses have told us, the traffic for bait between Newfoundland and the French Islands is so great, and such a full supply of bait is brought to the French Islands, more than there is a demand for, that it is sometimes thrown overboard in quantities that almost fill up the harbor. That was the statement of one of the witnesses. I do not think, therefore, that I need spend more time, either upon the codfishery, or the question of buying bait or procuring bait for codfishing.

What shall I say of the United States herring fishery, alleged to exist at Grand Manan and its vicinity? Three British witnesses testify to an annual catch of one million, or one and a half million dollars' worth by United States fishermen in that vicinity, all caught inshore. But these witnesses do not name a single vessel, or captain, or give the name of any place from which such vessels come, except to speak in general terms of the Gloucester fleet. These witnesses are McLean, McLeod, and McLaughlin. The fish alleged to be taken are chiefly herring. I shall not stop to read their evidence, or comment upon it in detail. They are contradicted by several witnesses, and by several depositions filed in the case, which you will find in the supplemental depositions lately printed; all of whom state what we believe to be clearly true, that the herring trade by United States vessels in the vicinity of Grand Manan, is purely a commercial transaction; that our fishermen cannot afford the time to catch herring; that their crews are too large, and their vessels too expensive to engage in catching so poor a fish as herring; that it is better for them to buy and pay for them, and that so they uniformly do. The members of the Gloucester firms who own and send out these vessels tell you that they go without nets, without the appliances to catch herring at all, but with large sums of money, they bring back the herring, and they leave the money behind them.

This question seems to me to be disposed of by the report of the Commissioner on the New Brunswick fisheries for 1876.

Mr. Venning, the Inspector of Fisheries for New Brunswick, quotes in his report on Charlotte County (pp. 266 and 267), from Overseer Cunningham of the Inner Bay. Some attempt was made to show that Overseer Cunningham, although the official appointed for the purpose, did not know much about it; but it will be observed that his statements, as well as those of Overseer Best (whose evidence is next quoted), are affirmed by Mr. Venning, the Inspector of Fisheries for New Brunswick, and inserted in his report, under his sanction; and I think that with the Minister of Marine and Fisheries, himself from New Brunswick, at the head of the Department, erroneous statements on a subject relating to the fisheries of his own Province were not likely to creep into official documents and remain there unobjected to. I think we must assume that these official statements are truer and more reliable than the accounts that come from witnesses: "The Winter herring fishery," Overseer Cunningham says, "I am sorry to say, shows a decrease from the yield of last year. This, I believe, is owing to the large quantity of nets, in fact miles of them, being set by United States fishermen all the way from Grand Manan to Lepreau, and far out in the Bay, by the Wolves, sunk from 20 to 25 fathoms, which kept the fish from coming into this Bay. In this view, I am borne out by all the fishermen with whom I have conversed on the subject. Our fishermen who own vessels have now to go a distance of six to eight miles off shore before they can catch any. The poorer class of fishermen, who have nothing but small boats, made but a poor catch. However, during the Winter months, there were caught and sold in a frozen state to United States vessels 1,900 barrels, at from $4 to $5 per barrel. The price being somewhat better than last year, helped to make up the deficiency in their catch."

Then he goes on to speak of the injurious effect of throwing over gurry, which, he says, is practised by Provincial fishermen as well as American, and says that, "as they are fishing far offshore a week at a time, this destructive practice can be followed with impunity and without detection." And Overseer Best speaks of the falling off in line fishing, but says that the yield of herring has exceeded that of the previous year, disagreeing with his friend, Overseer Cunningham. He attributes the deficiency in line fishing to the use of trawls. He goes on to say, "The catch was made chiefly in deep water this year, as far out as five to seven miles off the coast, and no line fish have been taken within two miles, except haddock." "The Winter fishing," he says, "was principally done in deep water, as rough weather prevailed most of the time, the fishermen found it very difficult to take care of their nets, a great many of which were lost. A large number of American vessels now frequent our coasts to engage in this fishery, and pay but little attention to our laws, which prohibit Sunday fishing and throwing over gurry. This I am powerless to prevent over a stretch of 20 miles of coast, on which from 60 to 100 vessels are engaged. A suitable vessel is necessary for this work, and she should cruise around among the fishing grounds and see that the laws are respected by those who are participating in the benefits of our fisheries."

Of course, it is difficult to prove a negative; but ought not the British agent to be required, upon a subject of such magnitude as this, to produce some more satisfactory evidence? If a large fleet of American vessels are year by year catching herring within three miles of land, among an equal body of British fishermen, within a limited space near Grand Manan, and if they are taking from a million to a million and half dollars' worth a year, is it not possible for our friends, the Minister of Marine and Fisheries and the learned counsel both from New Brunswick, to furnish the names of just one or two vessels or one or two captains among the great number that are so engaged? A million to a million and a half dollars' worth is the estimate that they put upon the fishery. How many herring do you suppose it takes to come to a million or a million and a half dollars? It takes more than all the herring that are imported into the United States, by the statistics. Just in that little vicinity, they say that a greater amount of such fish are taken than are imported into the United States. Now, if an operation of that enormous magnitude is going on, it does seem to me that somebody would know something more definite about it than has appeared in this evidence. Certainly, there has been earnest zeal and the most indefatigable industry in the preparation of the British case. Nobody doubts that. There has been every facility to procure evidence; and are we not entitled to require at the hands of Her Majesty's Government something that is more definite and tangible than has appeared on this subject? I have made all the inquiry in my power, and I cannot find out what the vessels are, who their captains are, from what ports they come, or to what markets they return. We know very well what the Gloucester herring fleet is. It is a fleet that goes to buy herring; that buys it at Grand Manan; that buys it at the Magdalen Islands; that buys it in Newfoundland; but of any fleet that fishes

for herring in the territorial waters of New Brunswick, after the utmost inquiry we can make, we remain totally ignorant.

There is another view of this subject which ought, it seems to me, to be decisive. Everybody admits that herring is one of the cheapest and poorest of fish, and that the former duty of a dollar a barrel, and five cents a box on smoked herring, would be absolutely prohibitory in the markets of the United States. Now, how much must these New Brunswick fishermen gain if they have as large a fishery as we have, and we have a fishery of a million and a half dollars in that vicinity? That is their statement; the British fishery is about equal to the American; the American is very near to one and a half million dollars a year in that vicinity; the British caught fish go to the United States markets almost exclusively,—I think one witness did say two-thirds; everybody else has spoken as if the herring market was in the United States almost altogether. How many barrels of herring does it take to come to a million dollars? We will let the other half million be supposed to consist of smoked herring in boxes. How many barrels of herring does it take? Why, it takes three or four hundred thousand. The herring sell for from two to four dollars a barrel. It takes 250,000, 300,00 or 400,000 barrels of herring,—and a duty of a dollar is remitted upon each barrel,—a duty which would exclude them from our market, if it were re-imposed. Is not that a sufficient compensation? If you believe that our people catch herring there to any considerable extent, is not that market from which these people derive, according to their own showing, so large sums of money, an equivalent? Remember, they say we catch a million to a million and a half dollars' worth; they say they catch as many; they say it nearly all goes to our market; the duty saved is a dollar a barrel; and, according to their own figures, they must be reaping a golden harvest. Happy fishermen of New Brunswick! By the statistics, they earn four or five times as much as the fishermen of Prince Edward Island, and the witnesses say that they earn really two or three times as much as the statistics show! They are receiving from a million to a million and a half dollars for fish sold chiefly in the markets of the United States, and the saving in duty is several hundred thousand dollars. It is true, that we cannot find imported into the United States any such quantity of herring; still, that is the account that they give of it.

This brings me, gentlemen, to the question of the inshore mackerel fishery,—that portion of the case which seems to me, upon the evidence, to be the principal part, I might almost say the only part, requiring to be discussed. Your jurisdiction is to ascertain the value of those fisheries for a period of twelve years, from July 1st, 1873, to July 1st, 1885. Of those twelve years, five have already elapsed; one fishing year has passed since the session of this Commission began. Inasmuch as the twelve years will terminate before the beginning of the fishing year in the Gulf of St. Lawrence for 1885, it is precisely correct to say, that five years have elapsed and seven remain. It is of no consequence how valuable these fisheries have been at periods antecedant to the Treaty, nor how valuable or valueless you may think they are likely to become after the Treaty shall have expired. The twelve years' space of time limits your jurisdiction, and five-twelfths of that time is to be judged of by the testimony as to the past. The results of the five years are before you. As to the seven remaining years, the burden of proof is upon Her Majesty's Government to show what benefit the citizens of the United States may reasonably be expected to derive during that time from these fisheries. It will be for you to estimate the future by the past, as well as you may be able.

This is a purely business question. Although it arises between two great governments, it is to be decided upon the same principles of evidence as if it were a claim between two men, as if it was a question how much each skipper that enters the Gulf of St. Lawrence to fish for mackerel ought to pay out of his own pocket. We are engaged in what the London *Times* has truly called a "great international lawsuit," and we are to be governed by the same rules of evidence that apply in all judicial tribunals,—not, of course, by the technicalities of any particular system of law, but by those great general principles which prevail wherever, among civilized men, justice is administered. He who makes a claim is to prove his claim and the amount of it. This is not a question to be decided upon diplomatic considerations; it is a question of proof. Money is to be paid for value received, and he who claims the money is to show that the value has been received or will be. If there are extravagant expectations on the one side, that is no reason for awarding a sum of money. If there is a belief on the other side that the results of the Treaty are injurious to a great industry, which nearly all civilized nations have thought it worth while to foster by bounties, that is no argument against rendering compensation. Whatever benefit the citizens of the United States are proved to derive from the inshore mackerel fisheries, within three miles of the shore of the Gulf of St. Lawrence, for that you are to make an award, having regard to the offset, of which it will be my duty to speak at a later period. The inquiry divides itself into these two heads: First, What has been the value from July 1st, 1873, down to the present time? and, second, What is it going to be hereafter? I invite your attention to the proof that is before you as to the value of the mackerel fishery since the Treaty went into effect. And here I must deal with the question: What proportion of the mackerel is caught in territorial waters, viz., within three miles from the shore? A great mass of testimony has been adduced on both sides, and it might seem to be in irreconcilable conflict. But let us not be dismayed at this appearance. There are certain land-marks which cannot be changed, by a careful attention to which I think we may expect to arrive at a tolerably certain conclusion. In the first place, it has been proved, has it not? by a great body of evidence, that there is, and always has been, in the Gulf of St. Lawrence, a very extensive mackerel fishery clearly beyond British jurisdiction, as to which no new rights are derived by the citizens of the United States from the Treaty of Washington. It is true that the map filed in the British case, and the original statement of that case, make no distinction between the inshore and the deep-sea mackerel fisheries. To look at this map, and to read the British case, you would think that the old claims of exclusive jurisdiction throughout the Gulf were still kept up, and that all the mackerel caught in the Gulf of St. Lawrence were, as one of the witnesses expressed himself, "British subjects." But we know perfectly well, that a United States vessel, passing through the Gut of Canso to catch mackerel in the Gulf, will find numerous places where, for many years, the fishing has been the best, where the fish are the largest, and where the catches are the greatest, wholly away from the shore. The map attached to the British case tells this story, for all through the Gulf of St. Lawrence, the gentlemen who formed that map have put down the places where mackerel are caught; and if the map itself does not indicate that seven-eighths of the mackerel fishing grounds must be clearly far away from the shore, I am very much mistaken. At the Magdalen Islands, where we have always had the right to fish as near as we pleased to the shore, the largest and the best mackerel are taken. At Bird Rocks, near the Magdalen Islands, where there is deep water close to the rocks, and where the mackerel are undoubtedly tsken close in shore (within two or three miles of the Bird Rocks, you will find the water to be twenty fathoms deep),—all around the Magdalen Islands, the mackerel fishing is stated by the experts who prepared this map to be good the season through. Then we have the Bank Bradley, the Bank Miscou, the Orphan Bank, the Fisherman's Bank, and we have the fishing ground of Pigeon Hill; all these grounds are far away from the shore, where there cannot be the least doubt that our fishermen have always had the right to fish, aside from any provisions of the present Treaty. The most experienced and successful fishermen who have testified before you say that those have been places to which they have resorted, and that there they were most successful.

Look at the testimony of Andrew Leighton, whom we heard of from the other side early as one of the most successful fishermen that ever was in the Gulf. He speaks of the largest seasons fishing any man ever had in the

Bay—1515 barrels,—and says, "I got the mackerel the first trip at Orphans and the Magdalens; the second trip at the Magdalens; the third trip at Fisherman's Bank, and I ran down to Margaree and got 215 barrels there, and went home." All the mackerel at Margaree, he says, were caught within two miles of the shore,—within the admitted limits. Recall the evidence of Sylvanus Smith and Joseph Rowe, experienced and successful fishermen, who tell you that they cared little for the privilege of fishing within three miles of the land; that they did not believe that vessel fishing could be prosecuted successfully there, because it required deeper water than is usually found within the distance of three miles to raise a body of mackerel sufficient for the fishermen on a vessel to take the fish profitably; that boat fishing is a wholly distinct thing from vessel fishing; that boats may anchor within three miles of the land, and pick up a load in the course of a day, at one spot, where mackerel would be too few and two small for a vessel with fifteen men to fish to any advantage. Almost all the evidence in this case of fishing within three miles of the shore relates to the bend of Prince Edward Island and to the vicinity of Margaree. As to the bend of the Island, it appears in the first place that many of our fishermen regard it as a dangerous place, and shun it on that account, not daring to come as near the shore as within three miles, because, in case of a gale blowing on shore, their vessels would be likely to be wrecked. It appears, also, that even a large part of the boat fishing there is carried on more than three miles from the shore. Undoubtedly, many of the fishermen have testified to the contrary; many of the boat fishermen from the Island have testified that nearly all their fish were caught within three miles; still it does appear by evidence that nobody can controvert, that a great part of the boat fishing is more than three miles out. One of the witnesses from the Island, James McDonald, says in his deposition, that from the middle of September to the first of November, not one barrel in five thousand is caught outside the limits; and he gives as a reason that the water will not permit fishing any distance from the shore, because it is too rough. But it is perfectly obvious, that a man who so testifies, either is speaking of fishing in the very smallest kind of boats, little dories that are not fit to go off three miles from the shore, and therefore knows nothing of vessel or large boat fishing, or else that he is under the same delusion that appears in the testimony of two other witnesses to which I referred in another connection: McNeill, who on page 42 of the British affidavits, describes the three-mile limits thus—"a line drawn between two points taken three miles off the North Cape and East Point of this Island;" and John A. McLeod, on page 228, who defines the three-mile limit as "a line drawn from points three miles off the headlands." When a witness comes here and testifies that after September not one barrel of mackerel in five thousand is taken outside of the three-mile limit, because it is too rough to go so far out, he is either speaking of a little cockleshell of a boat, that is never fit to go out more than one or two miles, or else he retains the old notion that the headland line is to be measured from the two points, and that three miles outside that line (which would be something like twenty-five or thirty miles out from the deepest part of the bend of the Island), is the territorial limit.

Mr. THOMSON: If you will read the other portion of his deposition, you will see that your statement is not quite fair.

Mr. FOSTER: "That the fish are nearly all caught close to the shore, the best fishing ground being about one and one half miles from the shore. In October, the boats sometimes go off more than three miles from land. Fully two-thirds of the mackerel are caught within three miles from the shore, and all are caught within what is known as the three-mile limit, that is, within a line drawn between two points taken three miles off the North Cape and East Point of this Island" (McNeill, p 42). We will have this evidence accurately, because I think it sheds considerable light on the subject. "That nine-tenths of our mackerel are caught within one and one-half miles from the shore, and I may say the whole of them are caught within three miles of the shore." (McLeod, p. 228). Somewhere the expression "not one barrel in five thousand" occurs. It is in one of those affidavits; perhaps in the first one. I have read the passage, so as to do no injustice to the statement of the witness.

Mr. Hall testified that, for a month before the day of his testimony, that is to say, after about the first week in September, no mackerel were caught within five or six miles of the shore; and he applied that statement to the specimen mackerel which were brought here for our inspection and our taste; and Mr. Myrick, from Rustico, told the same story. Moreover, all their witnesses, in speaking of the prosperity of the fishing business of the Island, which has been dwelt upon and dilated upon so much, speak of the fact that not only are the boats becoming more numerous, but they build them larger every year,—longer, deeper, and bigger boats,—why? To go farther from the shore. So said Mr. Churchill. I call that a pretty decisive test of the question, what proportion of the mackerel is caught within three miles of the shore. What does Professor Hind say on that subject? In the report that has been furnished us, he says (page 90):—"Mackerel catching is a special industry, and requires sea-going vessels. The boat equipment so common throughout British American waters is wholly unsuited to the pursuit of the mackerel which has been so largely carried on by United States fishermen. Immense schools of mackerel are frequently left unmolested in the Gulf and on the coasts of Newfoundland, in consequence of the fishermen being unprovided with suitable vessels and fishing gear. It is, however, a reserve for the future, which, at no distant day, will be utilized." Then he goes on to remark, that the use of the telegraph is likely to become of great value in connection with these fisheries.

Now, is there any explanation of these statements, except that the bulk of the mackerel are caught more than three miles off, in the body of the Gulf? If it is a "special industry," to which boats are wholly unsuited, can it possibly be true that a great proportion of the fish is caught within three miles of the shore? How can you account for these statements of their scientific witness in his elaborate report, except by the fact that he knows that the mackerel fishery is, so large a part of it, a fishery more than three miles off the coast, that it can profitably be pursued only in vessels?

There are two other things that lie beyond the range of controversy, to which I wish to call your attention. In the first place, there is a statement made by the United States Consul at Prince Edward Island, J. H. Sherman, back in 1864, in a communication to the Secretary of State at Washington, long before any question of compensation had arisen,—a confidential communication to his own Government, by a man who had every opportunity to observe, and no motive to mislead. He was writing with reference to the value of the inshore fisheries, and the statement so perfectly corresponds with what I believe to be the real truth that I desire to read it. "The reciprocity treaty seems to have been an unalloyed boon to the colony. The principal benefit that was expected to accrue to the United States by its operation was from the removal of the restrictions upon our vessels engaged in the fisheries to a distance of three marine miles from the shore; but whatever advantage might have been anticipated from that cause has failed to be realized.

"The number of vessels engaged in the fisheries on the shores of this colony has greatly diminished since the adoption of that treaty, so that it is now less than one-half the former number. The restriction to three marine miles from the shore (which we imposed upon ourselves under a former treaty) has, I am assured, but few, if any disadvantages, as the best fish are caught outside of that distance, and the vessels are filled in less time, from the fact that the men are liable to no loss of time from idling on the shore."

Next take Appendix E of the British case. Look at the report of the Executive Council of Prince Edward Island, made to the Ottawa Government in 1874, with reference to the preparation of this very case. They are undertaking to show how large a claim can be made in behalf of the inshore fisheries of the Island, and what do they

say? Page 3rd, paragraph 8: "From the 1st of July to the first of October is the mackerel season around our coasts, during which time the United States fishing fleet pursue its work, and as it has been shown" (I do not know where it has been shown) "that in 1872 over one thousand sail of United States schooners, from 40 to 100 tons, were engaged in the mackerel fishery alone." More than the whole number of the United States vessels licensed to pursue the mackerel and cod fisheries in that year, so that those statistics were large and the gentlemen who prepared this statement were not indisposed to do full justice to their claims. They did not mean to understate the use made of the fisheries of the Island nor the importance of them to the United States fishermen. "This fact, together with our experience in the collection of "Light money," now abolished, as well as from actual observation, a fair average of United States vessels fishing around our coast during the season referred to, may be safely stated at three hundred sail, and as a season's work is usually about six hundred barrels per vessel, *we may fairly put down one-third of the catch as taken inside of the three mile limit.*"

Such was the extent of the claim of the Prince Edward Island Government with reference to the proportion of the inshore and offshore catch of mackerel when they began to prepare this case. After this, they may pile affidavits as high as they please, they can never do away with the effect of that statement. Those gentlemen know the truth. The rest of this paragraph goes on to estimate that $5 a barrel is the net cost of the fish, but I will not go into that.

Mr. THOMSON:—You will not adopt that whole paragraph?

Mr. FOSTER;—Hardly. I adopt the statement, that in the judgment of the Executive Council of the Island, the strongest claim that they could make as to the proportion of mackerel taken within three miles of the shore was one-third.

But we have more evidence about this inshore fishery, for I am now trying to call your attention to those matters that lie outside the range of controversy, where you cannot say that the witnesses, under the pressure of excited feeling, are making extravagant statements. Let us see what the statement was in the debates upon the adoption of the Treaty. Dr. Tupper, of Halifax, in giving an account of the state of the fisheries, says: "The member for West Durham stated that if Canada had continued the policy of exclusion, the American fisheries would very soon have utterly failed, and they would have been at our mercy. This was a great mistake. Last summer he went down in a steamer from Dalhousie to Pictou, and fell in with a fleet of thirty American fishing vessels, which had averaged three hundred barrels of mackerel in three weeks, and had never been within ten miles of the shore." I am inclined to concede, for the purposes of the argument, that of the mackerel caught by boats off the bend of Prince Edward Island, about one-third are taken within three miles of the shore. I believe it to be a very liberal estimate, and I have no idea that any such proportion was ever taken by a single United States vessel fishing in that vicinity. I have already alluded to the fact, that the boat fishing and the vessel fishing are wholly different things, and to the necessity of a vessel being able to raise a great body of mackerel. Do you remember the testimony of Captain Hurlbert, pilot of the *Speedwell*, certainly one of the most intelligent and candid witnesses that has appeared here? He stated that you could not catch the mackerel in any quantities on board vessels off the bend of the Island, because the water was not deep enough within three miles. Take the chart used by Prof. Hind in connection with his testimony, and see within three miles of the shore how deep the water is. Ten to fifteen fathoms is the depth as far out as three miles. You will hardly find twenty fathoms of water anywhere within the three mile zone. Capt. Hurlbert gave, with great truth, the reason for his opinion, that there was not depth of water enough there to raise a body of mackerel necessary for profitable vessel fishing. My brother Davies felt the force of that, and cross-examined him about the Magdalen Islands. I have been looking at the chart of the Magdalen Islands, and I have also considered the testimony as to the fishing in that vicinity. A great deal of the fishing at the Magdalen Islands is done more than three miles from the shore. The place where the best mackerel are taken, Bird Rocks, will be found to have twenty fathoms of water within the three mile limit. And when you come to that locality where I honestly believe a larger proportion of mackerel are caught within three miles than anywhere else, that is, off Margaree, in the Autumn, you will find, by the chart, that the water there is deep, and that twenty fathoms is marked for quite a distance in a great many localities, within three miles of the land. I have always understood the Byron Islands and the Bird Rocks to be a part of the Magdalen Islands, and they have always been so testified to by the witnesses. When they have spoken of the Magdalen Islands, they have included fishing in those two localities as within the Magdalen Islands fisheries. In speaking of localities, they name the Bird Rock, but they speak of it as part of the Magdalen Islands. That particular question of geography may deserve more attention hereafter. I cannot now pause to consider it.

Right here, let me read from an early report on this subject of fishing inshore. Capt. Fair, of Her Majesty's Ship *Champion*, in 1839, says that he passed through a fleet of six or seven hundred American vessels in various positions, some within the headlands of the bays, and some along the shores, but none within the three mile interdiction. While cruising in the vicinity of Prince Edward Island, he states that there was not "a single case which called for our interference, or where it was necessary to recommend caution; on the contrary, the Americans say that a privilege has been granted them, and that they will not abuse it."—(*Sabine's Report on the Fisheries, page* 410).

There is something peculiar about this Prince Edward Island fishery, and its relative proportion to the Nova Scotia fishery. As I said before, I am inclined to believe that the greatest proportion of mackerel caught anywhere inshore, is caught off Margaree late in the Autumn. The United States vessels, on their homeward voyage, make harbour at Port Hood, and lie there one or two weeks; while there, they do fish within three miles of Margaree Island; not between Margaree Island and the main land, but within three miles of the island shores; and just there is found water deep enough for vessel-fishing. Look at the chart, which fully explains to my mind the inshore fishing at this point. Margaree is a part of Nova Scotia, and Prof. Hind says there is an immense boat-catch all along the outer coast of Nova Scotia, and estimates that of the Dominion mackerel catch, Quebec furnishes 7 per cent. (he does not say where it comes from), Nova Scotia 80 per cent., New Brunswick 3 per cent., and Prince Edward Island 10 per cent. Considering the fact that the preponderance of the testimony in regard to the mackerel fishery comes from Prince Edward Island, is it not strange that it does not furnish more than 10 per cent. of the entire catch? That is, not more than 12 or 16,000 barrels of mackerel a year. But this accords with the report of J. C. Tache, Deputy Minister of Agriculture, pages 43 and 44, which is the most intelligible report or statistical memoranda of the Canadian fisheries that I have found. It bears date 1876, and in narrow compass, is more intelligible to me, at least, than the separate statements which I am obliged to draw from the large volumes. Mr. Tache says that "the figures of the Fisheries' Report are a very great deal short of the real quantities caught every year, as regards cod and herring, although coming quite close to the catch of mackerel. The reason is, that it is specially from large commercial houses, which are principally exporters of fish, that the information is gathered by the fisheries' officers; then it comes that mackerel being principally obtained for exportation, and held in bond by large dealers, is found almost adequately represented in these returns."

When I called Prof. Hind's attention to these statements, and remarked to him that we had not heard much said about the places where mackerel were caught in Nova Scotia, he replied it was because there was an immense boat-catch on the coast. If there has been any evidence of United States vessels fishing for mackerel within three miles of the shores, or more than three miles from the shore of the outer coast of Nova Scotia, it has escaped my attention.

There is no considerable evidence, I do not know but I might say, no appreciable evidence, of United States vessels fishing for mackerel off the coast of Nova Scotia, (I am not now speaking of Margaree, but the coast of Nova Scotia). As to Cape Breton, very little evidence has been given except in reference to the waters in the neighborhood of Port Hood.

You will observe that this estimate of the Prince Edward Island fisheries, ten per cent., must be nearly correct. It is larger than the returns of exportation, a little larger than Mr. Hall's estimate, and I think if I say that from 12 to 15,000 barrels of mackerel are annually exported from Prince Edward Island, I shall do full justice to the average quantity of fish caught there. Now, it does seem to me, that there has been no evidence that can tend to lead you to suppose that the quantity taken by United States vessels in that neighborhood since the Treaty of Washington, five years ago, compares at all in magnitude with the quantity taken by the Island vessels themselves.

There are some other topics connected with the mackerel catch to which I want to call your attention. Remember, gentlemen, always, that we hold this investigation down to the period of the Treaty; and that you have no right to make any award against the United States for anything anterior to the first day of July, 1873, or subsequent to twelve years later than that.

Now, I wish to present some figures relative to the years that have elapsed since the fishery clauses of the Treaty of Washington took effect. I will begin with 1873. That year, the Massachusetts inspection of mackerel was 185,748 bbls.: the Maine inspection was 22,193 bbls.; the New Hampshire inspection was 2,398 bbls. (I am quoting now from Appendix O.) The total amount of the Massachusetts, Maine and New Hampshire inspection, for the year 1873, is 210,339 bbls. That is the entire amount caught by United States vessels and boats around our shores, coasts, and in the Gulf of St. Lawrence. Whatever comes from our vessels appears in the inspection. During that year, we are favored with the returns from Port Mulgrave; and, allowing for a little natural spirit of exaggeration, which some might attribute to the patriotic feelings of the Collector, and others to the disposition of American fishermen to tell as good stories of their catch as they can, we find the Port Mulgrave returns to be pretty accurate. They are a few per cent. in excess of the statistics of the catches, with which I have compared them to some extent; but still are tolerably accurate and fair returns for that year. They give 254 vessels, with an average catch of 348 sea barrels, and 313 packed barrels, aggregating 88,012 sea barrels. Taking off ten per cent. for loss by packing, which accords with the current of the testimony,—the Port Mulgrave inspector estimates the loss by packing to be 7½ per cent., and he estimates 15 bbls. off, but the current of the testimony makes it ten per cent.,—the aggregate was 79,211 packed barrels Of the 254 vessels, 131 came from Gloucester. Of these 254 vessels, 25 were lost that year, a loss of ten per cent. of all the United States vessels that were in the Gulf. One-tenth part of all the vessels that came to the Gulf that year were lost. That is the largest catch that our vessels have made since the Treaty. Of that 79,211 bbls., which were caught by United States vessels in the Gulf of St. Lawrence, in the year 1873, what proportion are you prepared to assume was caught inshore? Is not a third a liberal estimate? Taking the Magdalen Islands, taking Bank Bradley, taking Orphan Bank, taking Miscou Bank, taking the Pigeon Hill grounds, taking the fishing off the head of the island, that place where Capt. Rowe said he always found the best and largest fish, inside of New London Head, 12 or 15 miles out,—taking all these well known localities into consideration, I ask whether there can be any doubt that it is a very liberal estimate indeed to say one-third was caught inshore? I do not think that all the mackerel taken by United States vessels inshore, in all parts of the Gulf of St. Lawrence, averages an eighth or a tenth of the total catch, but I will assume for the moment one-third, the proportion which the Executive Council of Prince Edward Island thought a fair average for the shores of their Island. That would make 26,404 bbls. caught in British territorial waters in that year, the first year of the Treaty. What were these mackerel worth? Mr. Hall tells you that he buys them, landed on shore, for $3.75 a barrel. After they have been caught, after the time of the fishermen has been put into the business, he buys them for $3.75 a barrel. If they are worth $3.75 a barrel when they are caught, what proportion of that sum is it fair to call the right to fish for them worth? You may set your own figures on that. Call it one-half, one-third, or one-quarter. I should think it was somewhat extraordinary if the right to fish in a narrow zone three miles wide was worth any large portion of the value of the fish after they were caught and landed. But you may estimate that as you please. I will tell you how you will come out if you charge us with having caught a third of our fish inshore that year, and with the full value that Mr. Hall pays for them after they are caught. It is $99,015.

That was the first year of the Treaty, and there were imported into the United States from the British Provinces 90,889 bbls., on which the duty of $2.00 a barrel would amount to $181,778. The value of the fish that our people caught is $99,000, and the British fishermen gain in remission of duties nearly $182,000.

Look at it in another way. Does anybody doubt that, barrel for barrel, the right to import mackerel free of duty is worth more than the right to fish for them? Is not the right to carry into the United States market, after they are caught, a barrel of mackerel, worth as much as the right to fish for a barrel of mackerel off the bight of the Island? Estimating it so, 90,889 bbls. came in duty free, and there were caught in the Gulf by American vessels, 79,211 bbls. That is the first year of the Treaty, and by far the best year.

The next year, 1874, the Massachusetts inspection was 258,380 bbls. Since 1873, there has been no return from Maine. There is no general inspector, and the Secretary of State informs us that the local inspectors do not make any returns. I suppose that if you call the Maine catch 22,000 bbls., the same as the year before, you will do full justice to it, for the Maine mackerel fishery, according to the testimony, has obviously declined, for years. The inspection in New Hampshire was 5519 bbls. There was imported into the United States that year from the Provinces, 89,693 bbls., on which there was saved a duty of $179,386. That year the Port Mulgrave returns show 164 vessels to have been in the Gulf of St. Lawrence, of which 98 came from Gloucester. 63,078½ sea barrels, or 56,770 packed barrels were taken. The Gloucester vessels caught 48,813 bbls. Take these 56,770 packed barrels as the aggregate catch in the year 1874 in the Gulf of St. Lawrence, by United States vessels, and set them off against the 89,693 barrels imported into the United States, and where do you come out? Pursuing the same estimate, that one-third may have been caught inshore,—an estimate which I insist is largely in excess of the fact,—there would be 18,923 bbls. caught inshore, which would be worth $70,961, at Mr. Hall's prices; and you have $70,961 as the value, after they are caught and landed, of the mackerel we took out of British territorial waters, to set against a saving of $179,386 on American duties. That is the second year.

Now, come to 1875. That year the catch was small. The Massachusetts inspection was only 130,064; the New Hampshire inspection, 3,415 bbls. The provincial importation into the United States is 77,538 bbls. That fell off somewhat, but far less than the Massachusetts inspection, in proportion. The duty saved is $155,076. Fifty-eight Gloucester vessels are found in the Bay, as we ascertain from the Centennial book, and Mr. Hind, speaking of the mackerel fishery in 1875, and quoting his statistics from some reliable source, says, "The number of Gloucester vessels finding employment in the mackerel fishery in 1875 was 180. Of these, 93 made Southern trips, 117 fished off shore, and 58 visited the Bay of St. Lawrence; 618 fares were received, 133 from the South, 425 from offshore, and 60 from the Bay." (Hind's Report, pp. 88, 89) Fifty-eight vessels from Gloucester made 60 trips.

Now, where are the Port Mulgrave returns for 1875? They were made, for we have extracted that fact. We

have called for them. I am sure we have called often and loud enough for the Port Mulgrave returns of 1875 and 1876. Where are they? They are not produced, although the Collector's affidavit is here, as well as the returns for 1877, which we obtained, and of which I shall speak of hereafter. The inference from the keeping back of these returns is irresistible. Our friends on the other side knew that the concealment of these returns was conclusive evidence that they were much worse than those of the previous year, 1874; and yet they preferred to submit to that inevitable inference rather than have the real fact appear. Rather than to have it really appear how much the 58 Gloucester vessels caught in the Bay that year, they prefer to submit to the inference which must necessarily be drawn, which is this,—and it is corroborated by the testimony of many of their witnesses,—that that year the fishing in the Bay was a total failure. I can throw a little more light on the result of the fishing in the Bay that year. There were 58 vessels from Gloucester, which averaged a catch of 191 bbls., while 117 on the United States coast caught an average of 409 bbls. This comes from the statistics for the Centennial. 11,078 bbls. of mackerel taken from the Gulf of St. Lawrence in 1875, is all that we know about. What more there were our friends will not tell us, because the aggregate of 11,078 bbls. caught by 58 vessels, averaging 191 bbls. a vessel, is so much better result than the Port Mulgrave returns would show, that they prefer to keep the returns back. I think, gentlemen, that this argument from the official evidence in your possession, is one that, under the circumstances, you must expect to have drawn. That year, so far as we know, only 11,078 bbls. of mackerel came out of the Gulf; but double it. You will observe that more than half of the vessels have come from Gloucester every year. The previous year, there were 98 out of 164. Let us double the number of vessels that came from Gloucester. Suppose that there were as many vessels came from other places, and that they did as well. The result would give you 23,156 bbls. Take the actual result of the Gloucester vessels; suppose as many more came from other places, when we know that the previous year a majority came from Gloucester, (I want to be careful in this, for I think it is important), and about 23,000 bbls. of mackerel were taken out of the Gulf of St. Lawrence in the year 1875, against an importation of 77,538 bbls. into the United States from the Provinces, on which a duty was saved of $155,076.

In the year 1876, by the official statement, which was lost, 27 trips were returned to the Custom House as being made by Gloucester vessels to the Gulf of St. Lawrence. I cannot verify that; it depends merely upon memory. We have not had the Port Mulgrave returns. I give my friends leave to put them in now, if they will, do so, or give us an opportunity to examine them. I invite them to put them in now, if they think I am over-stating the result. There were 27 Gloucester vessels (I may be in error about this, it is mere memory) came to the Gulf in 1876. The Massachusetts inspection was 225,941 bbls; the New Hampshire inspection was 5,351 bbls. The United States importation was 76,538 bbls. Duty saved, $153.076. To be sure they will say that 1875 and 1876 were poor years. They were poor years; no doubt about that. But average them with 1873 and 1874, and see if the result is in the least favorable; see if they are able to show any considerable benefit derived by our people from inshore fishing, or anything which compares with the saving in respect to duty that they make.

When we began this investigation, nearly every witness that was examined was asked whether the prospects for the present year were not very good—whether it was not likely to be an admirable mackerel year in the Gulf, and they said "Yes." They said the Gulf was full of mackerel. Somehow or other, that impression got abroad, and our vessels came down here in greater numbers than before for several years. One witness has seen 50 or 75 vessels there. I think 76 came from Gloucester. There may have been 100 there in all. You will recollect that one witness said the traders in Canso telegraphed how fine the prospects were,—with a view, probably, to increase their custom; but they did expect that the fishing in the Gulf of St. Lawrence was to be better than it had been for a long time. Let us see what has happened this year. We have a part of the Port Mulgrave returns, down to the 25th of Sept., 1877. There is another page, or half-a-page, which our friends have not furnished us. I invite them to put that in now. I would like it very much. But so much as we were able to extract produced the following result:—60 vessels; 8,365½ bbls; an average of 139½ sea-barrels, or 125 packed bbls.; and one of our affidavits says that the fish on one vessel were all bought. The *John Wesley* got 190 bbls., very much over the average, and the witness said he went to the Gulf, could not catch any mackerel, and thought he would buy some of the boatmen. But 125 packed barrels is the average catch, and 8,365½ is the total number of bbls. Now, multiply that by the value of the mackerel after they are landed, and see what is the result. It is about $31,370.

I will not stop to do that sum accurately, because it is too small; but I will call your attention to the results of the importation this year. The importations into Boston, to October 1st, from Nova Scotia and New Brunswick, were 36,576 barrels; from Prince Edward Island, 14,549½ barrels; in all, 51,125½ barrels, which would amount in duty saved to $102,251, up to the 1st of October. It is not strictly evidence,—and if my friends object to it, it may be stricken out,—but here is the last report of the Boston Fish Bureau, that came yesterday, which gives later results. Up to November 2d, there had been 77,617 barrels imported into Boston from the Provinces,—more than double the amount that was imported in 1876, up to the same time; so that, while there has been this great falling off in the vessel fishery in the Gulf,—it is a total failure to-day,—there has been double the catch by boats, and double the catch by the Provincial fishermen. They have saved $155,234 of duty as against something like $30,000 worth of fish, when they are caught. It may be said that these returns will not represent the average, but we had a witness here, the skipper of the schooner *Eliza Poor*, Captain William A. Dickie, who testified on page 264 of the American evidence, that he had 118 sea barrels, or 106 packed barrels. He was one of those men who happened into Halifax, on his schooner, and upon cross-examination it was drawn from him by Brother Doutre, that Mr. Murray, the Collector at Mulgrave, told him that he had an average or more than an average of the catch of the United States fleet. He saw fifty United States vessels in the Gulf. In the absence of more complete returns, that is the best account I am able to give of the condition of the mackerel fishery in the Gulf of St. Lawrence since the Treaty of Washington was enacted.

I might confirm this by calling your attention to the testimony of witnesses from the other fishing towns in Massachusetts,—Provincetown, Wellfleet, and other places,—showing how the number of their vessels has decreased, and that the business is being abandoned, so far as the Gulf of St. Lawrence goes. Whatever is left of it is concentrated in Gloucester, and there its amount is insignificant.

I have spoken incidentally of the amount of duties saved upon the Provincial catch. On the subject of duties I propose to speak separately by-and-by; but I do not wish to leave this branch of the subject without calling your attention to what strikes me as evidence so convincing that it admits of no answer. We have shown you how, under the operation of the Treaty of Washington, or for natural causes, the mackerel fishery of the United States vessels in the Gulf of St. Lawrence has been dwindling down; that hardly any profitable voyages have been made to the Gulf since the Treaty. Certainly there has been no year when the fishing of our vessels in the Gulf has not been a loss to the fishermen. Let me call your attention to the fisheries of the Provinces. In 1869, Mr. Venning, in making his fishery report, after speaking of the falling off in the mackerel catch, went on to say:—"This may be accounted for chiefly by stating that a large proportion of our best mackerel catchers ship on board American vessels on shares, and take their fish to market in those vessels, and thus evade the duty; but after selling their fish, for the most part return home with the money"

The Hon. S. Campbell, of Nova Scotia, in the debate on the Reciprocity Treaty, says:—

"Under the operation of the system that had prevailed since the repeal of the treaty of 1854, the fishermen of Nova Scotia had, to a large extent, become the fishermen of the United States. They had been forced to abondon their vessels and homes in Nova Scotia, and ship to American ports, there to become engaged in aiding the commercial enterprises of that country. It was a melancholy feature to see thousands of young and hardy fishermen compelled to leave their native land to embark in the pursuits of a foreign country, and drain their own land of that aid and strength which their presence would have secured."

Mr. James R. McLean, one of our witnesses, was asked whether the condition of things was not largely due to want of capital, and he said:—

"It was owing to this reason:—We had to pay $2 a barrel duty on the mackerel we sent to the United States, and the men would not stay in the Island vessels when they saw that the Americans were allowed to come and fish side by side with the British vessels, and catch an equal share of fish; of course this was the result. The fishermen consequently went on the American vessels; our best men did o, and some of the very best fishermen and smartest captains amongst the Americans are from Prince Edward Island and Nova Scotia."

Captain Chivirie, the first and favorite witness called on the British side, says:—

"Q. What class of men are the sailors and fishermen employed among the Americans? A. I would say that for the last fifteen years two-thirds of them have been foreigners.

"Q. What do you mean by the term 'foreigners?' A. That they are Nova Scotians, and that they come pretty much from all parts of the world. Their fishermen are picked pretty much out of all nations.

"Q. If the Americans were excluded from our fishing privileges, what do you think these men would do? A. They would return to their native homes and carry on fishing there.

"Q. Have many of them come back? A. Oh yes. We have a number of Island men who have returned. A large number have done so. A great many come home for the Winter and go back to the States in the Spring; but during the past two years many of this class have come down to remain. This year I do not know of more than a dozen out of three hundred in my neighborhood who have gone back. They get boats and fish along the coast, because they find there is more money to be secured by this plan of operations. The fisheries being better, the general impression is that they are all making towards home to fish on their own coast."

James F. White says in his affidavit, put in on the British side:—

"The number of boats fishing here has trebled in the last three years. The reason of this increase is that other business is depressed, and fishermen from the United States, Newfoundland, New Brunswick, and Nova Scotia are coming here to settle, attracted by the good fishing, so that we are now able to get crews to man our boats, which formerly we were unable to do. Another reason is that the year 1875 was a very good year, and owing to the successful prosecution of the fishing that year, people's attention was turned to the business, and they were incited to go into it."

And another of their men, Meddie Gallant, says in his affidavit:—

"In the last five years, the number of boats engaged in fishing in the above distances has at least doubled. At this Run alone there has been a very great increase. Eight years ago there were only eight boats belonging to this Run, now there are forty-five. The boats are twice as good in material, fishing outfit, in sailing, in equipment, in rigging, and in every way, as they were five years ago. There is a great deal more money invested in fishing now than there was. Nearly every one is now going into the business about here. The boats, large and small together, take crews of about three men each. That is, besides the men employed at the stages about the fish, who are a considerable number."

So, then, while the mackerel fishing of our vessels in the Gulf has been diminishing, theirs has been largely increasing. What! all this, and money, too! Is it not enough that two, three, or four times as much fish is taken by them as before the Treaty? Is it not enough that they are prosperous, that those who have left them are returning home, and everybody is going into the business? Can they claim that they are losers by the Treaty of Washington? Is it not plain that they have, in consequence of its provisions, entered upon a career of unprecedented prosperity?

At this point, Mr. Foster suspended his argument, and the Commission adjourned until Tuesday, at noon.

TUESDAY, November 6, 1877.

The Commission met, according to adjournment, and Mr. Foster resumed his argument.

Gentlemen of the Commission,—

At the adjournment yesterday, I had been giving some description of the quantity of the mackerel fishing since the Treaty of Washington by American vessels in the Gulf of St. Lawrence and in the vicinity of British waters. For the years 1873 and 1874, I am content to rest upon the information derived from the Port Mulgrave statistics. With reference to the subsequent years, 1875, 1876 and 1877, there are one or two pieces of evidence to which I ought, perhaps, specifically to refer. Your attention has already been called to the fact that the Magdalen Islands and the Banks in the body of the Gulf of St. Lawrence,—of which Prof. Hind says there are many not put down on the chart, "and wherever you find banks," he says, "there you expect to find mackerel,"—have been the principal fishing grounds of the United States vessels for many years. The disastrous results of the great gale of 1873, in which a large number of United States vessels were lost, and in which more than twenty Gloucester vessels went ashore on the Magdalen Islands, show where, at that time, the principal part of the mackerel fleet was fishing. In 1876, the report of the Commissioner of Fisheries for the Dominion speaks of the number of vessels that year found at the Magdalen Islands. He says, "About one hundred foreign vessels were engaged fishing this season around the Magdalen Islands, but out of that number I do not calculate that there were more than fifty engaged mackerel fishing, and according to the best information received, their catch was very moderate.'

We have also the statement of one of the Prince Edward Island witnesses, George Mackenzie, on page 132 of the British evidence who, after describing the gradual decrease of the American fishery by vessels, say, "There has not been for seven years a good vessel mackerel fishery, and for the last two years it has been growing worse and worse." He estimates the number of the United States vessels seen off the Island at about fifty. We have also the testimony of Dr. Fortin on the subject, who spent a number of weeks this year, during the height of the fishing season, in an expedition after affidavits, that took him all around the Gulf, where he could not have failed to see what ever American vessels were fishing there. He says he "may have seen about 25 mackereling and sailing about," and that he heard at the Magdalen Islands there were seventy. According to the best information that I can obtain, that is not far from correct. Joseph Tierney, of Souris, says that there were twenty or thirty at Georgetown, fifteen or twenty at Souris, and he should think when he left home there were seventy-five. Ronald Macdonald, of East Point, says that he has not seen more than thirty sail this year at one time together; that last year he saw as many as a dozen and perhaps fifteen or twenty sail at a time. The number has diminished very much, he says, for the last five or six years, until this year.

Now, gentlemen, this is the record of the five years during which United States fishermen, under the provisions of the Treaty of Washington, have derived whatever advantages they could obtain from the inshore fisheries. I have heard the suggestion made, that it would have been better if this Commission had met in 1872, because there might have then been evidence introduced with reference to the whole twelve years of the Treaty of Washington, and I have even heard it said that it would have been fair to estimate the value of the privilege for the twelve years according to the appearance at that time. That is to say, that it would have been fairer to estimate by conjecture than by proof, by anticipation than by actual results. It seems to me, on the contrary, gentlemen, that the fairer way would have been, either to have the value of this privilege reckoned up at the end of each fishing year, when it could be seen what had actually been done, or to have postponed the determination of the question until the experience of the whole twelve years, as matter of evidence, could be laid before the Commission.

What shall we say of the prospects of the ensuing seven years? What reason is there to believe that the business will suddenly be revolutionized; that there will be a return to the extraordinary prosperity, the great number of fish, and the large catches that are said to have been drawn from the Gulf twenty-five, twenty, fifteen years ago? We were told that the time for the revolution had come already, when we met here, but the result proves that the present season has been one of the worst for our fishermen. What chance can you see that a state of things will ensue that will make the privilege any more valuable for the seven years to come than it has been for the five years already passed? Have you any right to assume that it is to be better without evidence? Have you any right, when you are obliged to judge of the future by the past, to go back to a remote past, instead of taking the experience of recent years? Would it be just for you to do so? This Commission, of course, does not sit here to be generous with the money of the Government of the United States, but simply to value in money what the citizens of the United States have under the treaty received, and are proved to be about to receive. It is, therefore, to be a matter of proof, of just such proof as you would require if you were assessing a charge upon each fishing vessel, either as it entered the Gulf or as it returned with its mackerel.

We think that there have been, heretofore, quite good standards by which to estimate the values of the inshore fisheries. For four years a system of licenses was enforced. In the year 1866 the license fee charged was only fifty cents a ton, except at Prince Edward Island, where it seems to have been sixty cents a ton. In 1867, it was raised to a dollar a ton, and $1.20 at Prince Edward Island. In 1868, it was two dollars a ton, and $2.40 at Prince Edward Island. The reason for the additional price on the island I do not know, but it is not, perhaps, of much consequence. Our fishermen told you that the motive that induced them to take out these licenses was twofold. In the first place, they desired to be free from danger of molestation. In the next place, they did not desire, when there was an opportunity to catch fish within three miles of the shore, to be debarred from doing so; and if the license fee had remained at the moderate price originally charged no doubt all of our vessels would have continued to pay the license as they did the first year. Three hundred and fifty-four, was the number of licenses the first year; but when the price was raised to a dollar a ton, half the number of vessels found it expedient to keep where they had always been allowed to go; to fish remote from the shore; even to avoid doubtful localities; to keep many miles out on the Banks, rather than pay a sum that would amount, on the average to $70 a trip; and when the price was raised to two dollars a ton, hardly any of the vessels were willing to pay it. The reason why they would not pay it was not that they were contumacious and defiant. They were in a region where they were liable to be treated with great severity, and where they had experienced, as they thought, very hostile and aggressive treatment. They desired peace; they desired freedom. They did not wish to be in a condition of anxiety. Neither the captains of the vessels on the sea, nor the owners of the vessels at home, had any desire to feel anxiety and apprehension. The simple reason why they did pay when it was fifty cents a ton and ceased to pay when it became one dollar, or two dollars a ton, was that the price exceeded, in their judgment, the value of the privilege. There were not mackerel enough taken within the inshore zone to make it worth their while to give so much for it. Whatever risk they were subjected to, whatever inconvenience they were subjected to from being driven off the shore, they preferred to undergo. If a license to fish inshore was not worth a dollar a ton in 1868 and 1869, in the halcyon days of the mackerel fishery, can anybody suppose it really is worth as much as that now? But fix the price of the license fee as high as you please. Go to this question as a question of computation, on business principles, pencil in hand; estimate how much per ton it is worth, or how

much per vessel it is worth, and see to what result you are brought by the figures. Nobody thinks that for some years past there have been in the Gulf of St. Lawrence three hundred vessels from the United States fishing for mackerel. The average tonnage is put by no one at over 70 tons. That is about the average of Gloucester tonnage, and the vessels that come from Gloucester are larger than those that come from other places. Three hundred vessels at $70 a vessel, $21,000 per annum. Put whatever valuation you please per ton, and state the account; debit the United States with that, and see what the result is when you come to consider the duties. If it is called two dollars a ton, the highest price ever charged, it will be about $42,000 a year.

Is there any prospect whatever that the mackerel fishery for American vessels in the Gulf of St. Lawrence will ever again become prosperous? In order that it should do so, there must concur three things, of no one of which is there any present probability. In the first place, there must be much poorer fishing off the coast of the United States than usual, for as things have been there for some years past until the present year, the fishing for mackerel was so much more profitable than it had ever been in the Gulf of St. Lawrence that there was no temptation for our vessels to desert our own shores; and off the shores of the United States seining can be pursued, which never has been successfully followed in the Gulf. Seining mackerel is about the only really profitable mode of taking the fish, as a business out of which money can be made to any considerable amount. The days for hook and line fishing have passed away, and seining is the method by which the fish must be taken if money is to be made. That has never yet been done, and is not likely to be done, in the Gulf. The bottom is too rough, the water is too shallow. The expedient that we were told at the beginning of the hearing had been adopted, turns out to be impracticable, for shallow seines alarm and frighten away the fish. The seines are not made shallow to accommodate themselves to the waters of the Gulf. Year by year they are made longer and deeper, that a school of fish may be more successfully enveloped by them. Then there must also be much better fishing in the Gulf than has existed for several years past. It has been going down in value every year since the Treaty went into effect. It has got down to an average, by the Port Mulgrave returns (I mean by the portion of the returns which we have) of 125 barrels a vessel this year, and according to the verbal statement of the Collector of Port Mulgrave, 108 barrels is quite up to the average. If any one takes the trouble to go through the returns we have put into the case and analyze them, it will appear that 108 barrels is quite as large as the average this year. Some vessels have come out of the Gulf with nothing at all, and some with hardly anything at all. In the next place, in order to induce American vessels to go for mackerel to the Gulf of St. Lawrence in any considerable numbers, mackerel must have an active market, at remunerative prices. There must be a different state of things in the United States in that respect from what has existed for many years past, for by all accounts the demand has been declining and the consumption has been diminishing for ten years past.

Without stopping to read at length the testimony on that point, there are two or three of the British witnesses who in a short compass state the truth, and to their testimony I wish to call your attention. Mr. Harrington, of Halifax, page 420, says, in answer to the question, "There has not been as much demand for mackerel from the United States for the last five years as formerly?" "Not so great." And in reply to the question, "There must be an abundant supply at home, I suppose?" he says, "I should say so, unless the people are using other articles of food.' Mr. Noble, another Halifax witness, page 420, being asked the same question, says, "I think for the past two years the demand for mackerel has not been quite so good as before." Mr. Hickson, of Bathurst, is asked this question, "Fresh fish are very rapidly taking the place of salt mackerel in the market, and the importance of salt mackerel and other cured fish is diminishing more and more every year. Is not this the case?' His answer is, "That is my experience in my district." "And owing to the extension of the railroad system and the use of ice cars, pickled, salt and smoked fish will steadily become of less consequence?" "Certainly." Mr. James W. Bigelow, of Wolfville, Nova Scotia, on page 223 of the British evidence, states very emphatically the practical condition of the business. He says, "The same remark applies not only to codfishing, but to all branches of the fishery;—within the past ten years, the consumers have been using fresh instead of salt fish. The salt fish business on the Continent is virtually at an end" He is sorry to say that he states this from practical knowledge of this business. He then goes on to say that fish is supplied to the great market of the United States, "from Gloucester, Portland and New York; but from Boston principally." "And the fish is sent where?" "To every point West, all over the Union; the fish is principally boxed in ice." Then he goes on to state that if the arrangements of the Treaty of Washington should become permanent, instead of being limited to a term of twelve years, with the new railroad communication with this city that has been already opened, the result will be to make Halifax the great fish-business centre of the continent; that the vessels will come in here with their fresh fish instead of going to Gloucester or Boston or New York; that a great business, a great city, will be built up here; and he says that, notwithstanding the Treaty is liable to terminate in seven years, he is expecting to put his own money into the business, and establish himself in the fresh fish business here. Our own witnesses—the witnesses for the United States—have given a fuller and more detailed explanation of this change that has taken place in the markets. It requires no explanation to satisfy any person, with the ordinary organs of taste, that one who can get fresh fish will not eat salt mackerel. Every body knows that. *Crede experto.* Our witnesses tell you that fresh fish is sent as far as the Mississippi, and west of the Mississippi, in as great abundance as is to be found on the sea-board. It is just as easy to have fresh fish at Chicago and St. Louis, and at any of the cities lying on the railroad lines one or two hundred miles west of the Mississippi, as it is to have fresh fish in Boston or Philadelphia. It is only a question of paying the increased price of transportation. Salt fish has to be transported there also, and it costs as much to transport the salt fish as the fresh fish. The result is, that people will not and do not eat salt fish nearly as much as formerly. Then there is a great supply of lake herring—a kind of white fish—from the northern lakes. The quantity is so great that the statistics of it are almost appalling, although they come from the most authentic sources. This lake herring, being sold at the same price as the inferior grades of mackerel—being sold often lower than the cheapest mackerel can be afforded—is taken in preference to it. People find it more agreeable.

At the South, where once there was a large mackerel demand, usually there has grown up an immense mullet business, both fresh and cured; that has taken the place of salt mackerel there. And so it has come to pass, that there is a very limited demand in a few large hotels for that kind of salt mackerel which is the best, the No. 1 fat mackerel—a demand that would not take up, at the usual price in the market—$20 a barrel—more than from five to ten thousand barrels all over the country; while, if you go down to the poorer grades of mackerel, few will buy them until they got as low as from seven to eight dollars a barrel. I am not going over the testimony of Proctor, Pew, Sylvanus Smith, and our other witnesses on this subject, because what they have said must be fresh in the minds of all of you. It comes to this: people will not eat the mackerel unless they can buy it at a very low price. It comes into competition, not with other kinds of fish alone, but with every description of cheap food, and its price can never be raised above the average price of other astples in the market of equivalent food-value.

If it is to be impossible to dispose of considerable quantities of these fish until the price is brought down to about eight dollars a barrel on the average, what inducement will there be to come, at great expense, to the Gulf of St. Lawrence, to have such results as for years past have followed from voyages here? The truth, gentlemen, is simply this: whether it is a privilege to you not to see United States vessels here, or whether their presence here has some incidental benefit connected with it, you are going to find for years to come that they will not be here. The people in the Strait of Canso who want to sell them supplies will find them not there to buy supplies, and the unhappy fishermen who suffer so much from having them in the neighborhood of the Island will be exempt from all such evil consequences hereafter. Once in two or three years, if there appears to be a chance of a great supply here, and if there happens to be a great failure on our own coasts, a few of our vessels will run up in midsummer to try the experiment. But as to a large fleet of United States vessels fishing for mackerel in the Gulf of St. Lawrence, there is no immediate prospect that such will ever be the case. Forty years ago, fishing for mackerel died out in the Bay of Fundy. According to the witnesses, many years ago mackerel were extremely abundant in the waters in the vicinity around Newfoundland. They have disappeared from all those places, though, strange to say, one schooner did get a trip of mackerel in a Newfoundland bay this summer, off the French coast, so that we are not obliged to pay for it in the award of this Commission, it was in waters where we had a right to fish before the Treaty of Washington. But this business, notoriously precarious, where no man can foretell the results of a voyage, or the results of a season, will pretty much pass away, so far as it is pursued by United States vessels. They will run out on our own coast; they will catch what they can and carry them to market fresh, and what cannot be sold fresh, they will pickle. They will, when the prospects are good, make occasional voyages here, but as for coming in great numbers, there is no probability that they will ever do it again. Our friends in Nova Scotia and upon the Island are going to have the local fishery to themselves. I hope that it will prove profitable to them. I have no doubt it will prove reasonably profitable to them, because they, living on the coast, at home, can pursue it under greater advantages than the men of Massachusetts can They are very welcome to all the profits they are to make out of it, and they are very welcome, if they are not ungenerous in their exactions from us, to all the advantages they derive from sending the fish that they take in their boats or vessels in Nova Scotia and Prince Edward Island to our markets. All they can make by selling them there. I am sure no one will grudge them.

I come now to a branch of this case which it seems to me ought to decide it, whatever valuation, however extreme, may be put upon the quantity of mackerel caught by our vessels in the territorial waters of the Provinces. I mean the duty question; the value of the remission of duties in the markets of the United States to the people of the Dominion. We have laid the statistics before you, and we find that in 1874 there was $335,181 saved upon mackerel and herring, and $20,000 more saved upon fish oil. There was, therefore, $355,972 saved in 1874. In 1875, there was a saving of $375,991 and some cents. In 1876, $353,212. I get these figures by adding to the results of Table No. 4, which shows the importation of fish, the results of Table No. 10, which shows the fish oil. The statistics are Mr. Hill's. In Table No. 5, you will find the quantities of mackerel and herring. The dutiable value of mackerel was two dollars a barrel; of herring, one dollar a barrel, and of smoked herring, five cents a box.

We are met here with the statement that the consumer pays the duties; and our friends on the other side seem to think that there is a law of political economy as inexorable as the law of gravitation, according to which, when a man has produced a particular article which he offers for sale, and a tax is imposed on that article, he is sure to get enough more out of the man to whom he sells the article to reimburse the tax. That is the theory; and we have heard it from their witnesses, — "*the consumer pays the duties*, — as if they had been trained in it as an adage of political economy. But, gentlemen, I should not be afraid to discuss that question as applicable to mackerel and herring and the cured fish that come from the Dominion of Canada into the United States before any school of political economists that ever existed in the world. I do not care with what principles you start, principles of free trade or principles of protection, it seems to me that it can be proved to demonstration that this is a case where the duties fall upon those who catch the fish in the Dominion and not upon the people of the United States, who buy and eat them. The very treaty under which you are acting requires you to have regard to the value of the free market, ordains that in making up your award you shall take it into account. And are you, upon any theories of political economy, to disregard what the treaty says you shall have regard to? Why, nobody ever heard the proposition advanced, until we came here to try this case, that free access to the markets of the United States was anything but a most enormous advantage to the people of these Provinces.

Let us look at the history of the negotiations between the two Governments on the subject. As early as 1845, (some years before the negotiations with reference to the Reciprocity Treaty), when the Earl of Aberdeen announced to Mr. Everett, as a matter of great liberality, that our fishermen were no longer to be driven out of the Bay of Fundy, he went on to say, that in communicating the liberal intentions of Her Majesty's Government, he desired to call Mr. Everett's attention to the fact that the produce of the labor of the British Colonial fishermen was at the present moment excluded by prohibitory duties on the part of the United States, from the markets of that country and he submited that the moment when the British Government made a liberal concession to the United States might well be deemed favorable for a kindred concession on the part of the United States to the British trade, by a reduction of the duties which operated so prejudically to the interests of British Colonial fishermen. That was the view of the home government, long before any Reciprocity Treaty had been agitated—thirty-two years ago. The letter of Lord Aberdeen bears date, March 10, 1845.

In 1850, a communication took place between Mr. Everett, then Secretary of State, through the British Minister at Washington, in which Lord Elgin made the offer to which I referred in my case, which I then understood to be an unequivocal offer to exchange free fish for free fishing, without regard to other trade relations. I found that, so far as that particular letter went, I was in error, and corrected the error. Subsequently, I found that Mr. Everett himself, two years later, had the same impression for in a letter that he wrote, as Secretary of State to the President, in 1853, before the Reciprocity Treaty, he says:—

"It has been perceived with satisfaction that the Government of Her Britannic Majesty is prepared to enter into an arrangement for the admission of the fishing vessels of the United States to a full participation in the public fisheries on the coasts and shores of the Provinces, (with the exception, perhaps, at present, of Newfoundland) and in the right of drying and curing fish on shore, on condition of the admission, duty free, into the markets of the United States, of the products of the Colonial fisheries; similar privileges, on the like condition, to be reciprocally enjoyed by British subjects on the coasts and shores of the United States. Such an arrangement the Secretary has reason to believe would be acceptable to the fishing interests of the United States." (32 Congress, 2 Session, Senate Ex. Doc., 34.)

The latter part of that letter contains a reference to general reciprocity, and shows the anxiety of the British authorities to have more extensive reciprocal arrangements made.

Mr. KELLOGG—What is the date of Lord Elgin's letter?

Mr. FOSTER. — The letter of Lord Elgin is dated June 24, 1851. The letter which I just read from

Mr. Everett to the President was in 1853. So that it seems that Mr. Everett then understood, as I did, that the offer was a specific one, and that the government of Great Britain was at that time disposed to exchange the right of inshore fishing for the admission of fish into the United States duty free. It is not particularly important, at a date so remote, how the fact really was. I refer to it only to show the great importance attached at that early day—an importance which has continued to be attached from that time to the present—by the Home Government as well as the Colonial Government, to free access to the markets of the United States.

Coming down to the date of the Reciprocity Treaty, we find in every direction, whatever public document we refer to of any of the Provinces, the same story told: That during the Reciprocity Treaty, they built up a great fish business, unknown to them before; that at the end of the Reciprocity Treaty, a duty of two dollars a barrel on mackerel, and one dollar a barrel on herring, excluded them from the markets of the United States and crushed out that branch of industry. At the risk of making myself tedious, I must read you some passages on that subject.

Here is what Mr. Peter Mitchell, the former Minister of Marine and Fisheries, says in 1869, in his "Return of all licenses granted to American fishermen," printed by order of Parliament, at Ottawa:—

"These exclusive duties bear with peculiar hardship on our fishing industry, and particularly that of Nova Scotia and Prince Edward Island—the fishermen and dealers in those Provinces being forced into competition, in United States markets, under serious disadvantages, side by side with the American free catch taken out of our own waters."

Yes, "*taken out of their own waters.*" I am not afraid of the words. If the consumer pays the duties, it would not make any difference out of what waters the fish were taken, which brought on competition, would it? I am discussing now the proposition that there is a law of political economy, of universal application, and particularly applicable to the mackerel which go from the Provinces to Boston, by which whatever tax is imposed in the United States is forthwith added to the price and has to be paid by the man who eats the mackerel in the States, and it makes no difference where the competition arises from. Mr. Mitchell's statement, therefore, is absolutely to the purpose. He continues:—

"At the same time, other producers are subjected to equally heavy charges on the agricultural, mineral and other natural products of the united Provinces.

"The direct extent to which such prohibitory duties affect the fishery interests of these Provinces may be stated in a few words. During the year 1863, for example, the several Provinces have paid in gold, as custom duty on Provincial caught fish exported to the United States about $220,000."

This amount was paid by the Provinces in 1866, the year after the Reciprocity Treaty ended. Then, in a note, he says:—

"More forcibly to illustrate the unequal operation of the present system, suffice it to instance the following cases:—A British vessel of 71 tons, built and equipped last season at St. John, N. B., costing $4,800, expressly for the mackerel fishery in the Gulf of St. Lawrence and Bay of Chaleurs, took 600 barrels of fish, which sold in Halifax and Boston for $6,000. After paying expenses (including $9.80 in gold for customs) a profit of $1,200 accrued to the owners. An American vessel from Newburyport, Mass., of 46 tons burthen, took a license at Port Mulgrave, N.S., paying $16. The whole cost of vessel and voyage was $3,200 or $2,400, Halifax currency. She fished 910 barrels of mackerel, which sold in Boston for $13,000, about $9,110 in gold, leaving a profit of $6,710."

After speaking of the question of raising the license fees to higher figures, Mr. Mitchell continues (p. 6):—

"It is recommended that the rate be $2 per ton, the mackerel fishery being that in which Americans chiefly engage, and as mackerel is the principal fish marketed in the United States by Canadians, on which the tax is $2 per barrel, this rate amounts to a charge of but 20 cents per barrel, still leaving them an advantage of $1.80 on each barrel, besides the drawback allowed on salt."

Did Mr. Peter Mitchell think that the $2 a barrel duty was got back by the fishermen of the Provinces? During the session of the Joint High Commission at Washington, when the American Commissioners made an offer to purchase the inshore fisheries in perpetuity, which was not coupled with any offer of free admission to our markets, the British Commissioners replied "that the offer was, as they thought, wholly inadequate, and that no arrangement would be acceptable of which the admission into the United States, free of duty, of fish, the production of the British fisheries, did not form a part." And after the Treaty of Washington had been ratified Earl Kimberly wrote to Lord Lisgar:—"It cannot be denied that it is most important to the Colonial fishermen to obtain free access to the American markets for their fish and fish oil."

You can explain the language of these statements only upon the theory that they knew and understood that the duty was necessarily a tax upon the fish production of the Provinces. How idle to have made observations of the kind that I have been reading except upon that plain hypothesis!

In the debates on the ratification of the Treaty it was said by Sir John A. Macdonald that—

"*The only market for the Canadian No. 1 mackerel in the world is the United States. That is our only market, and we are practically excluded from it by the present duty. The consequence of that duty is that our fishermen are at the mercy of the American fishermen. They are made the hewers of wood and drawers of water for the Americans. They are obliged to sell their fish at the Americans' own price. The American fishermen purchase their fish at a nominal value and control the American market.* The great profits of the trade are handed over to the American fishermen or the American merchants engaged in the trade, and they profit to the loss of our own industry and our own people."

And here let me call your attention to a striking fact, that from the beginning to the end of these negotiations the people of the Maritime Provinces, who own the inshore fisheries, have been the people who have been most anxious on any terms to have the duties removed in the United States markets. It was said in this debate by some one (I do not remember the name of the speaker) that "it is harsh and cruel for the people of Ontario, for, the take of forcing a general reciprocity treaty, to injure the fishing interests of the Provinces by preventing them from getting a free market in the United States."

A gentleman from Halifax—Mr. Power—who is said to have devoted his whole life to the business, and to understand all about it, tells the story in a more practical way:—

"In the Spring of each year, some forty or fifty vessels resorted to the Magdalen Islands for herring, and he had known the number to be greater. These vessels carried an average of 900 barrels each. So that the quantity taken was generally in the neighborhood of 50,000 barrels. During the existence of the Reciprocity Treaty, no United States vessels went after these fish. All the vessels engaged in that fishery belonged to some one of the provinces now forming this Dominion. Since the abrogation of the treaty and the imposition of the duty of a dollar per barrel by the United States, the case had become entirely changed. Vessels still went there, but they were nearly all American. Now, under this treaty, we would get that important branch of trade back again."

You will remember that I said yesterday, gentlemen, that herring,—a fish so poor and so cheap that American vessels cannot afford to engage in the fishery, it is far more advantageous for them to purchase than to catch,—

would be, by a duty of a dollar a barrel entirely excluded from the markets of the United States and it seems that such was the result in the interval between the termination of the Reciprocity Treaty and the ratification of the Treaty of Washington. See how Mr. Power deals with this question of whether the consumer pays the duty.

"*He had heard it said that the consumer paid the duty. Now, whilst this might be the case with some articles, it was not so with the article of our fish. In our case, in this business, our fishermen fished side by side with their American rivals, both carrying the proceeds of their catch to the same market, where our men had to contend against the free fish of the American fishermen. Let him illustrate this. An American and a provincial vessel took 500 barrels of mackerel each; both vessels were confined to the same market, where they sold at the same price. One had to pay a duty of $1,000, while the other had not to do so. Who then paid the $1,000? Most certainly not the purchaser or consumer, but the poor, hard-worked fishermen of this Dominion; for this $1,000 was deducted from his account of sales.* Those who contend that in this case the consumer paid the duty, ought to be able to show, that if the duty were taken off in the United States, the selling price there would be reduced by the amount of the duty. There was nothing in the nature or existing circumstances of the trade to cause any person who understands to believe that this would be the case; *and therefore it would be seen that at present our fishermen labored under disadvantages, which made it almost impossible for them to compete with their rivals in the United States; and that the removal of the duty, as proposed by this treaty, would be a great boon, and enable them to do a good business where they now were but struggling, or doing a losing trade.*"

And the next speaker, after depicting in glowing terms just the condition of prosperity that the Island of Prince Edward is enjoying now, as a result sure to follow from the ratification of the treaty goes on to say that no men can compete with the Provincial fishermen on equal terms, because their fishing is at their own door and asserts that only an equal participation in the markets of the United States is necessary to give them the monopoly of the whole business.

Another speaker tells the story of the fleet of Nova Scotia fishing vessels built up under the Reciprocity Treaty, which were forced to abandon the fishing business when the Reciprocity Treaty ended and a duty was put upon fish. Somewhere I have seen it stated that vessels were left unfinished on the stocks when the Reciprocity Treaty terminated, because, being in process of construction to engage in the fishing business, their owners did not know what else to do with them.

Are we to be told that these men were all mistaken,—that the consumer paid the duty all along,—that no benefit was realized to the Provincial fishermen from it? Why, even the reply to the British case concedes that when the duty existed, some portion of it was paid by the Provincial fishermen. It is to be remembered, too, gentlemen, that in considering this question of what is gained by free markets, you are not merely to take into account what in fact has been gained by the change, but the people of these Provinces have acquired, for a term of twelve years, a vested right to bring all descriptions of fish, fresh or salt, and fish oil, into our markets. Before the expiration of that time, the existing duties might have been increased in amount; duties might have been put upon fresh fish; there was nothing to prevent this and there was every reason to anticipate that if a harsh and hostile course had been pursued towards American fishermen with reference to the inshore fisheries, there would have been duties more extensive and higher than ever before put upon every description of fish or fish product that could possibly go to the United States. They gained, therefore, our markets for a fixed term of years, as a matter of vested right. How much their industry has been developed by it, their own witnesses tell us.

Now, gentlemen, if you could consider this as a purely practical business question between man and man, laying aside all other considerations,—a question to be decided, pencil in hand, by figures,—does anybody in the world doubt which is the greatest gainer by this bargain, the people of this Dominion, having the free markets of the United States, or a few Gloucester fishermen catching mackerel within three miles of the shore, in the bend of the Island, or for a week or two off Margaree? Those are the two things.

But I am not afraid, gentlemen, to discuss this question upon abstract grounds of political economy. I said there was no school of political economy according to which there was any such rule as that the consumer paid the duties. I must trouble you with a few extracts from books on that subject, wearisome as such reading is. Here is what Andrew Hamilton said, one of the disciples of Adam Smith, as long ago as 1791:—

"If all merchants traded with the same rate of duty they experience the same general advantages and disadvantages; but if the rate of a tax was unequal, the inequality unavoidably operated as a discouragement to those whom the higher tax affected. If one merchant was charged two shillings for the same species and quantity of goods on which another was charged only one shilling it was evident that he who paid the highest duty must either lose the market or smuggle or sell his goods at an inferior profit. In other words, the difference in the rate of the tax would fall on the merchant liable to the highest duty and in cases of competition would always drive him out of the market." [p. 187.]

Then he goes on to say, on a subsequent page:—

"We may suppose a tax to be laid on in a department where, in the progress of wealth, profits were about to be lowered. If this tax was just equal to the reduction of the rate of profit that was about to take place, then common rivalship would induce the dealers to pay the tax and yet sell their goods as heretofore." [p. 217.]

He says further, on page 242:—

"Let us suppose a brewer to have one thousand barrels of strong ale upon hand. That a tax of one shilling per barrel is laid upon the ale, and that he may raise the price just so much to his customers, because they will readily pay the tax rather than want the ale. In this case, the brewer would be directly relieved from the tax. But if, on the other hand, he found after advancing the tax he could not raise the price of his ale above what it was formerly, and yet was under a necessity of disposing of it, though this may drive him from the market or unite brewers to stint the supply, so as to bring up the price, on some future occasion, yet in the meantime the trader would suffer; nor would he immediately derive, by any of his ordinary transactions, an effectual relief from the loss he had thus sustained by paying the tax. When, therefore, a trader advances a tax upon a great quantity of goods, he can receive no effectual relief from such a tax, but in a rise of the price of the article, adequate to the tax which he has advanced." * * * * *

"It follows that all speculations whose object is to show on what fixed fund or class taxes must fall are vain and unsatisfactory, and will be generally disproved (as they almost always have been) by experience." [p. 257.]

"A dealer who can evade such a tax will soon possess a monopoly if the tax is paid by his competitors. It will be to him a kind of bounty for carrying on his business, and this must drive his competitors either to evade the tax also or to relinquish the employment." [p. 288.]

I am almost disposed to hand to the reporters the extracts, rather than trouble you to read them; and yet I feel it my duty to press this subject, because, if I am right in it, it is decisive."

SIR ALEX. GALT—I think you had better read them.

Mr. FOSTER—Mill says, and he is the apostle of free trade, in volume 2 of his "Political Economy," page 113:—

"If the north bank of the Thames possessed an advantage over the south bank in the production of shoes, no shoes would be produced on the south side, the shoemakers would remove themselves and their capitals to the north bank, or would have established themselves there originally, for, being competitors in the same market with those on the north side, they could

not compensate themselves for their disadvantage at the expense of the consumer, the amount of it would fall entirely on their profits, and they would not long content themselves with a smaller profit, when by simply crossing a river they could increase it."

Apply that statement to the evidence in this case, and remember how, when the Reciprocity Treaty ended, the fishermen of Nova Scotia and Prince Edward Island took refuge on board United States vessels, for the purpose, as one of the official documents that I read from yesterday says, of evading the duty. It might be a curious question, if it were important enough to dwell upon it, whether, in assessing against the United States the value of the privilege of fishing inshore, you were or were not to take into account the fact, that half of the people who fish on shares in United States vessels are subjects of Her Majesty, and having disposed of their half of the fish, having paid half of the fish for the privilege of using the vessel and its equipment, they sell the other half of the fish, and bring the proceeds home; and whether it is a just claim against the United States if British subjects go in United States vessels, to require the United States to pay money because they do so.

Mill says in another passage, in volume 2, page 397 :—

"We may suppose two islands, which, being alike in extent, in natural fertility and industrial advancement, have up to a certain time been equal in population and capital, and have had equal rentals, and the same price of corn. Let us imagine a tax to be imposed in one of these islands, but not in the other. There will be immediately a difference in the price of corn, and therefore, probably, in profits."

I am almost through with this tediousness, but there is a good Scotch book on political economy by John McDonald, of Edinburgh, published in 1871—and we have always had sound political economy from Scotland—from which I must read a few lines —

"In the third place," McDonald says, on page 351, "it may be possible to impose Custom duties which will permanently be paid, either wholly or partly, not by the consumers but by the importers or producers. Assume that we draw our stock of sugar from a country engaged in the growth of sugar, and capable of selling it with profit to us some shillings cheaper than any other country can, the former will of course sell the sugars to us at a price slightly below what would attract other competitors. Impose a duty of some shillings a cwt., without altogether destroying the peculiar advantages of the trade, while we will pay no dearer for our sugar, the importers will pay the tax at the expense of their profits. If we add to these considerations the difficulty of ascertaining the actual incidence of many such taxes, distrust of sharp contrasts between direct and indirect taxes will be inspired."

"Customs duties sometimes fall on the importer, not on the consumer. And if this were a common occurrence, it might seriously impair the doctrine that protective duties are the taxing of the home consumer for the sake of the home producer. But this incidence is confined to the following rare circumstances: If the sole market open to the importer of the staple goods of one country is the country imposing the duties. Secondly, if the other market open to him was so distant or otherwise disadvantageous that it would be preferable to pay the tax; or, thirdly, if the only available place for procuring commodities of vital moment to the importing country, was the country imposing the duty. Wherever the profits are such as to admit of a diminution without falling below the usual rate, it may be possible for a country to tax the foreigner." (p. 393.)

I was interested some years ago in an article that I found translated from the *Revue de Deux Mondes* of the 15th of Oct. 1869, on "Protection and Free Trade," by a gentleman of the name of Louis Alby. I do not know who he is, but on pages 40 and 41, of the pamphlet, he not only states the doctrine, but he illustrates it :

"The free-traders believe—and this is the foundation of their doctrine—that when the import duty on an article of foreign merchandise is reduced, this reduction of taxes will at once cause an equal diminution in the price of the merchandise in the market, and an equal saving to the purchaser. In theory this consequence is just, in practice it never takes place. If the reduction is considerable, a part, and that far the smallest, profits the consumer, the larger portion is divided between the foreign producer and the several intermediaries. If the reduction is small, these last entirely absorb it, and the real consumer, he who makes the article undergo its last transformation, is in no wise benefited. The real consumer of wheat is neither the miller nor the baker, but he who eats the bread. The real consumer of wool is neither the draper nor the tailor, but he who wears and uses the clothes.

"This discrepancy between the variations of custom-house duties and the selling prices cannot be denied, and since the commercial treaty the experiment has been tried. All prohibitions have been removed and all duties reduced; but what article is there the price of which has been sensibly lowered for consumption? When economists demanded the free importation of foreign cattle, they hoped to see the price of meat lowered, and for the same reason the agriculturists resisted with all their strength."

"As soon as the duties were removed, the graziers from the northern and eastern departments hastened to the market on the other side of the frontier; but the sellers were on their guard and held firm, and, competition assisting them, prices rose instead of falling; all the advantage of the reduction of duty was for foreign raisers of cattle, and meat is dearer than ever. The same result followed in reference to the wools of Algiers, and on this point I can give the opinion of the head of one of the oldest houses in Marseilles, an enemy, moreover, to protection, like all the merchants of seaport towns:—'When the duties on Algerian wools were removed,' he said to me, '*we supposed that this would cause wool to sell cheaper in France, but the contrary happened.* There was more eagerness for purchasing in Africa; there was more competition, and the difference in the duties was employed in paying more for the wool to make sure of getting it. *It is not, then, the French manufacturer who has profited by the removal of duties, it is the Arab alone.*' Thus the interest of the consumer, about which so much noise is made, far from being the principal element in the question, only plays a secondary part, since the reduction in the tariff only profits him in a small measure."

Now, we are in a condition to understand precisely the meaning of what one of our witnesses said, Mr. Pew, that the price of mackerel to the man who bought one mackerel at a time and ate it, had not changed for ten years; that it was a very small purchase; that the grocer who sold it to him would not lessen the price if mackerel went down, and would not raise the price if mackerel went up; that it kept to him uniform; so that, after all, the question has been a question where the greater or less profit accrued to parties who handled the mackerel.

If ever there was a case where it was impossible to transfer a duty once paid by a man who catches fish and brings it to market so that its incidence would fall on the consumer, it is the one we are dealing with. Why so? You cannot raise the price of mackerel very much, because its consumption stops when you get above $8, or $10 at the highest, a barrel. People will not eat it in larger quantities unless they are induced to do it because it is cheapest procurable food. That is one reason why the duty cannot be put on to the price. There is another reason why it cannot be added to the price,—a perfectly conclusive one, and that is, that not more than one-fourth or a less part of the supply,—it has been assumed in the questions as one-fourth is imported and subject to the duty. I do not care what fraction it is, whether one-third, one-fourth or one-fifth, not more than a small fraction of the mackerel that is in the markets of the United States at any time comes from the Provinces; and in order to get the price up to a point that will reimburse the provincial fisherman who has paid a duty, you must raise the price of all the mackerel in the market, must you not? That is perfectly plain. If there are between three and four hundred thousand barrels of mackerel in the United States, and thirty, forty, fifty, sixty, seventy, eighty or a hundred thousand of them are taxed $2 a barrel, do you think it is going to be possible to raise, by the tax on the provincial catch, the price of the whole production in the market? If that could be done it might come out of the consumer, and then it would be a benefit to our fishermen and an injury in the end to our consumers. But it can not be done. The price cannot be raised; the fraction is not large enough to produce any perceptible influences upon it. So the result has always been, and they know that it was so before and must be so again, that such a

duty cuts down their profits to the quick. It cuts them down so that the business must be abandoned, and take away the United States market, as you would take it away if a higher tariff was imposed, and the fishing business of the Provinces would gradually die out of existence. It is not a case—let me repeat it, because there has been so much apparent sincerity in the belief that that the tax would come out of the consumer,—it is not the case of a tax put upon the whole of the commodity, or the greater part of the commodity, but it is a tax put upon the smaller part of the commodity in the only market to which both producers are confined; and you might just as well say, if two men made watches, one here and one in Boston, which were just exactly alike, and their watches were both to be sold in Boston, that you could put a tax of twenty-five or fifty per cent. on the importation of the Halifax watch into Boston and then raise the price.

The only instance in which the imposition of a tax upon a part of the production of an article results in raising the price of the whole is where the demand is active, where the supply is inadequate, and where there is no equivalent that can be introduced in the place of the taxed article. It might just as well be said that a wood lot ten miles from town is worth as much as a wood lot five miles from town. Wood will sell for a certain price; and the man who is the farthest off, and who has the greatest expense in hauling the wood to market, is the man who gets the least profit.

It was estimated in the debates on the Treaty of Washington that the tax on mackerel at that time amounted to fifty per cent. It was truly stated to be a prohibitory duty. You will remember that Mr. Hall has also given you a practical view of this subject. Mr. Hall, Mr. Myrick and Mr. Churchill, located on Prince Edward Island. To be sure it is their misfortune not yet to be naturalized British subjects. Detract whatever you choose from the weight of their evidence because they are Americans, but give to it as much as its intrinsic candor and reasonableness require at your hands. What do these gentlemen tell you of their practical condition? Mr. Hall says that when the duties were put on, at first, people on the island were helped by a good catch, a good quality and by a short catch in the United States, and by the condition of the currency, but when they began to feel the full effect of the imposition of the duties, they were ruined. His partner confirms the same story. Mr. Churchill, the other man, whose business it is to hire by the month the fishermen of the Island and pay them wages says he could not afford to hire the men if a duty was put upon the fish. Do you suppose he could? The fish landed on the shore of Prince Edward Island are worth $3.75 a barrel,—that is what they are sold for there. The fishermen earn for catching them from $15 to $25 a month. Put a tax of $2 on to $3.75 worth of mackerel and can there be any doubt of the result?

If this subject interests you, or if it seems to you to have a bearing upon the result, I invite your careful attention to the testimony of Hall, Myrick and Churchill. Do they not know what the result of putting a tariff upon their mackerel would be? Do not the people of Prince Edward Island know? If they have been stimulated to a transient, delusive belief that they may, in some way, get the control of the markets of the United States for the eighty or ninety thousand barrels which, at the utmost, is produced in the Provinces and put the price up as high as ever they please, do you not think that that delusion will be dissipated, and that their eyes will be most painfully opened, if it ever comes to pass that a duty shall be re-imposed?

It may be said that this question of duties is a question of commercial intercourse, and that it is for the benefit of all mankind that there should be free commercial intercourse, no matter whether one side gains and the other side loses or not; no matter where the preponderance of advantage is, we believe in untrammelled commercial intercourse among the whole human family. I am not at all disposed to quarrel with that doctrine. But that is not the case we are trying here. We are trying a case under a Treaty where there has been an exchange of free fish against free fishery; and you are to say on which side the preponderance of benefits lies. We have no right, then, to indulge theories as to universal freedom of trade, because we are bound by a charter under which we are acting. You are to have regard to this question, so the Treaty says. Everybody has had regard to it since it first began to be agitated in both countries. Statesmen, public writers, business men,—they have all considered it of the utmost consequence, and certainly this Commission, enjoined in the Treaty to have regard to it, are not going to disregard it and leave it out of consideration.

Now, am I not right in saying, that the whole value of whatever fish we catch in the territorial waters of these Provinces, when landed on the shores of the Provinces, or landed on the decks of our vessels, is of far less pecuniary magnitude than the direct pecuniary gain resulting from free importation into our markets? And that is a gain that is constantly increasing. Twice as large a quantity has gone from Nova Scotia and Prince Edward Island to Boston this year as went last year up to the same date, and, making a moderate allowance for the vicissitudes of the business, and for one year being a little worse than another, there has been a continued development of the fishing business and fishing interests of these Provinces; and what has it sprung from? Do not these gentlemen understand the sources of their own prosperity? Do they not know when they speak of the business having developed that it is the market that has developed the business? They cannot eat their mackerel, they have too good taste to desire to eat them, apparently, after they are salted. The only place where they are able to dispose of them is in the United States. There is no evidence that the price of the fish has been lowered to the consumer by the circumstance that any more comes from the Provinces than did formerly, when the duty was imposed upon it. The price to the actual consumer has remained the same. If it could be shown that there has been a trifling reduction to the consumer, is that of any consequence compared with this direct and overwhelming advantage which the Provincials gain? Why, it is not only in this fish business that the control of the United States markets bears with such tremendous power upon the productions of the Dominion. In 1850, when the subject of reciprocity was being discussed, Mr. Crampton, then British Minister at Washington, requested Hon. William Hamilton Merritt, a Canadian of distinction, to prepare a memorandum on the subject which I have here before me. He is speaking of the effect of duties in the United States on Canadian products generally. He says:—

"The imports from Canada since 1847 have in no instance affected the market in New York. The consumer does not obtain a reduction of prices: the duty is paid by the grower, as shown by the comparative prices on each side of the boundary, which have averaged in proportion to the amount of the duty exacted."

The Canadians in their fishing industry, as I have said over and over again, have very great natural advantages over the fishermen of the United States in the cheapness with which they can build their vessels and hire their crews, and the cheapness of all the necessaries of life. This increased cheapness is virtually a bounty upon the Canadian fisheries. It gives them the effect of a bounty as compared with United States fishermen. While there was a duty upon imported fish in the United States it counteracted that indirect bounty. Now that the duty has been taken away, this immense development of the fishing interests of the Provinces, of which they are so proud, and of which they have said so much, has taken place, and out of this salt mackerel business it seems to me that they are quite sure eventually to drive the American fishermen. Everybody is going into the business, in Prince Edward Island, as their witnesses say. Out of three hundred fishermen from one port who used to be in our vessels and who have returned, hardly twelve are going back to the United States. They are going to have a monopoly of this branch of the fishing industry. It has been of great value to

them ; it will continue hereafter to be of greater value to them ; and it is a value that no vicissitudes in the business are likely to take from them, because there is a certain quantity of mackerel which they will be able to catch near home which they can afford to sell in the markets of United States at low prices, and from which they cannot fail to derive a very great and permanent advantage.

Gentlemen of the Commission, I have tried to make a business speech on a business question, and I shall spare my own voice and your patience any peroration. I hope I have established to your satistaction that the exchange of the right to the inshore fisheries for the free markets of the United States leaves the preponderance of benefits and advantages largely on the side of the Canadians. Such certainly is the belief of the government and people of the United States. A declaration to that effect, that is, a declaration that no money award ought to be made, in our opinion is required by the evidence, and by every consideration of justice. If this be so, the consequences are immaterial to us, but I cannot refrain from saying, that though such a result might cause a little transient disappointment to a few individuals, it would, in my judgment, tend more than anything else to establish the permanent relations between the United States and the Dominion of Canada on a footing of justice and peace, friendship and commercial prosperity. We are neighbors in geographical position, we are sprung from the same common origin, we speak the same language, have inherited the same literature, to a large extent have common traditions and history, we live under very similar laws and free institutions ; we are two great, free, energetic, prosperous countries, which cannot help respecting each other, and though the surface may be occasionally for a short time ruffled to a trifling degree, yet in the depths of the hearts of the people of each country they entertain for each other a sincere and profound good will.

No. V.

CLOSING ARGUMENT OF HON. WM. H. TRESCOT,

ON BEHALF OF THE UNITED STATES.

Mr. President and Gentlemen of the Commission,—I am very glad that in this controversy there is one point upon which we are all agreed, and that is, the importance of settling it, of having a source of constant irritation dried up forever, or, better still, if it be possible, of having it converted into a spring of mutual and perpetual benefit. Whatever, therefore, may be the direct practical result of this investigation, we shall have achieved no small or inconsiderable thing, if we have learned at its close to appreciate each other's rights and interests fairly, justly and kindly.

The best way to secure that end is to speak on both sides with entire candour, to state our respective views as clearly and as strongly as we can, and then to leave it to the impartial judgment of the Commission to balance our calculations, compare our pretensions, and estimate at their true value the claims which we have submitted, only asking them to remember that they do not sit here as Arbitrators to compromise rival interests, but as the appraisers of certain values, as the judges of the correctness of certain facts and figures.

I conceive it to be the duty of every one participating in this investigation to do all he can to aid the Commission in reaching an agreement, and that you will arrive at some sound and satisfactory conclusion, I sincerely hope; for, during the whole of our examination, I confess I have never looked up at the picture of His Majesty, George III., which hangs behind the President's chair, without feeling that it is not creditable that two great and kindred nations should, to-day, be still angrily discussing a question which he thought he had finally settled with Franklin and Adams, with Jay and Laurens, an hundred years ago, when he recognized the independence of the United States, with all its consequences.

You have been told, and with truth, by the representatives of both contestants, that the Treaty of 1871 is the charter of your authority. To ascertain, therefore, the extent of the powers which have been given, and the character of the duties which have been imposed, we must go to the Treaty of Washington. But we cannot go to that Treaty alone. The Treaty of 1871 is but one phase of the Fishery Negotiations. It was a marked change from the condition of things in 1866; that was a change from the condition of things in 1854; that again was a large departure from the convention of 1818, and that convention was in itself a very great change from the Treaty of 1783.

It is simply impossible to understand the meaning of the Treaty of 1871 correctly without reference to the history of those negotiations, and the positions which have been taken, and which have been abandoned or maintained by the respective Governments.

And the British case, as filed, distinctly recognizes this necessity, not only in the elaborate history of those negotiations with which it prefaces its argument, but in the central assumption of its formal contention, viz: that the Treaty of 1818 is part and parcel of the Treaty of 1871.

These negotiations fortunately lie within a compact and manageable compass, and it is possible, I think, briefly and clearly to develope their history and sequence.

The Treaty of 1783, the Convention of 1818, the Reciprocity Treaty of 1854, and the Treaty of Washington of 1871, are landmarks in our navigation over these rather troubled waters. If I may borrow a figure from our subject, I will endeavour, in my argument, to keep well within the three mile limit, not to run between headland and headland, unless I am driven by extraordinary stress of weather, and even then, I shall not enter and delay in every port that lines the coast for shelter, food or fuel, unless the persuasive rhetoric of my friend from Prince Edward's Island should detain me in the magnificent harbours of Malpeque and Cascumpeque, or my friend from Newfoundland should toll me with "fresh squid" into the happy and prosperous regions of Fortune Bay.

But before I go into the discussion of these treaties, I wish to ask your consideration to some observations on the general meaning and proper interpretation of the Treaty of 1871, in order that they may be out of the way of the main argument. And first I will ask you to carry with you throughout the discussion, a fact so obvious that I would not have referred to it at all had not the whole argument of the British case entirely ignored it. That fact is simply, that this Convention, and the Treaty upon which it is founded, are transactions between the United States on the one side and Great Britain on the other. Let me ask your attention to the 22nd Article of the Treaty of 1871.

"Inasmuch as it is asserted by the *Government of Her Britannic Majesty*, that the privileges accorded to the citizens of the United States under Article XVIII of this Treaty, are of greater value than those accorded by Articles XIX and XXI of this Treaty *to the subjects of Her Britannic Majesty*, and this assertion is not admitted by the Government of the United States; it is further agreed that Commissioners shall be appointed to determine, having regard to the privileges accorded by the United States *to the subjects of Her Britannic Majesty*, as stated in Articles XIX and XXI of this Treaty, the amount of compensation," &c., &c.

Now, who are the subjects of Her Britannic Majesty? Are they only the inhabitants of the Dominion of Canada? The fishermen of the Maritime Provinces? The boatmen of the bend of Prince Edwards Island? The herring and squid catchers of Newfoundland? We have been told in prose and poetry that the Dominion of Her Britannic Majesty is one on which the sun never sets, and it is to the subjects of this Dominion, in its widest extent, that we have given the privileges granted by the United States in this Treaty. And I ask if, in equalizing this privilege, the *value* of the privilege is one of the elements of your calculation, is not the *extent* to which those privileges are opened an equal subject of valuation?

I know what my friends will say. They will say, of course "it is obvious that it is neither possible nor probable that any of the subjects of Her Britannic Majesty will use these privileges, except the inhabitants of the Dominion. Well, I do not know that my friends have the right to assume any such ground, after the brilliant exhibition of their closing testimony. Do you not recollect what the confidential scientific adviser of the gentlemen on the other side told you, that the time was coming, had come, when the fishing industry of the world would be a common fishery to the whole world; when a skipper would go out of harbor with an orographic chart of the coast in one hand, and a thermometer in the other, to measure the variations of zone-temperature; when he would, day by day, learn the condition of the controversy between the Labrador Arctic current and the Gulf stream; when by a system of telegraph and signal stations there would be a new meaning given to the scripture, "Deep calleth unto deep;" that Labrador would speak to Newfoundland, and Newfoundland to Nova Scotia, and Nova Scotia to Cape Cod; and that wherever the fishes were, there would the fishermen of the world be gathered together! I cannot accept that prophecy in all its fulness. I know it has been said very often, that fish diet is a wonderful stimulant to the mental powers. I think since we have been discussing this case, we have found that mackerel, especially, has a most wonderful effect upon the arithmetical faculties of the intellect; that it stimulates the imagination until it sets all the powers of calculation at defiance; and I am satisfied that the princely fortune that was supposed to have been made by the boy in the Arabian fable out of his basket of eggs,—which were unfortunately destroyed before he realized it,—is nothing compared with the profits that my friend from Prince Edward Island, through cross-examination, can develope from an ordinary catch of four hundred barrels of mackerel. I presume that my friends will not allow me to assume, even upon their own testimony, that this millennial fishery will be in perfect working order until the Treaty of 1871 has expired, and they will therefore insist that it is neither possible nor probable that any of the subjects of Her Britannic Majesty, except the inhabitants of the Dominion, can ever use these privileges. Suppose I grant that, what then? I find in the British case a very elaborate statement of a very sound principle, page 34: "It is possible, and even probable, that the United States fishermen may avail themselves of the privilege of fishing in Newfoundland inshore waters, to a much larger extent than they do at present; but even if they should not do so, it would not relieve them from the obligation of making the just payment for a right which they have acquired, subject to the condition of making that payment. The case may not be inaptly illustrated by the somewhat analogous one of a tenancy of shooting or fishing privileges; it is not because the tenant fails to exercise the rights which he has acquired by virtue of his lease, that the proprietor should be debarred from the recovery of his rent."

I think it will take more than the very large ability and ingenuity of the British counsel to show any difference between the two cases. If the American fisherman is bound to pay for the inshore fisheries of Newfoundland, which he does not use, on the principle of tenancy, why should not the British subject pay for the inshore United States fisheries which he does not use?

Mr. THOMSON: I understand you admit the principle.

Mr. TRESCOT: I am using it as a reply to this argument. I am going to show you that my argument is based on yours; and I contend, therefore, on the very principle that you state.

"It is not because the tenant fails to exercise the rights which he has acquired by virtue of his lease, that the proprietor should be debarred from the recovery of his rent." On this principle, we claim that all the subjects of Her Britannic Majesty are tenants, under the Treaty, and must pay for the privilege whether they use it or not; and you are bound to take that into consideration in establishing the value of the privileges exchanged.

Further, if this is a Treaty between Great Britain and the United States, it cannot be converted into a Treaty between the United States and Canada. This Commission cannot alter it or supplement it. Certain specified provisions in the Treaty it can execute, but it cannot amend its errors, or correct its faults. If in that Treaty the British Government has compromised or endangered the interests of the colonies, much as it is to be regretted, you have no power to undo the work; it is a matter with which the Commission has nothing to do.

Upon the negotiation of the Treaty of 1871, the most correct and influential representative of public opinion in England, the *London Times*, used the following language:

"We watched with some uneasiness the repeated splutters of bad feeling between the fishermen of New England and the people of the Maritime Provinces, because we could never be certain that an ugly accident might not some day force us, much against our will, to become the champions of a quarrel we could only half approve. It is very easy, therefore, to understand with what motives our Ministers suggested a Commission, and with what readiness they yielded to the hint that it should be allowed to settle all subjects of difference between the two countries. Lord Derby has repeatedly blamed their eagerness, and the American government could not but be sensible of the advantage they obtained when the Commissioners arrived at Washington, bound to come to some settlement on the points in dispute. It is true that one of the Commissioners was the Prime Minister of Canada, but against this circumstance must be set the facts that the other four approached their work from an English point of view, that the Commissioners, as a body, were instructed from day to day, and, we may almost say, from hour to hour, by the English Cabinet, and their work was done with an eye to the approval of the English people. It was inevitable that the result of their labors should not satisfy the inhabitants of the Dominion. We are far from saying that the Commissioners did not do their best for Canadian interests as they understood them, but it was not in human nature for them or their instructions to be to Canada what they are to England; and, as the Treaty was conceived for the purpose of removing the present and contingent liabilities of England, it was agreed upon as soon as it was believed that these liabilities were settled." If this is so, then surely this Commission was not appointed to correct "the inevitable" results of the Treaty which created it.

The Colonial authorities recognized this view. When that Treaty was formed, Earl Kimberley, writing to the Colonial governor, made this statement, in a paragraph which is not too long to read, for I do not mean to trouble you with a great many quotations. It is a statement of the Secretary of State for the Colonies to the Governor-General, dated "Downing Street, 17th June. 1871," and published at Ottawa:

"The Canadian Government itself took the initiative in suggesting that a Joint British and American Commission should be appointed, with a view to settle the disputes which had arisen as to the interpretation of the Treaty of 1818. But it was certain that, however desirable it might be, in default of any complete settlement, to appoint such a Commission, the causes of the difficulty lay deeper than any question of interpretation, and the mere discussion of such points as the correct definition of bays could not lead to a really friendly agreement with the United States. It was necessary, therefore, to endeavor to find an equivalent which the United States might be willing to give in return for the fishing privileges, and which Great Britain, having regard both to Imperial and Colonial interests, could properly accept. Her Majesty's Government are well aware that the arrangement which would have been most agreeable to Canada was the conclusion of a Treaty

similar to the Reciprocity Treaty of 1854, and a proposal to this effect was pressed upon the United States Commissioners, as you will find in the 36th Proctocol of the Conferences. This proposal was, however, declined, the United States Commissioners stating that they could hold out no hope that the Congress of the United States would give its consent to such a tariff amendment as was proposed, or to any extended plan of reciprocal free admission of the products of the two countries. The United States Commissioners did indeed propose that coal, salt and fish should be reciprocally admitted free, and lumber after the 1st of July, 1874; but it is evident that, looked at as a tariff arrangement, this was a most inadequate offer, as will be seen at once when it is compared with the long list of articles admitted free under the Reciprocity Treaty. Moreover, it is obvious from the frank avowal of the United States Commissioners, that they only made this offer because one branch of Congress had recently more than once expressed itself in favor of the abolition of duties on coal and salt, and because Congress had partially removed the duty from lumber, and the tendency of legislation in the United States was towarde the reduction of taxation and of duties, so that to have ceded the fishery rights in return for these concessions would have been to exchange them for commercial arrangements, which there is every reason to believe may before long be made without any such cession, to the mutual advantage of both the Dominion and the United States; and Her Majesty's Government are bound to add that whilst, in deference to obtain a renewal in principle of the Reciprocity Treaty, they are convinced the establishment of free trade between the Dominion and the United States is not likely to be promoted by making admission to the fisheries dependent upon the conclusion of such a Treaty; and that the repeal by Congress of duties upon Canadian produce, on the ground that a Protective Tariff is injurious to the country which imposes it, would place the commercial relations of the two countries on a far more secure and lasting basis than the stipulations of a Convention framed upon a system of reciprocity. Looking, therefore, to all the circumstances, Her Majesty's Government found it their duty to deal separately with the Fisheries, and to endeavor to find some other equivalent; and the reciprocal concession of free fishery with free import of fish and fish oil, together with the payment of such a sum of money as may fairly represent the excess of value of the Colonial over the American concession, seems to them to be an equitable solution of the difficulty.

"It is perfectly true that the right of fishing on the United States coasts, conceded under Article XIX, is far less valuable than the right of fishing in Colonial waters, conceded under Article XVIII, to the United States, but on the other hand, it cannot be denied that it is most important to the Colonial fishermen to obtain free access to the American market for their fish and for fish oil, and the balance of advantage on the side of the United States will be duly redressed by the Arbitrators under Article XXII. In some respects a direct money payment is perhaps a more distinct recognition of the rights of the Colonies than a tariff concession, and there does not seem to be any difference in principle between the admission of American fishermen for a term of years in consideration of the payment of a sum of money in gross, and their admission under the system of licenses, calculated at so many dollars per ton, which was adopted by the Colonial Government for several years after the termination of the Reciprocity Treaty. In the latter case, it must be observed, the use of the Fisheries was granted without any tariff concessions whatever on the part of the United States, even as to the importation of fish.

"Canada could not reasonably expect that this country should, for an indefinite period, incur the constant risk of serious misunderstanding with the United States; imperilling, perhaps, the peace of the whole Empire, in order to endeavour to force the American Government to change its commercial policy; and Her Majesty's Government are confident that, when the Treaty is considered as a whole, the Canadian people will see that their interests have been carefully borne in mind, and that the advantages which they will derive from its provisions are commensurate with the concessions which they are called upon to make. There cannot be a question as to the great importance to Canada of the right to convey goods in bond through the United States, which has been secured to her by Article XXIX; and the free navigation of Lake Michigan, under Article XXVIII; and the power of transhipping goods, under Article XXX, are valuable privileges which must not be overlooked in forming an estimate of the advantages which Canada will obtain. Her Majesty's Government have no doubt that the Canadian Government will readily secure to the citizens of the United States, in accordacce with Article XXVII, the use of the Canadian Canals, as, by the liberal policy of the Dominion, these canals are already opened to them on equal terms with British subjects; and they would urge upon the Dominion Parliament and the Legislature of New Brunswick, that it will be most advisable to make arrangement as to duty on lumber floated down the St. John River, upon which the execution of Article XXX, as to the trans-shipment of goods, is made contingent."

That is the view he took of that Treaty. What was the view that the Canadian Government took of it? On page 47 of this same pamphlet will be found the reply of a Committee of the Privy Council to that letter of the Earl of Kimberley, in which will be found this statement:

"When the Canadian Government took the initiative of suggesting the appointment of a joint British and American Commission, they never contemplated the surrender of their territorial rights, and they had no reason to suppose that Her Majesty's Government entertained the sentiments expressed by the Earl of Kimberley in his recent despatch. Had such sentiments been expressed to the delegate appointed by the Canadian Government to confer with His Lordship a few months before the appointment of the Commission, it would at least have been in their power to have remonstrated against the cession of the inshore fisheries, and it would moreover have prevented any member of the Canadian Government from acting as a member of the Joint High Commission, unless on the clear understanding that no such cession should be embodied in the Treaty without their consent. The expediency of the cession of a common right to the inshore fisheries has been defended, on the ground that such a sacrifice on the part of Canada should be made in the interests of peace. The Committee of the Privy Council, as they have already observed, would have been prepared to recommend any necessary concession for so desirable an object, but they must remind the Earl of Kimberley that the original proposition of Sir Edward Thornton, as appears by his letter of 26th January, was that a friendly and complete understanding should be come to between the two governments, as to the extent of the rights which belong to the citizens of the United States and Her Majesty's subjects respectively, with reference to the fisheries on the coasts of Her Majesty's possessions in North America."

Then there is a continuation of the argument.

Mr. THOMSON: Won't you read it?

Mr. TRESCOT: I will read it if you wish.

Mr. THOMSON: I would like to hear it, if it is not too much trouble to you.

Mr. TRESCOT: I will read it with great pleasure, although it does not bear upon the point I desire to present.

"In his reply dated 30th January lest, Mr. Secretary Fish informs Sir Edward Thornton that the President instructs him to say that 'he shares with Her Majesty's Government the appreciation of the importance of a friendly and complete understanding between

the two Governments with reference to the subjects specially suggested for the consideration of the proposed Joint High Commission." In accordance with the explicit understanding, thus arrived at between the two Governments, Earl Granville issued instructions to Her Majesty's High Commission, which, in the opinion of the Committee of the Privy Council, covered the whole ground of controversy. The United States had never pretended to claim a right on the part of their citizens to fish within three marine miles of the coasts and bays, according to their limited definition of the latter term, and although the right to enjoy the use of the inshore Fisheries might fairly have been made the subject of negotiation, with the view of ascertaining whether any proper equivalents could be found for such a concession, the United States was precluded by the original correspondence from insisting on it as a condition of the Treaty. The abandonment of the exclusive right to the inshore Fisheries without adequate compensation"—mark that, "the abandonment of the exclusive right to the inshore Fisheries without adequate compensation was not therefore necessary in order to come to a satisfactory understanding on the points really at issue. The Committee of the Privy Council forbear from entering into a controversial discussion as to the expediency of trying to influence the United States to adopt a more liberal commercial policy. They must, however, disclaim most emphatically the imputation of desiring to imperil the peace of the whole empire in order to force the American Government to change its commercial policy. They have for a considerable time back ceased to urge the United States to alter their commercial policy; but they are of opinion that when Canada is asked to surrender her inshore Fisheries to foreigners, she is fairly entitled to name the proper equivalent.'

I need not go any further. You can read it if you wish. Then, of course, Lord Kimberley replied to that communication. The reply it is not worth while to read. The Privy Council then replied to his strictures upon their opinion, and their communication is the point to which I wish to come.

"In the course of the negotiations, the United States Commissioners had offered as an equivalent for the rights of Fishery, to admit Canadian Coal and Salt, free of duty, and Lumber, after the 1st of July, 1874. This was deemed both by the Imperial and Canadian Governments an inadequate offer, and a counter proposition was made by the British Commissioners, that lumber should be admitted free immediately, and that in consideration of the continued exclusion of cereals, live stock and other articles, admitted under the Treaty of 1854, a sum of money should be paid to Canada. The United State Commissioners, not only refused the counter proposition, but withdrew their former offer, substituting one which the Committee of Council infer from the Earl of Kimberley's. Despatch was in the opinion of Her Majesty's Government, more favorable to Canada, than that which had been rejected as inadequate. Wide, however, as are the differences of opinion on this Continent regarding the Treaty, there is but one opinion on the point under consideration. It is clear that the United States preferred paying a sum of money to the concession of commercial advantages to Canada, and the Committee of Council feel assured that there is not a single member of the Canadian Parliament, who would not have much preferred the rejected proposition to that which was finally adopted.

"The Committee of Council cannot, with the Earl of Kimberley's Despatch before them, continue to affirm that Her Majesty's Government are of opinion that the cession of the Fishery rights was made for an inadequate consideration, but they regret that they are themselves of a different opinion.

"While still adhering to their expressed opinions as to the Fishery Articles of the Treaty of Washington, they are vet most anxious to meet the views of Her Majesty's Government, and to be placed in a position to propose the necessary legislative measures, and they will therefore proceed to make a suggestion which they earnestly hope may receive a favorable response.

"The adoption of the principle of money payment in satisfaction of the expenses incurred by the Fenian raids, would not only be of no assistance with reference to the Treaty, but might lead to some complications. It is not improbable that differences of opinion would arise in the discussion of the details of those claims between the two Governments, which might lead to mutual dissatisfaction. Again such a solution of the question, would necessitate a discussion in the Imperial Parliament, in the course of which, opinions might be expressed by members, which might irritate the people of Canada and might moreover encourage the Fenian leaders in the United States, who have not ceased their agitation.

"There is in the opinion of the Committee of Council a mode by which their hands might be so materially strengthened that they would be enabled not only to abandon all claims on account of the Fenian raids, but likewise to propose with a fair prospect of success, the measures necessary to give effect to those clauses in the Treaty of Washington, which require the concurrence of the Dominion Parliament. That mode is by an Imperial guarantee to a portion of the loan which it will be necessary for Canada to raise in order to procure the construction of certain important public works, which will be highly beneficial to the United Kingdom as well as to Canada."

Now, I ask if, in the face of that official demand for a guarantee of that loan in compensation for the sacrifice of the fisheries, which demand was recognised as just, and granted by the British Government it is possible to claim that those interests were not sacrifices which were compensated, or whether any construction is just, which, isolating the articles of this Treaty, and converting it into a separate negotiation, determines that there were certain Imperial advantages gained by the British Government in return for the sacrifice of those fisheries, and then claims that that compensation should be made part and parcel of the consideration in a case like this? I beg you to understand distinctly that I do not con- tend that this Commission is not bound to equalize the two exchanges which have been committed to them. That is their duty. But I mean to say, that in making that equalization, they are bound to consider nothing but the specific value of the articles exchanged, and that the question whether or not, equalisation is compensation for any sacrifices made by the Treaty is one with which they have nothing to do; the question which is submitted to them is the value, and nothing else, of the two exchanges. It is not the duty, nor is it within the power of this Commission, as the British Counsel seem to suppose, to make the Treaty of 1871 an equal Treaty, but simply to equalise a specific exchange of values under a special provision of that Treaty It is precisely, as far you are concerned, as if, instead of the exchange of fishing privileges, that Treaty had proposed an exchange of territory. For instance, if that Treaty had proposed the exchange of Maine and Manitoba, and the United States had maintained that the value of Maine was much larger than Manitoba, and referred it to you to equalise the exchange. It is very manifest that to New England, for instance, it might not only be disadvantageous, but very dangerous; but the only question for you to consider would be the relative value of the two pieces of territory. So here, I do not care what the consequences may be. It may be that when you have equalized these privileges so as to make the exchange of privileges precisely even, that then the consequences of the exchange of fisheries might be the destruction of all the fisheries of Prince Edward Island, the entire destruction of the fishing industry of the Maritime Provinces. But that is a matter with which you have nothing to do. This is a consequence of the Treaty, and not a consequence of the difference in value between the two articles of exchange which you are called upon to appraise.

The same principle would lead to this result, also; that with the consequential profit or loss of the fisheries, you have nothing to do. You have a right to measure the value of the fisheries as they are, and what they are, but you have no right to put into that estimate a calculation of the enterprise, industry, skill, and capital, which the American puts into the fishery; that is, brains, and money, and experience, which is entirely foreign to the fishery, as a fishery. It is free to be employed anywhere else, and you have no right to calculate that. The fish in the water have a certain value, but the skill, and capital, and enterprise, which are required to take them out, does not belong to the fishery, as a fishery; and it is not a matter that you have any right to take into calculation. Take, for example, the extraordinary principle that is stated in the British case, on page 34:—

"A participation by fishermen of the United States in the freedom of these waters, must, notwithstanding their wonderfully reproductive capacity, tell materially on the local catch, and, while affording to the United States fishermen a profitable employment, must seriously interfere with local success."

Is that a principle of calculation which you can apply to a case like this? Was there ever a case of such absolute forgetfulness of that homely old proverb, over which every one of us has painfully stumbled in his walk through life, that "you cannot eat your cake and have it too?" Why, take that favourite and apt illustration of the British case, a tenancy for shooting. If I exchanged a grouse moor, in Scotland, for a pheasant, preserve in England, and

my friend, Her British Majesty's Agent, was arbitrator to equalize their values, what would he think of the claim that the grouse moor was the more valuable because I used a breech loader, carried two keepers with extra guns, shot over dogs costing 100 guineas a piece, and bagged a hundred brace, where the other sportsman stuck to the old muzzle loader, carried no keeper, shot over an untrained pointer, and only bagged twenty-five brace, or to the still more extraordinary complaint, that the freedom of the moor, notwithstanding its wonderful reproductive capacity, must tell materially on the local shooting, and while affording the lessee profitable and pleasant employment, "must seriously interfere" with the pot-shooting of the boys of the lessor's family! And that is just precisely the argument that our friends have made. They undertake, not to decide the value of the fishery, but they undertake to put into arbitration here what we do with the fishery. That is, we are to pay, not only for the privilege of going mackerel fishing in the bend of Prince Edward Island, but we are to pay for every dollar of capital and industry we employ, and for the men employed, and the result of that combination is the money to which they are entitled.

So also with the consequential damages, with regard to the destruction of fish, trawling, seining, and all those things with which you have nothing to do. I think I can reply to the whole of that by a very pithy sentence, uttered by one of your citizens, who was very famous, the late Joseph Howe, in a speech made in my country in regard to the fisheries here. He said: "as for the destruction of the fisheries, when one thought that the roes of thirty cod supply all the waste of the American, British and Colonial fisheries, it was not worth while to discuss that question; and I do not think it is either. Because all those arguments apply to the Treaty. They are very good reasons why the exchange never should have been made at all, why American fishermen never should have been admitted at all, why the Treaty should never have been made; but they are arguments which cannot be employed in the consideration of the question submitted to you,—the value of the fishery.

And now, with regard to this question of consequences, there is but one other illustration to which I will refer and I will be done. I find at the close of the British testimony an elaborate exhibit of 166 Lights, Fog-Whistles, and Humane Establishments, used by United States fishermen on the coast of the Dominion, estimated to have cost in erection from the Sambro Light House built in 1758, to the present day, $832,138, and for annual maintenance, $268,197. I scarcely know whether to consider this serious; but there it is, and there it has been placed, either as the foundation for a claim, or to produce an effect. Now, if this Dominion has no commerce; if no ships bear precious freight upon the dangerous waters of the Gulf, or hazard valuable cargoes in the Straits which connect it with the ocean; if no traffic traverses the Imperial river which connects the Atlantic with the great Lakes; if this fabulous fishery, of which we have heard so much, is carried on only in boats so small that they dare not venture out of sight of land, and the fishermen need no other guiding and protecting light than the light streaming from their own cabin windows on shore; if, in short, this Dominion, as it is proudly called, owes nothing to the protection of its commerce and the safety of its seamen; if these Humane Establishments are not the free institutions of a wise and provident government, but charitable institutions to be supported by the subscriptions of those who use them,—then the government of the Dominion can collect its $200,000 by levying light dues upon every vessel which seeks shelter in its harbours, or brings wealth into its ports. But if, in the present age of civilization, when a common humanity is binding the nations of the world together every day by mutual interests, mutual cares, and privileges equally shared, the Dominion repeals her Light dues in obedience to the common feeling of the whole world, with what justice can that government ask you, by a forced construction of this Treaty, to re-impose this duty, in its most exorbitant proportions and its most odious form, upon us and upon us alone?

But that is not, perhaps, the question I should ask you. I should ask, and I do ask, where do you find in Article 18 of the Treaty, among the advantages which the Treaty of 1871 gives us, and authorizes you to value any such "advantage" as the use of light houses and fog whistles? And if you decided, and properly decided, that you could not take into consideration the advantages of commercial intercourse, purchasing bait and supplies, and the privilege of transhipping, because they were not given by the Treaty, identified as they were with the use of the fishery, how can you be asked even to take this preposterous claim into consideration? If the principle laid down by the British case (p. 13) is true. "It is submitted that in order to estimate the advantages thereby derived respectively, by subjects of the United States and of Great Britain, the following basis is the only one which it is possible to adopt under the terms of the first portion of Article 18 of the Treaty of Washington of 1871, viz: That the value of the privileges granted to each country respectively by Articles 18, 19, and 21, of that Treaty, *which were not enjoyed under the 1st Article of the Convention of the 20th October*, 1818, is that which the Commission is constituted to determine." If this principle of interpretation be true, how can such a demand be made until it is shown that under the 1st Article of the Convention of 1818, the privilege of using the light houses and fog whistles—that is, the privilege of seeing a light or hearing a sound—was not enjoyed? Illiberal, unjust, and narrow, as was the policy of that Convention,—it has not yet been charged with so grievous an offence against humanity. It might stop our fishing, but it did not assume to stop our sight and hearing at the three-mile limit.

And in leaving this question of "consequences," I may say, in justification of the length with which I have dwelt on it, that this "consequential,"—I might almost say "inconsequential,"—reasoning pervades the whole British case, and infects the whole cross-examination of counsel on the other side. The effort has been studiously made to create an atmosphere in which the uncertain and doubtful advantages of the Treaty would loom out so largely as to deceive the inexperienced eye as to the exorbitant value that was sought to be attached to them.

I have but one other consideration to suggest before I come to the history of this question, and it is this: If you will examine the Treaties, you will find that everywhere it is the "United States fishermen," the "inhabitants of the United States,"—the citizens of the United States who are prohibited from taking part in the fishery within the three-mile limit. Now, I say,—remember, I am not talking about local legislation on the other side at all, I am talking about Treaties,—I say, there is nothing in any Treaty which would forbid a Nova Scotian or a Prince Edward Island citizen from going to Gloucester, hiring an American vessel with an American register and coming within the three-mile limit and fishing—nothing at all. If such a vessel be manned by a crew half citizens of the United States and half Nova Scotians, who are fishing on shares, recollect, and who take the profits of their own catches, where is the difference?" The United States citizen may violate the law, but are the citizens of Nova Scotia doing so? They are not the "inhabitants" or "fishermen of the United States" excluded from fishing within the three-mile limit. Take the analogy suggested by the British case. Suppose, for instance, there was a law forbidding shooting in the Dominion altogether by any one not a citizen, might not a citizen of the United States lend a gun to a citizen of the Dominion who wanted to shoot game and pay him for the game that he shot? It comes to this that when Nova Scotia fishermen fish in an American vessel within the three-mile limit, always supposing that they engage in the business on shares, they are simply using an instrument lawfully under the Treaty that the American part of the crew are using unlawfully,—that is all. I do not press this legal view, because it is one which, one of these days, will have to be taken up and decided; I simply say that that is common sense opinion, that if, out of 5,000 fishermen, 2,500 are British subjects, and fishing in American vessels, taking their own catches, making their own profits, in that case, you cannot in equity and justice consider that as part of the privilege given to the

fishermen or inhabitants of the United States. I am glad I am furnishing my friends something to think of even if it amuses them.

Mr. TOMPSON—You are.

Mr. TRESCOT—I thought I was. The three points which I make, are these :—

1 —That in valueing the exchange of privilege, the *extent* to which the privilege is offered, is a fair subject of calculation, and that a privilege opened to "all British subjects" is a larger and more valuable privilege than one restricted to only the British subjects resident in the Dominion.

2.—That in valueing the exchange of privilege, only the direct value can be estimated, and *the consequences* to either party cannot be taken into account.

3. -That so far as British subjects participate in the inshore fishery in United States vessels upon shares, their fishery is in no sense the fishing or fishermen of inhabitants of the United States.

With regard to the history of these Treaties, there are two subjects in that connection which I do not propose to discuss at all. One is the headland question. I consider that the statement made by my distinguished colleague, who preceded me, has really taken that question out of this discussion. I do not understand that there is any claim made here that any portion of this award is to be assessed for the privilege of coming within the headlands. As to the exceedingly interesting and very able brief, submitted for the other side, I am not disposed to quarrel with it. At any rate, I shall not undertake to go into any argument upon it. It refers entirely to the question of territorial right, and the question of extent of jurisdiction,—questions with which the United States has nothing to do. They have never been raised by our government, and probably never will be, because our claim to fish within the three mile limit is no more an interference with territorial and jurisdictional rights of Great Britain than a right of way through a park would be an interference with the ownership of the property, or a right to cut timber in a forest would be an interference with the fee-simple in the soil.

Mr. TOMPSON :—Do you mean to say there would be no interference there ?

Mr. FOSTER :—Certainly not. It would be simply a servitude. You do not mean to say that my right to go through your farm interferes with the fee-simple of the property ?

Mr. TOMPSON—It does not take away the fee-simple, but it interferes with my enjoyment of the property.

Mr. TRESCOT—That is another question, because compensation may be found and given. I simply say that it does not interfere with the territorial or jurisdiction right. That is the view I take of it, at any rate, and I think I can sustain it, if it ever becomes necessary.

Then, with regard to the character of the Convention of 1818. I wish to put on record here my profound conviction, that by every rule of diplomatic interpretation, and by every established precedent, the Convention of 1818 was abrogated by the Treaty of 1854, and that when that Treaty was ended in 1866, the United States and Great Britain were relegated to the Treaty of 1783, as the regulator of their rights. That proposition I will maintain whenever the proper time arrives. But certainly, I am not at liberty to take that ground here at all, and for this reason : that by the action of the two governments, and by the formal incorporation, so to speak, of the Treaty of 1818 in the Treaty of 1871, that Treaty is made the practical rule of decision in this case ; consequently, we have nothing to do with that, except to say this : that the Treaty of 1818 depends for its validity and its existence upon the headland question ; that the two stand or fall together ; because the convention of 1818 was a relinquishment of certain rights upon certain conditions, and if those conditions are not understood in the same sense by the parties to the contract, the contract ends, or is to be submitted to arbitration. If then the Treaty of 1871 should end with nothing else to supply its place, it would be absolutely necessary, either that the headland question should be settled or the convention of 1818 should be considered as annulled.

I cannot enter into the history of the treaties as fully as I could wish.* The subject is not only one of great historical interest, but in certain contingencies would be of direct consequence. It cannot, however, be treated briefly or without travelling too far from the immediate question at issue. I will, therefore, only summarize those conclusions, which are relavant to the present investigation.

And I refer to them in this connection, because, underlying the whole British case, just like the consequential argument to which I have already referred, there runs the assumption that in all these transactions, the policy of the United States has been one of encroachment and invasion, while the conduct of Great Britain has been that of generous concession. Never was there an assumption more entirely the reverse of historical truth.

The Treaty of 1783 ascertains and defines what were the original relations of the parties to this controversy. I need not read its provisions, but I do not think I will be contradicted when I say that they were simply the recognition of absolute and equal rights. The separation of the Colonies rendered necessary not only their recognition, but the definite and precise adjustment of their territories and possessions ; and among the latter was recognized and described, not as a grant or concession, but as an existing right, the use of the Fisheries, not only as they had been used, but as they ever should be used by British subjects. Reserving the territorial and jurisdictional rights on the adjacent shores to the owners of the land—the fisheries—the right to use the waters for the purpose of fishing was made a joint possession.

At that time the only parties in interest were the citizens of the United States, and the British owners of a few fishing settlements along the coasts. The parties who are now the real complainants, were not then even in existence. Speak of encroachments ! Encroachments upon whom. Why, in those days, where was Newfoundland, who comes here to-day as an independent sovereignty, and invests her distinguished representative with a measure of ambassadorial authority ? Not even a colony—a fishing settlement, owned by a British corporation—governed without law by any naval officer who happened to be on the coast with a marling spike in one hand and the articles of war in the other—no Englishman allowed to make a home on the Island—and the number of women permitted to reside there limited, so as to prevent the growth of a native population. Where was Prince Edward Island, which speaks to-day through a Premier and Assembly ? Why, in the early years of the revolution, an American skipper, not then having the fear of the three mile limit before his eyes, entered that famous bend, of which we have heard so much, fishing for men instead of mackerel, and he caught the Governor and the Executive Council—a catch which, I am sure, my friend on the other side will admit to be all "Number one's"—and carried them to Gen. Washington, who, not knowing what use to put them to, treated them as our witnesses have told us the fishermen treat young cod, threw them back into the water, and told them to swim home again. Why, the very names with which we have become so familiar in the

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* The British Case, referring to the Treaty of 1783, says : "The rights conceded to the United States fishermen under this Treaty were by no means so great as those which, as British subjects, they had enjoyed previous to the War of Independence ; for they were not allowed to land to dry and cure their fish in any part of Newfoundland, and only in those parts of Nova Scotia, the Magdalen Islands and Labrador, where no British settlement had been or might be formed, expressly excluding Cape Breton, Prince Edward Island and other places." There is no express exclusion of Cape Breton and Prince Edward Island in the Treaty. Both were acquired by the Treaty of 1763, and were formally annexed to Nova Scotia. It was not until 1770 that Prince Edward Island had a separate government as an experiment, and a very poor experiment it turned out to be. To the American negotiators of 1783, Nova Scotia included both Cape Breton and Prince Edward Island.

last months,—Tignish and Paspebiac, Margaree and Chetticamp, Sciminac and Scatter'e, had not then risen from the obscurity of a vulgar geography, to shine in the annals of international discussion. There was then no venerable Nestor of Dominion politics, to whose experienced sagacity the interests of an empire might be safely entrusted—there were no learned and dignified Queen's Counsel to be drawn up in imposing contrast to the humble advocates who address you from this side of the table. There was no Minister of Marine, with one hundred and sixty fine fog whisles at his command, ready to blow a blast of triumph all along the coast upon the receipt of this award. There were no rights to invade, and the Maritime Provinces and the Dominion, came into existence, subject to the conditions of national life, which that Treaty created. When they did come into these waters they found us there.

Our rights, and the character of our rights, under the Treaty of 1783, were never questioned or disputed for over a quarter of a century, not until the war of 1812, and then the question was made only as an effort of diplomatic *finesse* The Treaty of 1783 had given to British subjects the right of navigation on the Mississippi River, under the belief that the boundary line between the two countries, touched the sources of that river. By 1814, it was discovered that this was not so, and as the right to use the territory of the United States to reach the river had not been given, the right to use the river was not available. Then was invented the theory that the war of 1812 abrogated the Treaty of 1783, and by it the British Government were enabled to propose to renew the Fishery Articles, if we would remodel and make effective the Article as to the Mississippi. We denied the theory. I will not, of course, trouble you with any detailed account of the negotiations, the correspondence between Mr. Adams and Lord Bathurst, and the negotiations of the Treaty of Ghent, are matters of familiar history.

The question thus raised was left unsettled, both governments maintaining their positions until the Convention of 1818. Two things are evident from that Convention. First, that our right, as we maintained it, to the inshore fisheries, was recognized, because Great Britain accepted from us the relinquishment of a portion of it, and by accepting what we gave recognized our right to give. Second, that we relinquished this right because our fishing was at that time entirely a deep-sea fishing, and because the settlement of the coasts of the Maritime Provinces and the development of local Colonial fisheries anticipated in the Treaty of 1783 were now being realized. That Convention was a friendly and liberal concession on the part of the United States, and when we are required to-day to pay for the restoration of the former condition, we are simply made to pay for our own liberality. For what are the Treaties of 1854 and 1871 but a restoration of the conditions of the Treaty of 1783, accompanied by that freer commercial intercourse which the interests and the intelligence of both countries demand.

I had proposed to trace the negotiations from 1818 to 1854, and thence to the Protocol and Treaty of 1871. But these latter were somewhat fully discussed in the argument upon the motion formerly made on behalf of the United States and my colleague has fully explained to you how and by what agencies the restrictions of the Convention of 1818, became so odious to our people.

I need not do more than refer you to the instructions of the British Government to the negotiators of the Treaty of Washington, and recognise, as I do most gladly, the wisdom and liberality of their spirit, and I now turn to the practical question which that Treaty submits to your decision.

I come now to the questions which that Treaty of 1871 raises, and they are simply these: what is the difference in value gained by us, and the advantages gained by you; that is to say, what is the difference in value between the right to fish within the three mile limit, on one side, and the right to fish on the United States shores, on the other, coupled with the right to send fish and fish oil to the United States market free of duty.

With regard to the fisheries. The fisheries with which the Treaty of 1871 is concerned, are the cod, the herring, the mackerel, the hake, the haddock and halibut fisheries, within the three mile limit. For the purposes of this argument, there will be, I think, a general agreement that we can dismiss the hake, haddock and halibut fisheries. It is admitted, also, that the cod-fishery is essentially a deep-sea fishery, and does not, therefore, come within the scope of your examination, especially as the question of bait and supplies, which alone connected it with this discussion, has been eliminated by your former decision.

We have left, then, only the herring fishery and the mackerel fishery. As to the herring fishery, I shall say but very few words. The herring fishery on the shores of the Magdalen Islands, we claim of right—a few scattering catches elsewhere are not appreciable enough to talk about; and we have, therefore, only the herring fisheries of Newfoundland and Grand Manan. The former is essentially a frozen herring business, and I do not believe there exists a question that this business, both at Newfoundland and Grand Manan, is entirely a mercantile business, a commercial transaction, a buying and selling, not a fishing. The testimony on this subject is complete, and is confirmed by Mr. Babson, the Collector of the Port of Gloucester, who has told you that the Gloucester fleet, the largest factors in this business, take out licenses to touch and trade, when they go for frozen herrings, thus establishing the character of their mercantile voyage.

The only open question, then, as to the herring fishery, is the fishery for smoked and pickled herring at Grand Manan, and in the Bay of Fundy, from Latite to Lepreaux, and whether that is conducted by United States fishermen within the three mile limit; a question, it seems to me, very much narrowed when you come to consider that from Eastport, in Maine, to Campobello, is only a mile and a half, and from Eastport to Grand Manan is only six or seven miles.

Mr. THOMSON:—Twelve or fourteen miles.

Mr. TRESCOT:—Not according to the statement of the witnesses. But call it ten miles, still it leaves a very small margin to make an agreement upon. I will not dwell upon that. The open question is whether there is fishing at Grand Manan that is participated in by American fishermen, within the three mile limit, and what advantages they derive from it, and what element that will make in the calculation of the award.

The testimony lies in a very small compass. There are three or four witnesses on either side. You saw and heard them; and I am very willing to leave that whole Grand Manan business to you without one word of comment upon the testimony, except to ask you one simple question, as plain, practical, business men: Were you compelled to-morrow, to invest money in the herring fishery of Grand Manan and the adjoining mainland and islands, to whom would you go for information, upon whose judgment would you rely; upon Mr. McLean, who estimates the value of that lilliputian fishery at $3,000,000, annually, one-half of which is the unlawful plunder of United States fishermen, a fishery which, according to his estimate, would require, instead of the few unknown vessels which cannot be named, a fleet which could not sail from any port without being registered, and making it more than one-third of all the fisheries of the United States—of all the fisheries of the Dominion, and everywhere recognized; or would you go to Mr. McLaughlin, the keeper of one of those 165 light-houses, for which we are to pay, and fish warden, who says it is his duty to make inquiries of every fishermen of his catch, but who adds that every fisherman of whom he inquired deliberately lied to him, in order to evade the school tax, and who then proceeds to fill out the returns from his inner consciousness of what the returns ought to be, and makes that return double his own official return to the Minister of Marine? Would you not go to the very men whom we have placed on the stand, men who, and whose fathers, have, for sixty years, been engaged in purchasing all these fish, furnishing supplies to all these fishermen, directing and controlling the whole business, and whose fortunes have been made and preserved by their precise and complete knowledge of the value and condition of this very fishery?

And now as to the mackerel fishery. There are two singular facts connected with it. The first is, that valuable as it is represented to be, lying, as it is claimed to do, within an almost closed sea, the mackerel fishery of the Gulf has been until within a few years the industry of strangers. It has not attracted native capital, it has not stimulated native enterprise, it has not developed native ports and harbours, while you claim and complain that it has built up Gloucester into established wealth and prosperity, and supplies, to a large degree, a great food market of the United States. I find the following "remarks" in a report of Commander Cochran, to Vice-Admiral Seymour, in 1851:—

"The curious circumstance that about 1,000 sail of American schooners find it very remunerative to pursue the herring and mackerel fisheries on the shores of our northern provinces, while the inhabitants scarcely take any, does indeed appear strange, and apparently is to be accounted for by the fact that the colonists are wanting in capital and energy. The Jersey merchants, who may be said to possess the whole labour market, do not turn their attention to these branches. The business of the Jersey houses is generally, I believe, with one exception, carried on by agents; these persons receive instructions from their employers to devote their whole time and an energy to the catching and curing of cod. Such constant attention to one subject appears at least to engender a perfect apathy respecting other branches of their trade. They are all aware, I believe fully aware, of the advantages to be derived from catching the herring and mackerel, when these come in shoals within a few yards of their doors, but still nothing is done.

"Commercial relations of long standing, never having engaged in the trade before, possible want of the knowledge of the markets, and the alleged want of skill among the fishermen of the method of catching and curing of these fish, together with the twenty per cent. duty on English fish in America, may tend to induce the Jersey houses not to enter into these branches. Added to all these reasons the capital of the principals is, I am informed, in most instances small. It will probably be difficult to find about the Bay of Chaleurs and Gaspe, any fishermen not engaged by some one of the numerous Jersey houses, and it may be said that a new branch of industry would much interfere with the cod-fishery, but so lucrative a trade as the herring and mackerel one would prove, would enable higher wages to be given than are done for cod. In fact, I believe that very small, if any wages are given at all, the money due to the fisherman for his summer labor being absorbed in food and clothing for himself and family, repairs of boats and fishing gear, almost always deeply in debt in the spring, or at any rate sufficiently so to ensure his labour for the ensuing summer, and so more persons would be induced to resort here the summer season."—(*Confidential Official Correspondence, pp.* 4 *and* 5).

This is precisely the testimony of the Gaspe witnesses who were put upon the stand. The great Jersey houses which do represent the capital, enterprise, experience and skill of the country, do not touch the mackerel fisheries. As they did a quarter of a century ago, so they do to-day; they abandon, neglect utterly what has been called the California of the coast, and make and maintain their fortunes by giving up mackerel fishing, and confining their attention exclusively to codfishing.

The other fact which strikes me is this: that whatever development there has been—and it has been chiefly if not entirely on Prince Edward Island, has come since 1854, and has grown larger and richer under the Reciprocity Treaty. In 1852, the Legislative Council and Assembly of Prince Edward Island, in Colonial Parliament assembled, declared that "the citizens of the United States have an advantage over the subjects of your Majesty on this Island which prevents all successful competition, as our own fish caught on our own shores by strangers, are carried into their ports by themselves, while we are excluded by high protective tariffs." (Confidential. Official Correspondence, page 5.)

From 1854, two years only after this declaration, there was a large and prosperous development of the Prince Edward's shore fishery. This point has been insisted on and reiterated over and over again by the British witnesses. And yet we are asked now to pay $15,000,000 for the twelve years use of the very privileges given by that Treaty under which this prosperity was developed; for, as far as the fishing articles and the fisheries are concerned, the provisions and privileges of the Treaty of 1871 are almost identical with the Treaty of 1854, the Treaty under which this fishery which now demands $15,000,000 compensation, was, I may almost say, created.

Passing by these topics, however, let me ask you to consider the difference in the character of the testimony upon which the two cases rest. I do not mean to institute any comparison between the veracity of the witnesses, or to imply that one has more than another deviated from the truth. But I can best illustrate what I do mean by asking the same question I did as to the herring fishing.

If you wished to invest in mackerel, would you trust the rambling stories of the most honest of skippers or the most industrious of boat-fishers, against the experience and the books of men like Proctor, Sylvanus Smith, Hall, Myrick and Pew? Would you feel safe in buying when they refused to buy? Would you be disposed to hold when you saw them selling? And here lies the whole difference between us. Ours is the estimate of the capitalist, theirs the estimate of the labourer. Let me take another illustration. Suppose that instead of estimating the relative value of these fisheries, you were called on to estimate the relative value of the cotton crops of Georgia and Mississippi. Would it enter your minds to go into remote corners of these great States and gather together 83 small farmers, planting on poor lands, without artificial manure, without capital to hire labor, and draw your inference of production from their experience, although every word of it were true? Would you go to a few great planters and judge of the returns of cotton planting from the results of lavish expenditure? No. You would go to Savannah and Mobile, to Charleston and New York, to the offices of the factors, to the counting-houses of the great buyers, to the receipts of the railroads, to the freight lists of the steamers. I may safely say that there is no great industry, the cost and profits of which can be ascertained by such partial, individual enquiry. I am willing to admit perfect honesty of intention on the part of the individuals; but they never can understand how small a portion of a great result is the product of their local contribution; and just as a small farmer in all sincerity measures the crop of grain or cotton that feeds and clothes the world, from the experience of his few acres,—so the boat fishermen of Prince Edwards measures the mackerel catch of the Gulf by the contents of his boat, and imagines the few sail he sees in the offing of his harbour to be a huge fleet that is stealing his treasure. I mean no disrespect to very excellent people, but as I have heard their testimony, I would not but recall the humble address of the Legislative Council and House of Assembly of Nova Scotia, "to the Queen's most Excellent Majesty," in March, 1838, in which the fishermen of Prince Edward and the Magdalen Islands are tersely described as "a well-intentioned, but secluded and uninformed portion of your Majesty's subjects."

Let me call your attention to another important point of difference between their testimony and ours. Theirs is the affirmative in this contention. They must prove their allegation. What is their allegation? They allege that the catch of mackerel by American fishermen within the three-mile limit is of more pecuniary value to us than the right to fish in the same limits in United States waters, with the additional right to send in fish and fish oil free, is to them. We say, prove it. Now, there can be but two ways of furnishing such proof. Either the British counsel must produce the evidence of a positive catch, of value sufficient to sustain the allegation, or they must prove such a habit of successful fishing by Americans within the limits as justifies their inference of a proportion of such value.

They have not attempted to do the first. Nowhere in their evidence have they shown so many barrels of mackerel positively caught within the three-mile limit, and said, "There is the number, and here is the value for which we are entitled to be paid" If all the mackerel that have been sworn to by every witness as caught within the limit,—not what he has heard has been caught or thinks has been caught, but knows from his personal knowledge,—be added together, it would not make $100,000. Their value would be utterly inappreciable compared with the amount claimed.

They have adopted the other course, and by it they must stand or fall. They have put on the stand (leaving out Newfoundland) about fifty witnesses who swore that they in United States ships caught mackerel within the limits, and they claim that this fact proves "the habit" of fishing within the limits. In reply, we put on an equal number of witnesses, who prove that they caught habitually good fares in the Bay, without fishing within the three-mile limit. "Granted," they say, "but this only proves that your fifty witnesses did not fish within the three-mile limit." That is true, but is it not equally true that their testimony only proves that their witnesses, and those alone, fished within the limits, and leaves the question simply, whether they caught enough to justify an award? To go a step further, you must prove "the habit" of United States fishermen. But how can you prove a habit with equal testimony for and against it? It is exactly like what all lawyers and business men know as proving "commercial usage." In the absence of Statute law, if you wanted to prove, "commercial usage" at Amsterdam or New York as to what days of grace were allowed on commercial paper, what would you do? Examine the merchants of these cities as to "the habit" of commercial people. Now, if fifty merchants swore that one day was allowed and another fifty swore three days were allowed, you might not know whether it was one or three, but you would know that you had not proved any "habit." Just so, if fifty fishermen of a fishing fleet swore that it was "the habit" of the fleet to fish inshore, and fifty swore that it was "the habit" never to fish inshore, you might not know which to believe; but supposing, what in this case will not be disputed, that the witnesses were of equal veracity, you would certainly know that you had not proved "the habit."

You will see, therefore, that the burden of proof is on our friends. They must prove their catch equal in value to the award they claim. If they can not do that, and undertake to prove "habit," then they must do,—what they have not done,—prove it by an overwhelming majority of witnesses. With equal testimony, their proof fails.

And now, with such testimony, let us take up the mackerel fishery. Before you can fix the relative value of American or British interest in this industry, you must ascertain what it is. Before you can say how it is to be divided, you must know what you are to divide. Fortunately, we are agreed that there is but one market for all mackerel, whether caught on the United States shores or in the Gulf of St. Lawrence, and that is, the United States. No statement has gone beyond the estimate of a supply from all the fisheries of more than 400,000 barrels. In fact, that is considerably above the average supply. Then no statement has gone beyond an average of $10 per barrel, as the price. That makes $4,000,000. Next, I think I am safe in saying that the consent of the most competent witnesses, has fixed 400 barrels as the limit below which a vessel must not fall in order to make a saving trip. If that be so, the supply of 400,000 barrels, represents 1000 profitable trips. That is not catches making large amounts of money, but catches that did not lose. What, then, is the average value of a profitable trip? Take the estimates of Mr. Sylvanus Smith, Mr. Procter, and Mr. Pew, and see what profits you can make out of even such a trip. I am taking a large result from these calculations when I take Mr. Smith's estimate of $220, where the owner runs the vessel, and that will give you from the 400,000 barrels a resulting profit of $220,000. And in this calculation, I have not attempted to separate the Gulf catch from the United States shore catch, or to determine what portion of the Gulf catch was made within the three-mile limit. Take the largest estimate that has been made by any body; call the Gulf catch a third of the whole; say $75,000 to avoid fractions; and then consider half of that caught within three miles, and you have $36,000 annually, or $432,000 in twelve years, for the privilege of making which you ask over one million annually, or $15,000,000 for the twelve years. But even with this result, this is an exaggerated, a very exaggerated estimate of the value of the mackerel fishery, because it assumes the highest catch ever known as the average. Now, there are two facts upon which all the testimony agrees. 1. The variable character of the mackerel fishery. 2. The steady diminution of the supply from the Gulf as compared with the supply from the United States shores. If these be taken into calculation, what margin is left for an award, especially when it is remembered that this award is for twelve years, and, in the opinion of those most experienced, the variation in the mackerel catch passes from its minimum to its maximum every seven years,—giving, therefore, in this period but one maximum year in return for the payment. Upon these two facts we can rest. I do not care to go through the testimony that you have had before you. I did make one or two tabular statements, but I do not think it worth while to trouble you with them. The general results you can get at as well as I did. You know the general run of the testimony. You know whether I am saying what is fairly and reasonably accurate. Our contention is that we have proved these points conclusively, and taking them as the basis, there is no margin whatever left for an award on account of profits accruing to the United States from the privilege of inshore fishing.

But there is another fact not stated in any of the evidence, but which is clearly proven by the whole of it; and it is this: The mackerel market is a speculative market; its profit represents simply a commercial venture, and not the profit to the fisherman. In other words, a barrel of mackerel salted, packed and sold, produces a result in which the profit of the fisherman makes but a small part. Take the statement of Mr. Hall, that he purchases regularly from the fishermen of Prince Edward Island their mackerel at $3.75 per bbl. Now, whatever Mr. Hall sells that barrel of mackerel for above and beyond $3.75 represents capital, labor, skill, with which the fishery, as a fishery, has no concern. Between the fish in the water and the fish in the market there is as much difference as there is between a pound of cotton in the field and a pound of cotton manufactured; and you would have as much right to estimate the value of a cotton plantation by the value of the cloth and yarn into which its production has been manufactured, as you have to value the fisheries by the value of the manufactured fish which are sold.

Suppose that Mr. Hall, or a combination of Mr. Hall's, should purchase the whole mackerel catch at $3.75, and then hold for such a rise in price as they might force. This speculation might make Mr. Hall a millionaire or a bankrupt, but would any man in his senses consider the result, be it profit or loss, as representing the value of the mackerel fishery?

So little, indeed, does the value of the fish enter into the market value of the mackerel, that you have this statement from Mr. Pew, the largest and longest established fish-merchant on this continent: "No. 1 Bay mackerel in the Fall were bought by us at $22.50, and piled away over Winter, and I think the next May and June they sold down as low as $4, $5, and $6 a barrel,—the same fish; and I think that shore mackerel, which had sold as high as $24, were then sold for about the same price." Would the mackerel market of that year have afforded you any fair criterion by which to appraise the mackerel fishery of that year? What interest had the mackerel fisherman in this speculative variation of the market price? And you have the further and uncontradicted testimony of more than one competent witness that when the mackerel catch of 1870 was, with one exception, the largest ever known, prices were maintained at a higher point than in years of very small catch.

Upon this state of facts, proven by such competent witnesses as Proctor, Sylvanus Smith, Myrick, Hall and Pew, I submit that in estimating the value of the fishery, you can only take the value of the raw material,—that is, the fish as taken by the fishermen and by him sold to the merchant; and even then, the price he receives represents, besides the value of the raw material, his time, his labor, his living, and his skill. For throughout this argument, you must not forget that the British Government gives us nothing. For the freedom from duty, and the right to fish in United States waters, it gives us the privilege only of using our own capital, enterprise,

and industry, within certain limits. It cannot secure us, and does not offer to secure us, a single fish. It cannot control the waters or the inhabitants thereof. It cannot guarantee that, in the twelve years of the treaty, the catch in the Gulf will be even tolerable, and, indeed, for the five years that have already run, it has been pure loss. And yet, the British case demands that we should pay, not only for the little we do catch, but for all that, under other circumstances, we might catch; and not only that, but that we should pay for all the fish that the British fishermen do not catch!

We contend, then, that we have proved that the mackerel fishery of the Gulf is so variable that it offers no certainty of profit; that the use of the Gulf fishery has diminished steadily; that in the Gulf there is no evidence of any habitual fishing within the three-mile limit; that an equal number of experienced and competent fishermen prove that they do not fish at all inside the limits, and that the development of the United States coast fishery has offered and is offering, a more profitable field for the industry and capital of United States fishermen, while the supply of fish from the lakes, and the transport of fresh fish far into the interior is superseding the use of salted mackerel as an article of food; and therefore there is no ground in any advantage offered by the treaty of 1871 upon which to rest a money award

We now go further and maintain that if in this condition of the mackerel fishery, you can find any basis for such award, then the advantages offered to the subjects of Her Britannic Majesty by the United States in the same Treaty are a complete offset.

These advantages consist, first, in the right to share the shore fisheries of the United States. It will not do to assert, as the British case does, that "Their modes of fishing for menhadden and other bait are furthermore such as to exclude strangers from participating in them without exceeding the terms of the Treaty; and even without this difficulty it must be apparent that such extensive native enterprises would bar competition and suffice to ensure the virtual exclusion of foreigners." (Page 29.)

These, as they stand, are mere assertions, unsupported by any proof. The Treaty provision is the highest law of the land, and no local legislation can prevent the exercise of the privileges it confers. The competition of native enterprise is just what the United States fishermen meet in British waters, and that the native enterprise is more extensive on the United States shores, only proves that there is an industry which better rewards the enterprise. It is like all Treaty privileges—one, the use of which depends upon those who take it, and if, when given and taken in exchange, the parties taking do not choose to use it, this refusal cannot deprive it of its value.

2. The second advantage given to Her Britannic Majesty's subjects, is the right to export into the United States fish and fish oil, free of duty. The estimate which we have submitted as to the value of this privilege, is that it is worth about $350,000 annually.

This has not been denied, but I am concerned with the principle, not the amount. To this offset the British Counsel object, upon the ground that the duty taken off the British producer, reduces the price to the American consumer, and is therefore a benefit to the latter to the same extent, for, if imposed, the consumer would have to pay. Into the politico economical argument, I shall not enter. You have heard enough of it in the cross-examinations, where counsel and witnesses gave you their opinions; and our view of the case has been placed before you with great clearness and force by the learned counsel, who preceded me. Upon that question, I have but two remarks to make, and I do not think either can be controverted:—

1. If it be assumed, as a general principle, that the consumer pays the duty, it is equally true that he does not pay the whole of it. For to assume any such position would be to strike out all possibility of profit. Take an illustration: A merchant imports 1000 yards of broadcloth, which, adding all costs and duties, he can sell at a profit at $6 a yard. Now add a duty of $2 a yard. He cannot sell his customer at $8 a yard; he must divide the rise in price, and while he adds the duty, he must diminish the profit. Except in case of articles of luxury, such as rare books, jewels, costly wines, scientific instruments, works of art, the increase of duty cannot, and never has been, imposed entirely upon the consumer.

2. If this be true, then you must ascertain what is the proportion of increase in price of mackerel, consequent upon the duty which is paid by the consumer before you can say what he, the consumer, gains by the removal. There has been no attempt to do this on the part of counsel. Our most experienced witnesses testify that the additional duty of $2 would raise the price of mackerel about fifty cents a barrel, which would leave $1.50 to be paid by the producer. I do not undertake to say whether this is right or wrong, for I am discussing the principle, not the amount. The question is an insoluble one. You have been told by competent witnesses, and after a fortnight's preparation for rebuttal, they have not been contradicted, that the mackerel market is a speculative one; that in one year the speculative price has varied from $22 to $4, while for ten years the price to the daily consumer has scarcely varied at all; that the price depends much upon the catch, and yet, that in the year of the largest catch, the price has not gone down; and that being food for poor people, there is a price which, when reached, with duty or without duty, the consumption is immediately reduced: and, added to all this, that the competition of fresh fish is fast driving it out of use. With all these conditions to be ascertained first, who can ever say what proportion of duty is paid by the producer, and what by the consumer, or if any is paid by the latter?

I do not believe it is possible to do it, but if it were possible to do do it, you cannot make it an offset. If you undertake to make an offset of it, let us know what it is. We state our account. We take this statement and we say, "In the year 1874 the duty remitted was $355,972." Now what are you going to set off against that?—an opinion, a theory, a belief, a speculation, to weigh it down with? If you are going to set off dollars against that, tell us how many dollars, in 1874, you are going to set off against that. How are you going to find out? How can you ever tell us? But if the gentlemen's theory is right, they have not converted it into a practical theory that you can apply. If they will undertake to tell us, "In 1874 and '75, we will show you a reduction of price in mackerel to a certain number of consumers, to the amount of $200,000 or $250,000," strike the balance. But you cannot strike the balance with an opinion. Before they can make this claim they must submit that statement to us. But I do not intend to dwell upon that, for this reason. The principle that I hold ought to applied to the solution of this question is this; that it is one with which, under the Treaty, you have nothing on earth to do. If our friends on the other side could show dollar for dollar that every dollar of the $355,000 remitted by the renewal of the duty was $355,000 to the benefit of the American consumers, you could not reckon it.

Now, let us look at the Treaty:—

"ARTICLE XXII.—Inasmuch as it is asserted by the Government of Her Britannic Majesty that the privilege accorded *to the citizens of the United States, under Article XVIII* of this Treaty are of greater value than those accorded by Articles XIX and XXI of this Treaty to the subjects of Her Britannic Majesty, and this assertion is not admitted by the Government of the United States, it is further agreed that Commissioners shall be appointed to determine, having regard to the privileges accorded by the United States to the subjects of Her Britannic Majesty, as stated in Article XIX and XXI of this Treaty, the amount of any compensation which, in their opinion, ought to be paid by the Government of the Her Britannic Majesty *in return for the privileges accorded to the citizens of the United States under Article XVIII.*"

Now, under this Treaty, there stands before you to-day a balance, on one arm of which hangs the 18th Article

of the Treaty of 1871, and on the other the 19th and 21st Articles. You cannot add to either scale one scruple, one pennyweight, which the Treaty has not put there. You cannot transfer weights from one to the other. You can only look at the index and see whether the register shows that one is heavier than the other, and how much heavier. What are the advantages conferred by the 18th Article of the Treaty of 1871 on the citizens of the United States.

"It is agreed by the High Contracting Party, that in addition to the liberty secured to the United States fishermen by the Convention between Great Britain and the United States, signed at London on the 20th day of October, 1818, of taking, curing, and drying fish on certain coasts of the British North American Colonies therein defined, the inhabitants of the United States shall have, in common with the subjects of Her Britannic Majesty, the liberty, for the term of years mentioned in Article XXXIII of this Treaty, to take fish of every kind, except shell-fish, on the sea coasts and shores, and in the bays, harbors and creeks of the Provinces of Quebec, Nova Scotia, and New Brunswick, and the Colony of Prince Edwards Island and of the several islands thereunto adjacent, without being restricted to any distance from the shore, with permission to land upon the said coasts and shores, and islands, and also upon the Magdalen Islands for the purpose of drying their nets, and curing their fish."

That is the only advantage which is given to us by the 18th Article of the Treaty, and it is the only advantage so given to us, the value of which you have any right to estimate. I am perfectly willing to admit a set-off of this kind, which is provided for apparently. It is agreed in Article XXI that for the term of years mentioned in Article XXXIII of this Treaty, fish, oil, and fish of all kinds (except fish of the inland lakes and of the rivers falling into them, and except fish preserved in oil), being the produce of the fisheries of the United States or of the Dominion of Canada or of Prince Edward Island, shall be admitted into each country respectively, free of duty.

Now, if against the $350,000 of duty remitted upon fish and fish oil imported from the Dominion into the United States, you can set off any duty on fish and fish oil imported from the United States into Canada, you will have the right to do it; but that is the extreme limit to which, under the words of that Treaty, you have a right to go. It is nothing whatever to you whether the advantage to us is great or small of the remission of that duty. It is a positive advantage to the citizens of the Dominion; it is given to them as an advantage, and in return for it, they have given us a right to do one thing and nothing else, and under that Treaty, you have no right to value any other advantage against us.

I have now stated as concisely as I have been able, the scope of our argument,—the principles which we think ought to be applied to the solution of this question. As to the facts, you will judge them by the impression the witnesses have made upon yourselves, and not by any representations of the impressions they have made upon us. And we fully and gratefully recognise that you have followed the testimony with patient and intelligent attention.

It seems to me (and this I would say rather to our friends on the other side than to you) that at the end of this long investigation, the true character of the case is not difficult to see. For a century, the relations of the two countries on this question have been steadily improving. We have passed from the jealous and restrictive policy of the Convention of 1818 to the free and liberal system of the Treaty of 1854, and with good sense and good temper, it is impossible that we should ever go backward. The old feuds and bitternesses that sprang from the Revolution have long since died out between the two great nations, and in fact, for Great Britain, the original party in these negotiations, has been substituted a nation of neighbors and kinsmen, a nation working with us in the wise and prosperous government of this vast Continent, which is our joint possession; a nation, I may add, without presumption or offence, whose existence and whose growth is one of the direct consequences of our own creation, and whose future prosperity is bound up with our own. In the Treaty of 1871 we have reached a settlement which it depends upon your decision to make the foundation of a firm and lasting union. Putting aside for the moment the technical pleadings and testimony, what is the complaint and claim of the Dominion? It is that where they have made of the fishery a common property, opened what they consider a valuable industry to the free use of both countries, they are not met in the same spirit, and other industries, to them of equal or greater value, are not opened by us with the same friendly liberality. I can find no answer to this complaint, no reply to this demand, but that furnished by the British case, your own claim to receive a money compensation in the place of what you think we ought to have given. If a money compensation is recompense,—if these unequal advantages, as you call them, can be equalized by a money payment, carefully, closely, but adequately estimated,—then we have bought the right to the inshore fisheries, and we can do what we will with our own. Then we owe no obligation to liberality of sentiment or community of interest; then we are bound to no moderation in the use of our privilege, and if purse-seining and trawling and gurry poison and eager competition, destroy your fishing, as you say they will, we have paid the damages beforehand; and when at the end of twelve years we count the cost and find that we have paid exorbitantly for that which was profitless, do you think we will be ready to renew the trade, and where and how will we recover the loss?

No. I believe that this Treaty as it stands executed to-day, interpreted in the broad and liberal spirit in which it was conceived, is, whether you regard the interests of the Maritime Provinces or the wider interests of the whole Dominion, a greater advantage in the present and a larger promise in the future than any money award which may belittle the large liberality of its provisions. As it stands, it means certain progress. The thorough investigation which these interests have now for the first time received, a few years, a few months of kindly feeling and common interest will supply all its deficiencies and correct all its imperfections.

And, therefore, do I most sincerely hope that your decision will leave it so, free to do its own good work, and then we who have striven together, not, I am glad to say, either unkindly or ungenerously, to reach some just conclusion, will find in the future which that Treaty contains the wisest solution, and we shall live to see all possible differences which may have disturbed the natural relations of the two countries, not remotely but in the tomorrow of living history, not metaphorically but literally, "in the deep bosom of the ocean buried."

No. VI.

CLOSING ARGUMENT OF HON. RICHARD H. DANA, JR.,

ON BEHALF OF THE UNITED STATES.

FRIDAY, Nov. 9th, 1877.

It please Your Excellency and Your Honors, —

Certainly, in the discharge of our respective duties on this high occasion, we are met under most favorable auspices. Our tribunal is one of our own selection. The two parties to the question, Great Britain and the United States of America, have each chosen its representative upon the Board; and, as to the President and umpire of the tribunal, while the treaty obliged us, by reason of the lapse of time, to refer the appointment to the representative of a foreign power at London, yet it is well known that the appointment was made in conformity with the expressed wish of those Governments, who found, as the head of this Court, one with character so elevated and accomplishments were so rare, that they had no difficulty in agreeing upon him themselves.

We have been fortunate, Gentlemen of the Commission, that no misfortune, no serious accident, in the long period of three months that so many gentlemen have been together, has fallen upon us. The shadow of death has not crossed our path, nor that of any of ours at a distance, nor even has sickness visited us in any perilous manner. We have been sustained all the while by the extreme hospitality and kindness of the people of this city, who have done everything to make our stay here as agreeable as possible, and to breathe away any feeling we might have had at the beginning that there might be any antagonism which would be felt beyond the legitimate contests of the profession. The kindest feeling and harmony prevail among us all. Your Legislature of this Province has set apart for our use this beautiful hall, and while my friend and associate, Mr. Trescot, saw in the presence of the portrait of His Majesty, which looks down upon us from the walls, an encouragement for the settlement of the matter confided to us, because that king supposed it settled more than a hundred years ago, I confess that the presence of that image has been to me throughout interesting and almost painful. It was the year that he ascended to the throne that the French were finally driven from North America and that it all became *British* America, from the Southern coast of Georgia up to the North Pole, and all these islands and peninsulas which form the Gulf of St. Lawrence passed under his sceptre. And what a spectacle for him to look down upon now, after an hundred years! A quiet assembly of gentlemen, without any parade or ostentation, without an armed soldier at the gate or door, settling the vexed question of the fisheries, which in former times and under other auspices, would have been cause enough for war. And settling them between whom? Between his old thirteen Colonies —now become a Republic of forty millions of people, bounded by seas and zones, and his own Empire, its sceptre still held in his own line, by the daughter of his own son, more extended, and counting an immensely larger population than when he left it, showing us not only the magnitude, and increase, and greatness of the Republic, but the stability, the security and the dignity of the British Crown. Yes, Gentlemen of the Commission, when he ascended the throne, and before that, when his grandfather, whose portrait also adorns these walls, sat upon the throne of England, this whole region was a field of contest between France and Great Britain. It was not then British North America. Which should hold them, with these Islands and peninsulas and these fisheries, adjacent to and about them, depended upon the issue of war, and wars one after another; but Great Britain, holding certain possessions here, claimed them, and made large claims, according to the spirit of that day, covering the Banks of Newfoundland, and the other banks, and the whole deep sea fishery out of sight of land, and also up to the very shores and within hailing distance of them, without any regard to a geographical limit of three miles, which is a very modern invention. That contest was waged, and the rights in these islands and these fisheries settled by the united arms of Great Britain and of New England, and largely, most largely, of Massachusetts. Why, Louisburg, on Cape Breton, held by the French, was supposed to be the most important and commanding station, and to have more influence than any other upon the destinies of this part of the country. And, Mr. President, it was a force of between three and four thousand Massachusetts men, under Pepperell, and a few hundred from the other colonies, with two hundred and ten vessels, that sailed to Louisburg, invested and took it for the British Crown, in trust for the British Crown and her colonies. Gridley who laid out the fortifications at Bunker Hill, and Prescott, who defended them, were in the expedition against Louisburg. And wherever there was war between France and England for the possession of this continent, or any part of it, or these islands and these fisheries, the militia and volunteers of Massachusetts fought side by side with the regulars of Great Britain. They fought under Wolfe at Quebec, under Amherst and Lord Howe at Ticonderaga; and, even at the confluence of the Alleghany and Monongahela, Washington commanded under Braddock. We followed the British arms wherever they followed the French arms. The soldiers of Massachusetts, following them to the sickly sugar islands of the West Indies, lay side by side on cots in the same fever hospitals and were buried in the same graves. And if any of you shall visit the old country again, and your footsteps may lead you to Westminster Hall, you will find there a monument to Lord Howe, the brother of Admiral Howe, who fell at Ticonderoga, erected to his memory by the Province of Massachusetts; and there let it stand, an emblem of the fraternity and unity of the olden times and a proof that it was together, by our joint arms and our joint enterprise, blood and treasure, that all these Provinces, and all the rights appertaining and connected therewith, were secured to the crown and the Colonies. Yes, Gentlemen of the Commission, every one of the charters of Massachusetts gave her a right to fish in these North-Western waters, and they, you will observe, were irrespective of her geographical position. None of them watered her shores, but they were the result of the common toil, treasure and blood of the Colonies and of the Crown, and they were always conceded to the Colonies by the Crown. The last Massachusetts charter granted by the Crown is in these words—it assures to Massachusetts "the right to use and enjoy the trade of fishing on the coast of New England, and all the seas thereto adjoining, or arms of said seas, where they have been wont to fish." The

test was the habit of the people; "where they had," in the good old Saxon English, "been *wont* to fish." It did not depend on geographical lines, They had no idea then of limiting the Colonies to three miles, and giving them a general right on the seas, but whatever right Great Britain had here she secured to the Colonies to the last.

I may as well present here, gentlemen of the Commission, as at any other time, my view respecting this subject of the right of deep-sea fishery. The right to fish in the sea is in its nature not real, as the common law has it, nor immovable, as named by the civil law, but personal. It is a liberty. It is a franchise, or a faculty. It is not property pertaining to or connected with the land. It is incorporeal; it is aboriginal. The right of fishing, dropping line or net into the sea, to draw from it the means of sustenance, is as old as the human race, and the limits that have been set about it have been set about it in recent and modern times, and wherever the fisherman is excluded, a reason for excluding him should always be given. I speak of the deep sea fishermen, following the free-swimming fish through the sea, not of the crustaceous animals or any of those that connect themselves with the soil under the sea, or adjacent to the sea, nor do I speak of any fishing which requires possession of the land or any touching or troubling the bottom of the sea—I speak of the deep sea fishermen who sail over the high seas pursuing the free swimming fish of the high seas. Against them, it is a question not of admission, but of exclusion. These fish are not property. Nobody owns them. They come we know not whence, and go we know not whither. The men of science have been before us, and fishermen have been before us, and they do not agree about it. Prof. Baird, in a very striking passage, gave it as his opinion that these fish retire in the winter to the deep sea, or to the deep mud beneath the sea, and become unseen and unknown, and in the spring they invade this great continent as an army, the left wing foremost, touching the Southern States first, and last the northern parts of the British colonies. Others think they go to the south and come back in lines and invade this country: but at all events, they are more like those birds of prey and game which retire to the South in the winter, and appear again and darken the sky as they go to the south. They are no man's property; they belong, by right of nature, to those who take them, and every man may take them who can. It is a totally distinct question whether, in taking them, he is trespassing upon private property, the land or park of any other individual holder. "The final cause," as the philosophers say, of the existence of the sea fish is, that they shall be caught by man, and made an object of food by man. It is an innocent use of the high seas, that use which I have described. More than that, it is a meritorious use. The fisherman who drops his line into the sea creates a value for the use of mankind, and therefore his work is meritorious. It is, in the words of Burke, "wealth drawn from the sea," but it was not wealth until it was drawn from the sea.

Now, these fishermen should not be excluded except from necessity, some kind of necessity, and I am willing to put at stake whatever little reputation I may have as a person acquainted with the jurisprudence of nations (and the less reputation, the more important to me) to maintain this proposition, that the deep sea fisherman, pursuing the free swimming fish of the ocean with his net, or his leaded line, not touching shores or troubling the bottom of the sea, is no trespasser, though he approach within three miles of a coast, by any established, recognized law of all nations. It may possibly cross the minds of some of this tribunal, that perhaps that is not of very great importance to us here, but from the reflection I have been able to give to this case (and I have had time enough, surely) it seems to me that it is. I wish it to be fully understood, what is the nature of that exclusive right for the withdrawing of which we are asked to make a money compensation? What is its nature, its history and its object? The Treaty between Great Britain and France of 1839, which provides for a right of exclusive fishery by the British on the British side of the channel, and by the French on the French side of the channel, and measures the bays by a ten mile line, is entirely a matter of contract between the two nations. The Treaty begins by saying, not that each nation acknowledges in the other the right of exclusive fishery within three miles of the coast; nothing of the kind. It begins by saying, "It is *agreed between the two nations* that Great Britain shall have exclusive fishery within three miles of the British coast, and that the French shall have exclusive fishery within three miles of the French coast," and then it is further agreed that the bays shall be measured by a ten mile line. All arbitrary alike, all resting on agreement alike, without one word which indicates that the law of nations any more gives an exclusive right to these fisheries by the British for three miles, than it does to measure the bays by ten miles. In the time of Queen Elizabeth this matter seemed to be pretty well understood in England. Her Majesty sent a Commission, if I recollect right, an embassy, to Denmark, on the subject of adjusting the relations between the two countries, and among the instructions given the ambassadors were these:

"And you shall further declare that the Lawe of Nations alloweth of Fishing in the sea everywhere; as also of using ports and coasts of princes in amitie for traffique and avoidinge danger of tempests; so that if our men be barred thereof, it should be by some contract. We acknowledge none of that nature; but rather, of conformity with the Lawe of Nations in these respects, as declaring the same for the removing of all clayme and doubt; so that it is manifest, by denying of this Fishing, and much more, for spoyling our subjects for this respect, we have been injured against the Lawe of Nations, expresslie declared by contract as in the aforesaid Treaties, and *the King's* own letters of '85.

"And for the asking of licence, (your Honors will be pleased to observe that the Danish statute required the English to pay licenses for fishing in certain parts of said sea close to the shore), if our predecessors yelded thereunto, it was more than by Lawe of Nations was due; yelded, perhaps, upon some special consideration, yet, growing out of use, it remained due by the Lawe of Nations, what was otherwise due before all contract; wherefore, by omitting licence, it cannot be concluded, in any case, that the right of Fishing, due by the Lawe of Nations, faileth; but rather, that the omitting to require Licence might be contrarie to the contract, yf any such had been in force.

"Sometime, in speech, *Denmark* claymeth propertie in that Sea, as lying between *Norway* and *Island*,—both sides in the dominions of oure loving brother *the King*, supposing thereby that for the propertie of a whole sea, it is sufficient to have the banks on both sides; as in rivers. Whereunto you may answere, that though propertie of sea, in some small distance from the coast, maie yeild some oversight and jurisdiction, yet use not princes to forbid passage or fishing, as is well seen in our Seas of England."

Though possession of the land close to the sea, says this remarkable letter of instructions, "may yield some oversight and jurisdiction, yet use not princes to forbid passage or fishing, as is seen by our law of England." There is much more to the same effect. So that whatever claim of jurisdiction over the sea a neighboring nation might make, whatever claim to property in the soil under the sea she might make, it was not the usage of Princes to forbid passage, innocent passage, or the fishing and catching of the free swimming fish, wherever they might be upon the high seas.

I wish particularly to impress upon your Honors that all the North British Colonies were in possession and enjoyment of the liberty of fishing over all the North Western Atlantic, its gulfs and bays. There is no word indicating the existence of either of these two things, a three mile line of exclusion, or attaching a right of fishing to the geographical position of the colony. No, gentlemen, the Massachusetts fisherman who dropped his leaded line by the side of the steep coast of Labrador, or within hail of the shore of the Magdalen Islands, did it by precisely the same right that he fished in Massachusetts Bay, off Cape Cod or Cape Ann. Nobody knew any difference in the foundation or the test of the rights, in those days. It was a common heritage, not dependent upon political geography. As I have said, it was conquered by the common toil, blood and treasure, and held as a common right and possession. "Be it so," your Honors may say, "but could not Great Britain take it from her Colonies?" Well, the

greatest philosopher, who gave his life to statesmanship—Edmund Burke—said, "that is a question which can better be discussed in the schools, where alone it can be discussed with safety." He compared it with the question of the right to shear wolves. He was not disposed, perhaps, to deny the right in the abstract, but as a servant of the Crown, he could not advise the Crown to try that kind of experiment. I recollect that when, before our civil war, an ardent and enthusiastic admirer of slavery said on the floor of Congress that capital ought to own labor, and that we had made a great mistake in New England that the capitalist did not own the men who worked in the factories and the men who followed the sea—Mr. Quincy replied by an anecdote respecting the bounty which the State of Maine gave for every wolf's head. A man was asked why he did not raise a flock of wolves for the bounty. He said it would turn out, he was afraid, to be a hard flock to tend. And the wisest men in Great Britain,—and I can say this in the presence of gentlemen who are almost all British subjects now, without fear of giving offence—the wisest men of Great Britain thought it was an attempt which had better not be made. But the Act of March, 1775, urged by the obstinacy of George III and his adherence to worn-out traditions, was passed. After a conflict with the colonies on the subject of the stamp act, and the tea tax, that fatal act was passed, aimed at home rule, self-government and the trade of the New England people,—or rather, I should say, in the first instance, of Massachusetts, because it was Massachusetts over which the contest was waged during the early part of our struggle,—and attempting to undo all we had been doing for one hundred and fifty years; to revolutionize our entire political system, and instead of leaving us what we had enjoyed for that time, home rule, to substitute a government at St. James or St. Stephens. Among other things, they provided that we should be deprived of our right in the fisheries. The statute acknowledged the existence of it, but Massachusetts was to be deprived of her right by the Act of Parliament. Then came the debate, fiercer than ever, "Can Parliament take from us this right?" Well, it rested upon the assumption that all the grants the charters vested in us were held at the discretion of Parliament, and if Parliament could take away our fisheries, she could take away our landmarks, she could take Boston and Salem, which had been granted to us under the same charter that the fisheries had been granted; and when that act was passed, Burke and Fox, and Sheridan, and Barré, and others, our friends in the British Parliament, called it a simple provocation to rebellion. Burke said, "It is a great penal bill which passed sentence on the trade and sustenance of America." New England refused obedience. The other colonies assisted her, and we always treated it as void. Then came the war, and what was the effect of that on our title? Why, may it please you, gentlemen, I do not deny that war has an effect, but not the kind of effect which has been contended for by the British Government and by counsel. I agree that war puts at hazard, not only every right of a nation, but the existence of the nation. There are boundary lines before war, and they are good against neutrals, and good between one another, unless something else happens; but the boundary lines and everything they have is put at stake by the war. If one party entirely conquers the other, it has a right to decide upon the future existence of the other nation, and all its rights; and when our ancestors pledged their "lives, fortunes, and sacred honor" to maintain all their rights, including this right against the demands of Parliament, I agree that they put this right, as they put their lives, at hazard; but, fortunately for us, the war did not turn out a conquest of any of our rights. At the close of the war, the Treaty of 1783 was made. Now, at the time when the Treaty of 1783 was made, Great Britain did not claim to have conquered America, or to have taken from us by military force any of our rights, and the consequence was that in framing the Treaty of 1783, while they altered by common consent some of the division lines, none by right of conquest, they declared that the people of the United States shall "continue to enjoy unmolested the right to take fish of every kind on the British banks, and all other banks of Newfoundland; also in the Gulf of St. Lawrence, and all other places in the sea where the inhabitants of both countries used at any time heretofore to fish." What could be stronger than that? It was an acknowledgment of a continued right possessed long before. And if any question of its construction arose, it appealed to what they had been heretofore accustomed to do; "where the inhabitants of both countries used at any time heretofore to fish."

How was it construed by British statesmen? Is there any doubt about it? I take it my brethren of the Colonial bar will consider Lord Loughborough good authority. He said these words in the House of Lords respecting the fishery clause of the Treaty: "*The fisheries were not conceded, but recognized as a right inherent in the Americans, which, though no longer British subjects, they are to continue to enjoy unmolested.*" The same thing, substantially, was said by Lord North, who had been, we are told now by his biographers, the unwilling, but certainly the subservient instrument in the hands of his king for trying to deprive us of this, as well as our other rights. We then did continue to enjoy them, as we had from 1620 down. We had as much right to them as the British Crown, because it was our bow and our spear that helped to conquer them. Then came the war of 1812, and we had enjoyed the fisheries freely, without geographical limit, down to that time. The war of 1812 certainly did not result in the conquest of America, either maritime or upon the land. It was fought out in a manly way between two strong people, without any very decided result; but after the war, in 1814, about the time we were making the treaty of peace at Ghent, that memorable correspondence took place between John Quincy Adams and Earl Bathurst, in which Earl Bathurst took this extraordinary position, that a war terminates all treaties. He took that position without limitation. Mr. Adams said, "Then it puts an end to our independence." No, was Earl Bathurst's answer,—your independence does not rest upon the treaty. The treaty acknowledged your independence as a fact, and that fact continues. No treaty now can take it from you; no treaty is needed to secure it to you; but so far as it was a treaty,—I mean, so far as any right rested upon it as a treaty gift, or treaty stipulation,—the war put an end to the treaty. Mr. Adams's answer was two-fold: first, he denied the position. He took the ground, which all statesmen and jurists take to-day, that a war does not, *ipso facto*, terminate a treaty. It depends upon the results of the war; it depends upon the nature of the treaty; it depends upon its language and terms. Each case is *sui generis*. Whether any war,—I mean the entering into war, the fact that the two nations are at war,—terminates a treaty, depends upon these questions. The treaty is put at hazard, like all other things. The termination of the war may terminate all treaties by a new treaty, or by conquest; but the fact that there is war, which is the only proposition, does not terminate any treaty, necessarily. Then Mr. Adams farther says: Our right does not rest upon the treaty. The treaty of 1783 did not give us this right. We always had it. We continued to enjoy these rights without geographical limitation, and it was conceded that we did so by the Treaty of 1783, and we no more depend upon a treaty gift of 1783 for the right to these fisheries than we depend upon it for the enjoyment of our right to our independence. Of course, the gentlemen of the Commission are familiar with that correspondence, and I will go no farther with it. The whole subject is followed up with a great deal of ability in that remarkable book which has been lying upon the table: I mean John Quincy Adams's book on "*The Fisheries and the Mississippi*," in connection with the Treaty of Ghent, and his reply to Mr. Jonathan Russell.

Well, the parties could not agree, and it went on in that way until 1818, and then came a compromise, and nothing but a compromise. The introduction to the Treaty of 1818 says: "Whereas, differences have arisen respecting the liberty claimed by the United States and inhabitants thereof to take, dry and cure fish in certain coasts, harbors, creeks and bays of His Majesty's dominions in America, it is agreed between the high contracting parties"—it is all based upon "differences." Now, the position of the two parties was this: the people of the United

States said, "We own these fisheries just as much to-day as we did the day that we declared war." Great Britain did not declare war, nor did she make a conquest. The declaration of war was from Washington, from the Congress of the United States, and it ended by a treaty which said nothing about fisheries, leaving us where we were. The ground taken by the United States was that the fisheries, irrespective of the three mile limit, or anything else, belonged to us still. Great Britain said, "No, you lost them," not by war, because Earl Bathurst is careful to say that the war did not deprive us of the fisheries, but the war ended the treaty, and the fisheries were appended solely to the treaty, and when the treaty was removed, away went the fisheries. Now, it is a singular thing in examining this treaty to find that there is nothing said about our right to take fish on the Banks, in the Gulf of St. Lawrence, and in the deep sea. The treaty of 1783 referred to that among other things, and it is well known that Great Britain claimed more than a jurisdiction over the fisheries. It claimed general jurisdiction and authority over the high seas, to which it appended no particular limit, and the claim admitted no limit. You were told by my learned associate, Judge Foster, a few days ago, that they arrested one of our vessels at a distance of sixty miles from the shore, claiming that we were within the king's chambers. Nothing is said in that treaty upon the subject. It is a implied concession, that all those rights belong to the United States, with which England would not undertake after that ever to interfere. And then we stood in this position,—that we had used the fisheries, though we did not border upon the seas, from 1620 to 1818, in one and the same manner, under one and the same right, and if the general dominion of the seas was shifted, it was still subject to the American right and liberty to fish.

I shall say nothing in this discussion about the right to land on shores for the purpose of drying nets and curing fish. That was a very antique idea. It has quite passed out now, fortunately, for your Provinces are becoming well settled, and no right ever existed to land and dry fish where a private right is interfered with. There is no evidence to show that we ever practiced that right or cared anything about it. It was put in the treaty to follow the language of the old treaties, for whatever it might be worth.

Your Honors will also observe, that until 1830, the mackerel fisheries were unknown. There was no fishery but the cod fishery. The cod fisheries were all the parties had in mind in making the Treaty of 1818, and to this day, as you have observed from some of the witnesses "Fishing" by the common speech of Gloucester fishing means, *ex vi termini*, cod fishing is one thing, and "mackereling" is another. In Mr. Adams's pamphlet, on the 23rd page, he speaks of it as a "fishery," or, in other words, cod fishery, and in 1818 the question was of the right of England to exclude. Now, for the first time, the doctrine respecting the three mile line had begun to show itself in international law. Great Britain availed herself of it, contrary to the instructions given by Queen Elizabeth,—a very wise princess, certainly surrounded by very wise counsellors,—availed herself of it to set up a claim to exclude the deep sea fishermen, though they did not touch the land or disturb the bottom of the sea, for a distance of three miles out. We denied that there was any such right by international law, certainly none by treaty; and certainly none could be set up against us, who own the right to fish. But England was a powerful nation. She fought us in 1812 and 1814 with one hand,—I acknowledge it, though it may be against the pride of American citizens,—while she was fighting all Europe with the other, but she was now at peace. Both nations felt strong; both nations were taking breath after a hard conflict, and it was determined that there should be an adjustment, and there was an adjustment, and it was this. Great Britain tacitly waived all claim to exclude us from the high-seas and from the King's chambers, except harbors and bays. She expressly waived all right to exclude us from the coasts of Labrador, from Mount Joly northward and eastward indefinitely, through those tumbling mountains of ice, where we had always pursued our gigantic game. She expressly withheld all claim to exclude us from the Magdalen Islands and from the southern, western, and northern shores of Newfoundland; and as to all the rest of the Bay of St. Lawrence and the coasts of Nova Scotia, and New Brunswick, we agreed to her right to exclude us. So that it stood thus: that, under that Treaty, and only under that Treaty, we admitted that Great Britain might exclude us, for a distance of three miles, from fishing in all the rest of her possessions in British North America, except those where it was expressly stipulated she should not attempt to do it. So she had a right to exclude us from the three mile line from the shores of Cape Breton, Prince Edward Island, Nova Scotia, a portion of Newfoundland and New Brunswick, and what has now become the Province of Quebec, while she could not exclude us from the coast of Labrador, the Magdalen Islands, and the rest of Newfoundland. There was the compromise. We got all that was then thought useful, with the right of fishing, with the right to dry nets and cure fish wherever private property was not involved. The Treaty of 1818 lasted until 1854,—thirty-six years. So we went on under that compromise, with a portion of our ancient rights secured and another portion suspended, and nothing more.

Great changes took place in that time. The mackerel fishery rose into importance. Your Honors have had before you the interesting spectacle of an old man who thinks that he was the first man who went from Massachusetts into this Gulf and fished for mackerel, in 1827, or thereabouts. He probably was. But mackerel fishing did not become a trade or business until considerably after 1830, and the catch of mackerel became important, to us as well as to the Colonies.

But there were great difficulties attending the exercise of this claim of exclusion—very great difficulties There always have been, there always must be, and I pray there always shall be such, until there be free fishing as well as free trade in fish. We had upon the stand Capt. Hardinge, of Her Majesty's navy, now or formerly, who had taken an active part in superintending these fisheries and driving off the Americans. He was asked whether the maintenance of this marine police was not expensive. He said that it was expensive in the extreme, that it cost £100,000—I believe that was the sum named. He did not know the amount, but his language was quite strong as to the expensiveness of excluding the Americans from these grounds, of maintaining these cruisers. But it also brought about difficulties between Great Britain and her Provinces. The Provincial authorities, on the 12th of April, 1866, after this time (but they acted throughout with the same purpose and the same spirit) undertook to say that every bay should be a British private bay which was not more than ten miles in width; following no pretence of international law, but the special Treaty between Great Britain and France; and afterwards they gave out licenses for a nominal sum, as they said, for the purpose of obtaining a recognition of their right. They did not care, they said then, how much the Americans fished within the three miles, but they wished them to pay a "nominal sum for a license" as a recognition of the right. Well, the "nominal sum" was fifty cents a ton; but by-and-by the Colonial Parliament thought that nothing would be a "nominal sum" unless it was a dollar a ton, and at last they considered that the best possible "nominal sum" was two dollars a ton.

But Her Majesty's Government took a very different view of that subject, and wherever there has been an attempt to exclude American fishermen from the three mile line, there has been a burden of expense on Great Britain, a conflict between the Colonial Department at London and the Provincial authorities here, — Great Britain always taking the side of moderation, and the Provincial Parliaments the side of extreme claim and extreme persecution. Then there was a difficulty in settling the three mile line. What is three miles? It cannot be measured out, as upon the land. It is not staked out or buoyed out. It depends upon the eye-sight and judgment of interested men, acting under every possible disadvantage. A few of the earlier witnesses called by my learned friends for the crown undertook to say that there was no difficulty in ascertaining the three mile line, but

I happened to know better, and we called other witnesses, and at last nobody pretended that there was not great difficulty. Why, for a person upon a vessel at sea to determine the distance from shore, everything depends upon the height of the land he is looking at. If it is very high, it will seem very much nearer than if it is low and sandy. The state of the atmosphere affects it extremely. A mountain side on the shore may appear so near in the forenoon that you feel that you can almost touch it with your finger's ends, while in the afternoon it is remote and shadowy, too far altogether for an expedition with an ordinary day's walk to reach it. Now, every honest mariner knows that is so, and knows there is great difficulty in determining whether a vessel is or is not within three miles of the shore, when she is fishing. But there is, further, another difficulty. "Three miles from the shore," — what shore? When the shore is a straight or curved line, it is not difficult to measure it; but the moment you come to bays, gulfs, and harbors, then what is the shore? The headland question then arose, and the Provincial officials told us,—the Provinces by their acts, and the proper officers by their proclamations, and the officers of their cutters, steam or sail, told our fishermen upon their quarter decks, that "the shore" meant a line drawn from headland to headland, and they undertook to draw a line from the North Cape to the East Cape of Prince Edward Island and to say that "the shore" meant three miles from that line; and then they fenced off the Straits of Northumberland; they drew another line from St. George's to the Island of Cape Breton; they drew their headland lines wherever fancy or interest led them. And not only is it true that they drew them at pleasure, but they made a most extreme use of that. We did not suffer so much from the regular navy, but the Provincial officers, wearing for the first time in their lives shoulder straps and put in command of a vessel, "dressed in a little brief authority, played such fantastic tricks before high heaven" as might at any moment, but that it was averted by good fortune, have plunged the two countries into war. Why, that conflict between Patillo and Bigelow amused us at the time, but I think your Honors were struck with the fact that, as Patillo escaped, was pursued, and the shots fired by his pursuers passed through his sail and tore away part of his mast and entered the hull, if they had shed a drop of American blood, it might "the multitudinous seas incarnadine" in war. Why, people do not go to war solely for interest, but for honor, and every one felt relieved, drew a freer breath, when he learned that no such fatal result followed. None of us would like to take the risk of having an American vessel within the three miles or without the three miles, but supposed to be within it, or actually within it for an innocent purpose, attacked by a British cutter, or attacked because she was within certain headlands, and blood shed in the encounter. Now, Great Britain felt that, and felt it more than the Provinces did, because she had not the same deep interest to blind her to the importance of the subject.

The results of the seizures were very bad. In the case of the *White Fawn*, tried before the Judge at New Brunswick, he says, "This fact has not been accounted for, that so long a time has elapsed from the time of the seizure until the case was brought into court;" so that, although he discharged the ship as innocent, the crew were dispersed, the voyage was broken up, and no answer was made to that pertinent inquiry of his Honor. It was a very common thing to hold vessels seized until it became immaterial to the owners, almost, whether they were finally released or finally convicted. My learned friend Judge Foster laid before your Honors a Nova Scotia statute of 1836, (I confess I have not read it; I looked for it, but was not able to find it) in which he said there was a provision, that if, in case of capture, an American seaman, fisherman, or master, did not make true answers, he forfeited one hundred pounds; that the onus, the burden of proof, to show that the vessel was not subject to capture was upon the owner, not upon the captor; that before the owner could contest the question with the man who seized his vessel, he must file a bond of sixty pounds for costs; he could bring no suit against his captor until one month's notice, giving the captor an opportunity, as it is said, to obtain evidence, but, as a practical lawyer, I should add, giving him also an opportunity to escape and to conceal his property; finding treble costs in case the American was convicted; and also providing that the simple judicial signature, declaring that there was probable cause for the seizure, prevented any action or suit whatever.

Now, these were strong penal measures, unknown to anything but criminal law, and even stronger than the laws of war; because if in high war a vessel is seized and released, the owner of the vessel may sue the commander of the ship, though he bears the colors of Great Britain or of the United States; he may sue him in the courts of his own country without giving him any previous notice, without giving any previous bond, and no certificate of probable cause from the Court will prevent the trying of the suit. I know it is true that if the Court which tries the suit decides that there was probable cause, the captain of the cruiser is not to be condemned, but the owner has a right to arrest and try him before a competent Court. But all these rights were brushed away by the Legislature of Nova Scotia—always supposing that Judge Foster was right in his statement of the character of that law.

Nor is that all, by any means. There was a further difficulty. No one could know what would become of us when we got into court. There was a conflict of legal decisions. One vessel might go free, when under the same circumstances another vessel might be condemned. The treaty of 1818 did not allow us to go within three miles of certain shores, except for the purposes of shelter, and getting wood or supplies, and prohibited fishing within three miles. The Act of the 59th of George III, was the Act intended to execute that Treaty. That Act provided, that, "if any such foreign vessel is found fishing, or preparing to fish, or to have been fishing, in British waters, within three miles of the coast, such vessel, her tackle, etc., and cargo shall be forfeited." That was the language of the Statute of George III, and of the Dominion statutes. Is it not plain enough,—it seems to me, it has seemed so to all Americans, I think, — that that statute was aimed, as the Treaty was, against fishing within three miles? But in one Court the learned judge who presides over it,— a man of learing and ability, recognized in America and in the Provinces, therefore giving his decision the greater weight,—decided first that the buying of bait was a preparing to fish. We had supposed that the statute meant "for fishing within three miles, you will be condemned," and in order that it should not be required that a man should be caught in the very act of drawing up fish (which would be almost impossible), it was extended by saying "or caught having fished or preparing to fish"—such acts as heaving his vessel to, preparing his lines, throwing them out, and the like. The learned Court decided, first, that buying bait, and buying it on shore, was "preparing to fish," within the meaning of the Statute. If an American skipper went into a shop, leaned over the counter, and bargained with a man who had bait to sell on shore, he was "preparing to fish," and, as he certainly was within three miles of the shore, his preparation was made within three miles; and it was apparently utterly immaterial whether he intended to violate the provision of the Treaty by fishing within three miles of the shore, so long as he was preparing, within three miles, to fish anywhere in the deep sea, on the Banks of Newfoundland, or in American waters. Then came the decision of another learned Judge in New Brunswick, (they were both in 1871), who said that buying bait was not the "preparing to fish" at which the statute was aimed; and further, that it was essential to prove that the fishing intended was to be within three miles of the shore. There was a conflict of decisions, and we did not know where we stood.

Another effect of this restriction was, that it brought down upon the Dominion fishermen the statute of the United States, laying a duty of two dollars a barrel upon every barrel of mackerel, and one dollar a barrel upon every barrel of herring. That statute was,—and I shall presently have the honor to cite the evidence upon that point, that

I may not be supposed to rely upon assertion—that statute was, in substance, prohibitory. The result was, that it killed all the vessel fishing of these Provinces. They had no longer seamen who went to sea in ships. A shore fishery sprung up for the use of the people themselves, and was gradually somewhat extended;—I mean, a boat fishery around the shores. But, as I shall cite authorities to show, as I hope that your Honors already believe, the first effect was to draw away from these Provinces the enterprising and skilled fishermen, who had fished in their vessels and sent their catches to the American market. It drew them away to the American vessels, where they were able, as members of American crews, to take their fish into market free of duty.

There was, at the same time, a desire growing on both sides for reciprocity of trade, and it became apparent that there could be no peace between these countries until this attempt at exclusion by imaginary lines, always to be matters of dispute, was given up—until we came back to our ancient rights and position. It was more expensive to Great Britain than to us. It made more disturbance in the relations between Great Britain and her provinces than it did between Great Britain and ourselves; but it put every man's life in peril; it put the results of every man's labor in peril; and for what? For the imaginary right to exclude a deep-sea fisherman from dropping his hook or his net into the water for the free-swimming fish, that have no habitat, that are the property of nobody, but which are created to be caught by fishermen. So at last it was determined to provide a treaty by which all this matter should be set aside, and we should fall back upon our own early condition.

Now, your Honors will allow me a word, and I hope you will not think it out of place,—it is an interesting subject; I do not think it is quite out of place, and I will not be long upon it,—on the nature of this right which England claimed in 1818, to exclude us from the three miles, by virtue of some supposed principle of international law. I have stated my opinion upon it; but your Honors will be pleased to observe, that on that, as upon the subject of headlands, on an essential part of it, without which it can never be put in execution, there is no fixed international law. I have taken pains to study the subject; have examined it carefully since I came here, and I think I have examined most of the authorities. I do not find one who pledges himself to the three mile line. It is always "three miles," *or* "the cannon shot." Now, "the cannon shot" is the more scientific, though not the more practical, mode of determining the question, because it was the length of the arm of the nation bordering upon the sea, and she could exercise her rights so far as the length of her arm could be extended. That was the cannon shot, and that, at that time, was about three miles. It is now many more miles. We soon began to find out that it would not do to rest it upon the cannon shot. It is best to have something certain. But international writers have arrived at no further stage than this: to say that it is "three miles *or* the cannon shot." When they are called upon to determine what are the rights of bordering nations, they say: "to the extent of three miles, or the cannon shot." But upon the question, "How is the three mile line to be determined," we find everything utterly afloat and undecided. My purpose in making these remarks is, in part, to show your Honors what a precarious position a State holds which undertakes to set up this right of exclusion, and to put it in execution. The international law makes no attempt to define what is "coast." We know well enough what a straight coast is and what a curved coast is, but the moment they come to bays, harbors, gulfs and seas, they are utterly afloat,—as much as the sea-weed that is swimming up and down their channels. They make no attempt to define it, either by distance or by political or natural geography. They say at once: "It is difficult, where there are seas and bays." Names will not help us. The Bay of Bengal is not national property; it is not the King's chamber; nor is the Bay of Biscay, nor the Gulf of St. Lawrence, nor the Gulf of Mexico. Names will not help us. An inlet of the sea may be called a "bay," and it may be two miles wide at its entrance; or it may be called a "bay," and it may take a month's passage in an old-fashioned sailing vessel to sail from one headland to the other. What is to be done about it? If there is to be a three mile line from the coast, the natural result is, that that three mile line should follow the bays. The result then would be that a bay more than six miles wide, was an international bay; one six miles wide, or less, was a territorial bay. That is the natural result. Well, nations do not seem to have been contented with this. France has made a Treaty with England saying that anything less than ten miles wide shall be a territorial bay.

The difficulties on that subject are inherent, and, to my mind, they are insuperable. England claimed to exclude us from fishing in the Bay of Fundy, and it was left to referees, of whom Mr. Joshua Bates was umpire, and they decided that the Bay of Fundy was not a territorial bay of Great Britain, but a part of the high seas. This decision was put partly upon its width, but the real ground was, that one of the assumed headlands belonged to the United States, and it was necessary to pass the headland in order to get to one of the towns of the United States. For these special reasons, the Bay of Fundy, whatever its width, was held to be a public and international bay.

Then look at Bristol Channel. That question came up in the case of *Queen* v. *Cunningham*. A crime was committed by Cunningham in the Bristol Channel, more than three miles from the shore of Glamorganshire on the north side, and more than three miles from Devonshire and Somersetshire on the south side. Cunningham was indicted for a crime committed in Glamorganshire. The place where the vessel lay was high up in the Channel, somewhere about 90 miles from its mouth, and yet not as far up as the river Severn. The question was, whether that was a part of the realm of Great Britain, so that a man could be indicted for a crime committed there. Now, there is a great deal of wisdom in the decision made in that case. The Court say, substantially, that each case is a case *sui generis*. It depends upon its own circumstances. Englishmen and Welshmen had always inhabited both banks of the Bristol Channel. Though more than ten miles in width at its entrance, it still flowed up into the heart of Great Britain; houses, farms, towns, factories, churches, courthouses, jails, everything on its banks; and it seemed a preposterous idea, and I admit it, that, in time of war, two foreign ships could sail up that Bristol Channel and fight out their battle to their own content, on the ground that they did not go within three miles of the shore. I think it would have been preposterous to say that a foreign vessel could have sailed up the centre of that Channel, and defied the fleets and armies of Great Britain, and all her custom-house cutters, on the ground that she was flying the American or the French flag, and the deck was a part of the soil under that flag. Well, it was a question of political geography,—not of natural geography. It was a question of its own circumstances. It was decided to be a part of the realm of Great Britain. I do not know that anybody can object to the decision.

The *Franconia* case, which attracted so much attention a short time ago, did not raise this question, but it is of some importance for us to remember. There, there was no question of headlands. It was a straight line of coast, and the vessel was within three miles of the shore. But what was the ship doing? She was beating her way down the English Channel against the sea and wind, and she made her stretches toward the English shore, coming as near as safety permitted, and then to the French shore. She was in innocent use of both shores. She was not a trespasser because she tacked within three miles of the British shore. It was a necessity, so long as that Channel was open to commerce. The question which arose was this. A crime having been committed on board of that ship while she was within three miles of the British coast, was it committed within the body of the county? Was it committed within the realm, so that an English sheriff could arrest the man, an English grand jury indict him, an English jury convict him, under English law, he being a foreigner on board a foreign vessel, bound from one foreign port to another, while perhaps the law of his own country, was entirely different? Well, it was extraordinary to see how the common-law lawyers were put their wits' end to make anything out of that statement. The thorough-bred common-law lawyers were the men who did not understand it; it was others, who sat upon the Bench, who understood it better,

and at last, by a majority of one, it was most happily decided that the man had not committed an offence within a British county, and he was released. That case termed not on a question of natural geography, nor on a question of political geography. It raised the issue: What is the nature of the authority that a neighboring nation can exercise within the three mile limit?

I am naturally led to the question: "Does fishing go with the three mile line?" I have the honor to say to this tribunal that there is no decision to that effect, though I admit that there is a great deal of loose language in that direction. I do not raise any question respecting those fish that adhere to the soil, or to the ground under the sea. But on what does that three mile jurisdiction rest, and what is the nature of it? I suppose we can go no further than this,—that it rests upon the necessities of the bordering nation,—the necessity of preserving its own peace and safety, and of executing its own laws. I do not think that there is any other test. Then the question may arise, and does, whether, in the absence of any attempt by Statute or Treaty to prohibit a foreign vessel from following with the line or the seine, and net, the free swimming fish within that belt, that act makes a man a trespasser by any established law of nations? I am confident it does not. That, may it please the tribunal, is the nature of this three mile exclusion, for the relinquishment of which Great Britain asks us to make pecuniary compensation. It is one of some importance to her, a cause of constant trouble, and, as I shall show you—as has been shown you already by my predecessors—of very little pecuniary value to England, in sharing it with us, or to us in obtaining it, but a very dangerous instrument for two nations to play with.

I would say one word here about the decision in the Privy Council in 1877 respecting the territorial rights in Conception Bay. I have read it over, and though I have very great respect for the common law lawyer, Mr. Blackburn, who was called upon to pronounce upon a question entirely novel to him, I believe that if your honors think it at all worth while to look over this opinion, in which he undertakes to say that Conception Bay is an interior bay of Newfoundland, and not public waters, although it is some fifteen or more miles wide, you will find that he makes this statement, which is conclusive, that an Act of Parliament is binding upon him, whether the Act of Parliament be in conformity with international law or not. But it is not binding upon you, nor is the decision. But there is nothing in the Act of Parliament which speaks upon that subject. It is the Act 59, George III., intended to carry out the Treaty of 1818, and for punishing persons who are fishing within the bays; and he infers from that, by one single jump, without any authority whatever, of judicial decision or legislative language, that it must have meant to include such bays as the bay in question. (*Direct U. S. Cable Co.* vs. *Anglo-American Telegraph Co.*, English Law Reports, Appeal Cases. Part 2, p. 394.)

This state of things brought us to the Treaty of 1854, commonly called the Reciprocity Treaty. The great feature of that Treaty, the only one we care about now, is, that it put us back into our original condition. It acknowledged our general right. It made no attempt to exclude us from fishing anywhere within the Gulf of St. Lawrence, and it allowed no geographical limits. And from 1854 to 1866 we continued to enjoy and to use the free fishery, as we had enjoyed and used it from 1620 down to that hour.

But the Treaty of 1854 was terminated, as its provisions permitted, by notice from the United States. And why? Great Britain had obtained from us a general free trade. Large parts of the United States thought that free trade pressed hardly upon them. I have no doubt it was a selfish consideration. I think almost every witness who appeared upon the stand at last had the truthfulness to admit, that when he sustained either duties or exclusion, it was upon the selfish motive of pecuniary benefits to himself, his section, his State, or his country; and if that were the greatest offence that nations or individual politicians committed, I think we might well feel ourselves safe. We had received, in return for this advantage, a concession from Great Britain of our general right to fish, as we always had fished, without geographical exclusion. My learned friend, Judge Foster, read to you (which I had not seen before, and which was very striking), the confidential report of Consul Sherman, of Prince Edward Island, in 1864. I dare say my learned friend, the counsel from that Island, knows him. Now, that is a report of great value, because it was written while the Treaty was in existence, and before notice had been given by our government of the intention to repeal it. It was his confidential advice to his own country as to whether our interests, as he had observed them, were promoted by it; and he said, if the Reciprocity Treaty was considered as a boon to the United States, by securing to us the right to inshore fishing, it had conspicuously failed, and our hopes had not been realized. I think these are his very words. He spoke with the greatest strength to his country, writing from Prince Edward Island, which claims to furnish the most important inshore fishery of any, and declared that so far as the United States was concerned, the benefit that came from that was illusory, and it was not worth while for us any longer to pay anything for it. And that, as your Honors have seen, and as I shall have the pleasure to present still further by-and-by, was borne out by the general state of feeling in America. The result was, that in 1866, the Reciprocity Treaty was repealed. That repeal revived, as my countrymen admitted, the Treaty of 1818, and it revived, of course, the duties on the British importation of mackerel and herring. We were remitted to the antiquated and most undesirable position of exclusion; but we remained in that position only five years, from 1866 until 1871, until a new Treaty could be made, and a little while longer, until it could be put into operation. What was the result of returning to the old system of exclusion? Why, at once the cutters and the ships of war, that were watching these coasts, spread their sails; they stole out of the harbors where they had been hidden; they banked their fires; they lay in wait for the American vessels, and they pursued them from headland to headland, and from bay to bay; sometimes a British officer on the quarter-deck,—and then we were comparatively safe,—but sometimes a new-fledged Provincial, a temporary officer, and then we were anything but safe. And they seized us and took us, not into court, but they took us into harbor, and they stripped us, and the crew left the vessel, and the cargo was landed; and at their will and pleasure the case at last might come into court. Then, if we were dismissed, we had no costs, if there was probable cause; we could not sue if we had not given a month's notice, and we were helpless. Not only did it revive the expensive and annoying and irritating and dangerous system of revenue cutters, and secret police, marine police, up and down the coast, telegraphing and writing to one another, and burdening the Provinces with the expense of their most respectable and necessary maintenance; but it revived, also, the collisions between the Provinces and the Crown; and when the Provincial Governments undertook to lay down a ten mile line, and say to the cutters, "Seize any American vessel found within three miles of a line drawn from headland to headland, ten miles apart," such alarm did it cause in Great Britain, that the Secretary of State did not write, but telegraphed instantly to the Provinces that no such thing could be permitted, and that they could carry it no farther than the three mile line. Then attempts were made to sell licenses. Great Britain said: "Do not annoy these Americans; we are doing a very disagreeable thing; we are trying to exclude them from an uncertain three mile line; we would rather give up all the fish in the ocean than have anything to do with it; but you insist upon it; we have done nothing with that fishery from the beginning," which, according to the view we took of it on our side of the line was pretty true; and they said, "do not annoy these Americans; give them a license,—just for a *nominal* fee." So they charged a nominal fee, as I have said, of fifty cents, a ton, which was afterwards raised,—they know why, we do not,—to a dollar. We paid the fifty cent fee, and some Americans paid the dollar fee,—and why? They have told you why. Not because they thought the right to fish within three miles was worth that sum, but it was worth that sum to escape the dangers and annoyances which beset them, whether they were innocent or guilty, under the law. Then,

at last, the Provinces, as if determined that there should be no peace on that subject, until we were driven out of the fisheries, raised it to an impossible sum,—two dollars a ton, and we would not pay it. What led them to raise it? What motive could there have been? They lost by it. Our vessels did not pay it. Why, this was the result—I do not say it was the motive—that it left our fishermen unprotected, and brought out their cutters and cruisers, and that whole tribe of harpies that line the coast, like so many wreckmen, ready to seize upon any vessel and take it into port and divide the plunder. It left us a prey to them and unprotected. It also revived the duties, for we, of course, restored the duty of two dollars a barrel on the mackerel, and one dollar a barrel on the herring. It caused their best fishermen to return into the employment of the United States, and their boat-fishing fell off. That has been stated to your Honors before, but it cannot be too constantly born in mind. We restored the duties, and that broke up the vessel-fishing of the Provinces; it deprived them of their best men; it caused trouble between the old country and the Provinces; it put us all on the trembling edge of possible international conflict. But we went on as well as we could in that state of things, until Great Britain, desirous of relieving herself from that burden, and the United States desiring to be released from those perils, and having also another great question unsettled, that is, the consequences of the captures by the *Alabama*, the two countries met together with High Commissioners, at Washington, in 1871, and then made a great treaty of peace. I call it a "treaty of peace," because it was a treaty which precluded war, not restored peace after war, but prevented war, upon terms most honorable to both parties; and as one portion of that Treaty,—one that, though not the most important by any means, nor filling so large a place in the public eye, as did the Congress at Geneva, yet filling a very important place in history, and its consequences to the people of both countries, was the determination of this vexed and perpetual question of the rights of fishing in the bays of the northwestern Atlantic; and by that Treaty, we went back again to the old condition in which we had been from 1620 down, with the exception of the period between 1818 and 1854, and the period between 1866 and 1871. That restored both sides to the only condition in which there can be peace and security; peace of mind, at least, freedom from apprehension, between the two governments. And when those terms were made, which were terms of peace, of good-will to men, of security for the future, and of permanent basis always, and we agreed to free trade mutually in fish and fish-oil, and free rights of fishing, as theretofore almost always held, Great Britain said, "Very well; but there should be paid to us a money compensation." The United States asked none; perhaps it did not think itself entitled to any. Great Britain said, "This is all very well; but there should be a compensation in money, because we are informed by the Provinces"—I do not believe that Great Britain cared anything about it herself—"that it is of more pecuniary value to the Americans to have their right of fishing extended over that region from which they have been excluded, than it is to us to have secured to us free right to sell all over the United States the catchings of Her Majesty's subjects, free from any duty that the Americans might possibly put upon us." "Very well," said the United States, "if that is your view of it, if you really think you ought to have a money compensation, we will agree to submit it to a tribunal." And to this tribunal it is submitted:—First, under Article XVIII of the Treaty of 1871, what is the money value of what the United States obtains under that article? Next, what is the money value of what Great Britain obtains under Articles XXI and XIX? Second,—Is what the United States obtains under Article XVIII of more pecuniary value than what Great Britain obtains under her two articles? Because I put out of sight our right to send to this market, and the right of the people of the Provinces to fish off our coasts, as I do not think either of them to be of much consequence. "If you shall be of opinion," says the Treaty, "that there is no difference of value,—and of course that means no *substantial* difference in value,—then your deliberations are at an end; but if you shall think there is a substantial difference in value, then your deliberations must go further, to show what the two values are, which is the greater, and what is the difference."

I hope, if your Honors are not already persuaded, that you will be before the close of the argument on the part of the United States, and may not be driven from that persuasion by anything that may occur on the other side, that the United States were quite honest when they made the statement, in 1871, that in asking for the abandonment of the restrictive system in regard to the fisheries, they did not do it so much from the commercial or intrinsic value of the fishing within the three-mile line, as for the purpose of removing a cause of irritation; and I hope that the members of this tribunal have already felt that Great Britain, in maintaining that exclusive system, was doing injustice to herself, causing herself expense, loss and peril; that she was causing irritation and danger to the United States; that it was maintained from a mistaken notion, though a natural one, among the Provinces themselves, and to please the people of the Dominion and of Newfoundland, and that the great value of the removal of the restriction is, that it restores peace, amity, good will; that it extends the fishing, so that no further question shall arise in courts or out of courts, on quarter-decks or elsewhere, whatever may be the pecuniary value of the mere right of fishing by itself; and that it would be far better if the Treaty of Washington had ended with the signing of the stipulations, except so far as the Geneva award was concerned, and that this question had not been made a matter of pecuniary arbitration; that either a sum of money had been accepted at the time for a perpetual right, as was offered, or that some arrangement by which there should be the mutual right of free trade in timber, in coal and in fish, or something permanent in its character, should have been arranged between the two countries. But that is a bygone; we are to meet the question as it comes now directly before us I think my learned friend, Judge Foster, said all that need be said and all that can be said of much value, in taking the position that we are not here to be cast in damages; we are to pay no damages, nor are we to pay for incidental commercial privileges, nor are they to pay for any; but it is a matter of remark, certainly, that when this cause came up, we were met by a most extraordinary array of claims on the opposite side,—sounding in damages altogether, or sounding in purchase of commercial privileges which were not given to us by Article XVIII of the Treaty. Why, if there was a British subject in Prince Edward Island who remembered that his wife and family had been frightened by some noisy, possibly drunken, American fisherman, he was brought here and testified to it, and he thought that he was to obtain damages. Undoubtedly that was his opinion. If a fisherman in his boat thought that a Yankee schooner "lee-bowed" him, as they call it, he was brought here to testify to it, and that was to be a cause of damage and to be paid for, and ultimately, I suppose, to reach the pockets of those who in their boats had been "lee-bowed," for that would seem to be poetic justice. Then we had the advantage of being able to buy our bait here, which we had always done, about which no Treaty had ever said a word, and they had the great advantage, too, of selling us their bait. They went out fishing for themselves, they brought in the bait, they sold it to us, and when our vessels came down after bait or for frozen herring, they boarded the vessels in their eagerness to be able to sell them; and so great was their need of doing something in that season of the year when those mighty merchants of Newfoundland and those mighty middle-men of Newfoundland, planters, had nothing for them to do, that they made a bargain to furnish us frozen herring and our fishing bait at so much a barrel, went out and got it for us, and brought it on board.

Those were privileges for which the Americans were also to pay something. I have no doubt that those ideas gained great currency among the people of these Provinces. They supposed it to be so, and hence a great deal of the interest which they took in the subject; hence the millions that were talked about. It is impossible to tell what limitation could have been put by this tribunal upon the demand, if you had opened that subject, and made up an award

on the right to buy bait, on the right to buy frozen herring, on the right to buy supplies, on the right to trade, not considering that these are mutual rights, for the benefit of both parties, and as to which it is almost impossible to determine which party gains the most. Then a great deal of anxiety was created through the Provinces, undoubtedly, by the cry that we were ruining their fisheries by the kind of seines that we were using—purse-seines; we were destroying the fish, and the ocean would be uninhabitable by fish, would be a desert of water. We were told that we were poisoning their fish by throwing gurry overboard, and for all that there were to be damages. Now, these inflammatory harangues, made by politicians, or published in the Dominion newspapers, or circulated by those persons who went about through the Dominion obtaining affidavits of witnesses, produced their effect, and the effect was a multitude of witnesses who swore to those things, who evidently came here to swear to them, and took more interest in them, and were better informed upon them, than upon any of the important questions which were to be determined. When we came to evidence to be relied upon, the evidence of men who keep books, whose interest it was to keep books, and who kept the best possible books, men who had statistics to make up upon authority and responsibility, men whose capital and interest and everything were invested in the trade, then we brought forward witnesses to whom all persons looking for light upon this question would be likely to resort. And I have no doubt that as fast as it became known through the line of these Provinces that no damages would be given for "lee-bowing," for poisoning fish, for purse nets, (which it appears we could not use), nor for the right to buy bait, and that it was to come down to the simple question of, on the one hand, participating with them in the fisheries of this region to the full extent, instead of to a limited extent; and they be relieved from all duties on their fish and fish oil on the other, with the consequent stimulation of their boat-fishing, and vessel-building and fishing, they all began to look at it in a totally different aspect. I am not able to produce it at this moment, but I will produce before the argument closes a memorial addressed to the Province of Nova Scotia, requesting them to bring things back to the old condition, that the fishing shall be left in common,—without any idea that free trade was to be set off against it.

Such was the state of things, and the condition of feeling in the Provinces. I need not press upon your Honors that we are right in that position, for, as to all, except the question of damages, your Honors have already, by an unanimous vote, passed in our favor, and of course it requires no argument to show that, as we are to make compensation for the value of what we obtain under the Article XVIII of the Treaty of 1871 in addition to what we had under the Treaty of 1818, provided the British side of the account does not balance it, that is all that we have to consider; and I dismiss all these elements which have undoubtedly been the prevailing means of securing witnesses, and of stimulating witnesses throughout these Provinces, up to the present time.

After the sound sense and humor of my learned friend, Mr. Trescot, on the subject of the light-houses, I suppose I should be inexcusable if I touched upon them again. I see that the counsel on the other side already feel the humor of the thing, and I suppose they rather regret that the subject was ever opened, because it shows to what straits they were driven to make up a case against the United States, to balance the overpowering advantage to them derived from the freedom of trade. Why, they come together, the wise men, and they say among themselves, "Free trade is a boon to us in our mackerel and in our herring; it is stimulating our fisheries; it is recalling our sons from afar, and employing them at home in our own industries; it is building up boat fishing; it is extending the size of our boats, and building up vessel fishing; the profits on our trade are now all that we have a right to make, with no discount whatever;—how can we meet that case of advantage? What can we say they ought to pay us, that shall be anything like a set-off for what we ourselves have received? The right to fish within three-miles? Why, the Americans had the whole Gulf of St. Lawrence, and all its bays; they had all its banks and all its eddies; they had Labrador and the Magdalen Islands; they had the north, west, and south parts of Newfoundland; they had everything except the three-mile line of the Island, as it is called, and the western shore of Nova Scotia. And what did they get? Not the value of the fish; not what the fish sold for in the American market; not the profit which the American dealer made on his fish;—that is the result of his capital, industry and labor. What did the American get? The value of the fish as it lies writhing on the deck? No; for that is the result of the capital that sends the ship and fits it out, of the industry and the skill of the fishermen. What did they get? They got only the liberty of trying to catch the fish, which were eluding them with all their skill in the water of the ocean,—the right to follow them occasionally, if they desire to do so, in their big vessels, within the limits of three miles. But it will not do to go to such a tribunal as this with such a case as that. The free-swimming fish in the seas, going we do not know how far off, and showing themselves here to-day and there to-morrow, schooling up on the face of the sea, and then going out of sight in the mud, having no habitat, and being nobody's property,—the right to try to catch them nearer the shore than heretofore, that is not capable of being assessed so as to be of much pecuniary value; we must have something else." So they started the theory of adding to this, compensation that ought to be made for right to buy the bait; for a right to refit; for a right to get supplies; for a right to trade; to unload cargoes of fish at Canso and send them to the United States, and for all the damage that fishermen might do anywhere by their mode of fishing; for the injury done by throwing overboard the gurry, and for collisions between boats and vessels that might occur in the waters of the Island bend; and, adding those all together, they might make a claim that what they lost in damages, and what they gave to us in facilities of trade, added to Article XVIII might make up something to set off against what they knew they were receiving in dollars and cents from us by the remission of duties. They felt that we had on our side a certainty; they had on their side altogether an uncertainty, and a mere speculation; that we remitted from our treasury and put back into their pockets exactly two dollars a barrel on every barrel of mackerel sent into port, and one dollar on every barrel of herring, that was to be computed and estimated, so that the British fisherman, when he landed his fish on the wharf in Boston, landed it on the same terms that the American landed his, while heretofore he landed it handicapped, by two dollars a barrel, which he must first pay. Our charge is substantial; ours can be put into the columns of an account; ours is certain. Theirs is speculative and uncertain, and unless it was backed up with some certainties of damages and of trade, they felt that it fell beneath them.

It will be my duty hereafter to press upon your Honors a little further the consideration of the utterly uncertain estimate that can be put upon the mere franchise or liberty of attempting to catch the free-swimming fish within certain limits of the ocean. Now, first, with your Honor's leave, I will take up the consideration of the money value of the removal of this geographical restriction, for that is what it is. The ancient freedom is restored; the recent and occasional restrictions as to three miles is removed, and the colonists say that that has been of pecuniary value to us. Whether it is a loss to them or not, is utterly immaterial, in this consideration. They cannot ask you to give them damages for any loss to them. It is only the value to us. It is like a person buying an article in a shop, and an arbitrator appointed to determine what is the value of that article to the purchaser. It is quite immaterial how great a mistake the man may have made in selling it to him, or what damage the want of it may have brought upon his family or himself. If I have bought an umbrella across the counter, and I leave it to an arbitrator to determine the value of the umbrella to me, it is totally immaterial whether the man has sold the only one he had, and his family have suffered for the want of it. That is a homely illustration, but it is a perfectly true one. The question is, what is the value to the citizens of the United States, in money, of the removal of this geographic restriction? Not what damage this may have been to the colonists, by reason of the Treaty which Her Majesty's Government saw fit to make with us.

What, then, is the money value of the removal of the restriction? On the subject of Newfoundland,—which I desire to treat with great respect, because of the size of the Island and its numerous bays, and because of my respect and affection for the gentleman who represents the semi-sovereignty before this tribunal,—there is an article in the *Revue des Deux Mondes* of November, 1874, on the value of Newfoundland and its fisheries to France, of extreme interest, from which I would like to quote largely. It seems to me to be exhaustive. It gives the whole history and present condition of these fisheries, and among other things, it shows that in attempting to grant us a right there, Great Britain made us overlap very much the rights of the French; and that if we should undertake to carry into effect some of the rights given us by the Treaty of 1871, we might have the Republic, or Monarchy, or Empire, or whatever it may be, on the other side of the water, to settle the question with, as well as this tribunal. I suppose this tribunal is satisfied that we do not catch cod within three miles of Newfoundland; that we do not catch even our bait there, but that we buy it. Finding that we had proved a complete case, that we bought our bait there, the very keen argument was made by the counsel on the other side, that though we bought our bait, we must be held to have caught it. "*Qui facit per alium, facit per se*," says the counsel; and so, if you buy a thing of a man and he sends a boy out to get it, the boy is your messenger, not his; and you have not bought it of him, but of the person to whom he sends for it! This is a homely illustration, but it is perfectly plain. When a fisherman comes and says, "I will sell my fish at so much a pound," and has not got them, but goes off and catches them, and I pay him that price, I buy the fish of him, do I not? What is it but a mere illusion, a mere deception, a mere fallacy to say, that because I knew that he had not the fish on hand at the time and is going off to get it, though I agree to buy it of him at a fixed rate, and I am not going to pay him for his services, but for the fish when delivered,—that I am fishing through him and not buying of him? It is very hard to argue a perfectly clear case, one that has but one side to it. Nothing but stress of law, or stress of facts, or stress of politics, could possibly have caused so much intelligence to be perverted upon this subject into an attempt to show that we were the catchers of the Newfoundland bait.

I will now take up for a moment the question of the cod fisheries, and I know that, whatever I may have been thus far, I shall be somewhat tedious here in the course which I am about to pursue; but I do not wish it to be said on the other side, and my instructions are not to leave it to be said, that we have asserted and stopped at assertions, however certain we may be that our assertions are well-founded, and even that they have the approbation of the Court. I shall endeavour to refer to the evidence, without reading much of it, on the principal points which I have so far assumed, and would be quite authorised in assuming.

In the first place, as to the cod fishery, it is a deep-sea fishery, not a fishery within three miles. I do not mean to say that a stray cod may not be caught occasionally within that limit; but as a business, it is a deep-sea business. With your Honors' permission I will read some of the evidence on that point.

Nathaniel E. Atwood, of Provincetown, page 47 of the American evidence, says:—

"Q. Is the codfishery, as pursued by the Americans, exclusively a deep sea fishery? A. Well, we call it a deep sea fishery; this is the case—the Labrador coast excepted, where it is prosecuted close inshore—in the Gulf of St. Lawrence, on the Grand Banks and on all the Banks between that place and Cape Cod, and away out to sea in other parts. It is true that some codfish come inshore but they do not do so to such an extent as to enable the catching of them to be made a business of."

Wilford J. Fisher, of Eastport, page 316, says:—

"Q How about the pollock? A. The pollock is caught more offshore than in.
"Q. Then the codfish? A. The codfish is caught almost exclusively offshore, except, as I tell you, in the early spring or late in the fall there is a school of small codfish that strikes within the limits, and the people there catch them more or less."

Prof. Baird, on page 455, of the American evidence, says:—

"Q. Take them as a whole then, they are a deep-sea fish. I don't mean the deep sea as distinguished from the Banks? A. An outside fish? Well, they are to a very considerable extent. The largest catches are taken offshore, and what are taken inshore are in specially favored localities, perhaps on the coast of Labrador, and possibly off Newfoundland. They bear a small proportion generally to what is taken outside, where the conveniences of attack and approach are greater."

Bangs A. Lewis, of Provincetown, page 96, American evidence, says, on cross-examination, in answer to Mr. Davies:—

"Q. And cod fish, we all know, are taken chiefly outside of the limits; it is a deep sea fishery as a rule? A. Yes."

E. W. French, of Eastport, p. 403, is asked:—

"Q. What is the fishery at *Grand Manan* and the *Bay of Fundy* generally? A. Codfish, pollock, hake, haddock and herring.
"Q. Are any of those fisheries entirely offshore fisheries? A. Codfish is an offshore fishery. Hake are taken offshore."

Capt. Robert H. Hulbert, of Gloucester, p. 296, testifies:—

"Q. And your codfish have not been taken within, how far from land? A. From 15 to 25 miles of Seal Island, and in that vicinity."

John Nicholson, Louisburg, C. B., p. 207 of the British evidence, says:—

"Q. Well, cod are often caught inshore, but would you not say cod was a deep-sea fishery? A. Yes.
"Q. And halibut is the same? A. Yes.

These are only passages selected from a large mass of testimony, but they were selected because the persons who testified in that way were either called by the British side, or they were persons of so much experience that they are fair specimens of our view of the subject.

Now, cod fishery is the great trade and staple of the United States, and is growing more and more so. The small fish that were once thrown overboard are now kept. The oil is used a great deal, cod-fish oil, and there are manufacturing establishments in Maine, Connecticut and Massachusetts, which we have been told by the witnesses work up a great deal of this material that used to be thrown overboard; they draw oil from it, and the rest is used for fertilizing the land, and that is a gradually increasing business. One of the witnesses, I recollect, from Gloucester, told us how greatly the trade in codfish had improved, so that now, instead of sending it out as whole fish, it is cut in strips, rolled together, and put into cans, and sold in small or large quantities to suit purchasers, and in that very easy manner, sent all over the United States.

Charles N. Pew, of the firm of John Pew & Sons, on page 496 of the American Evidence, testified that the total value of fish production in seven years from 1870 to 1876 inclusive, was:

Bay Mackerel	.....	$77,995.22
Shore	do.....	271,333.54
Codfish	&c.....	702,873.10
		$1,052,201.86

"These figures give what our vessels caught. They do not give what we purchased outside of what the vessels caught."

The codfishery is also one as to which there is no fear of diminution,—certainly none of its extermination. Prof Baird told us, on p. 456 of the American Evidence, that a single cod produces from three to seven million eggs, each one capable of forming another living animal in the place of its mother. He said that owing to the winds and storms to which they were exposed, and to their being devoured by other fish which sought for them, the best information was that about a hundred thousand of these eggs prosper so as to turn into living fish, capable of taking care of themselves, the undefended and unrestricted navigators of the ocean. Although that is not a large percentage of the amount of ova, yet an annual increase of a hundred thousand for every one, shows that there is no danger of the diminution, certainly none of the extermination, of that class of fish. It is enormous in quantity, something which the whole world combining to exterminate, could hardly make any impression upon; and when the argument is made here that we ought to pay more for the right to fish because we are in danger of exterminating what codfish we have,—if that argument is made,—it amounts to nothing. But if the further argument is made, that we have no codfishery to depend upon, then we have the statistics and we have information from witnesses from all parts, that the codfishery shows no signs of diminution, and that it is as large and extensive and as prosperous as ever. Gloucester has gone more into the business than it ever has before, and I do not recollect that there is any evidence, of the least value, showing that that fishery is likely to fall off materially as a commercial product in our hands. There is a single British concurrence out of several others, I think, in this statement, which I will read:—

George Romeril, Agent of Robin & Co., one of the British witnesses, page 306, says:

"Q. Is there much difference in the results of the cod-fishery year after year? A. No; just as much fish are now caught as ever was the case.

"Q. In making this statement, you refer to an experience of 21 years? A. Yes.

"Q. What is your evidence on this point A. That the cod-fishery is not precarious.

"Q. You have always an average catch? A. It is always about the same.

"Q. This fishery can always be depended upon? A. Yes.

"Q. Do those who engage in this fishery as a rule make a living? A. A thriving fisherman will always make a good living about our coast.

"Q. But what will a fair average man do? A. He can always make a good living."

I read that, because it is the testimony of an intelligent British witness, who represents one of those great Jersey firms that deal in cod-fish on the west coast of the Gulf.

The bait of the codfish need not be caught within the three mile line. That, I think, we have pretty well established. I referred just now to their argument, that we caught whatever we bought, but that I certainly may pass by. We may buy it when we wish it, but we need not have it. Your Honors recollect the testimony of our witnesses from Provincetown, as well as those from Gloucester, who said that they believed it was more for the interest of all concerned, that the codfishery should be carried on with bait kept in ice as long as it can be, and salted bait—with fish, and bait, and liver, and everything else that can be carried out and kept there, and what birds and fish can be caught on the Banks, and the vessels stick to their business. The testimony was uniform; there was not one who failed to join in the expression of opinion, that that course was far better for the mercantile purposes of our community, than that our fishermen should run inshore and buy the bait. But if they did go inshore, and buy the bait, it would be a question entirely beyond your Honors' consideration. We have a right to buy it where we please, even here, and we certainly need not catch it. Among the curious grounds set forth to swell up the English claim against us, to make it meet, if possible, the obvious money claim we had against Great Britain, if it was seen fit to enforce it,—we now put it in only as a set-off,—appears in the testimony that our fishing vessels, going into Newfoundland, employed the men there to fish, and that it had a very deleterious moral effect upon the habits of the Newfoundland fishermen; that they had been, up to the time the Americans appeared there to buy their bait, an industrious people, in a certain sense; they had fished a certain part of the year under contracts, which it seems they could not get rid of, with a class of owners who held them in a kind of blissful bondage; but that when the Americans appeared, they led them to break these contracts, sometimes tempted them to fall off from their agreements, and put money into their pockets; they paid them for work; they gave them labor at a time when they ought to have been lying idle, when it was better for them to lie idle! Oh, it steadied them, improved their, raised their moral tone, to be idle, and tended to preserve those desirable relations that existed between them and the merchants of St. John! A great deal was said about that; but at last there came upon the stand a witness, whose name, if I recollect, was Macdonnell, (p. 313 of the British testimony), a British witness. I did not know that he would not be fully as well filled with these feudal opinions as the others had been. He said the people at Fortune Bay were well off. I asked him:—

"Q. You say the people down at Fortune Bay are well off? A There are some poor people there, but, as a general thing, the people are all comfortable.

"Q. You say they have piles of money stored in their houses? A. Some of them have. I know men who went from LaHave down there, who were so well off they retired from the fishing business. The largest part of the money they made was in supplying bait to those French vessels which come from France to fish.

"Q. Where did you find them? A At St. Peter's. The men of Fortune Bay seine herring, capelin and squid and run them across to St. Peter's and sell them to the French vessels which are lying waiting for them.

"Q. That is their market? A. Yes.

"Q. They also sell to the Americans? A. Yes; they go in and obtain a great deal of bait in Newfoundland, not so much at Fortune Bay as at St. John's.

"Q The men with piles of money, where do they live? A. They may have plenty of money and yet live in a hovel. They are not sensible enough to enjoy the money after they have made it.

"Q. We have been told, on the contrary, that they spend all their money as fast as they get it on rum and tobacco; did you find that to be true? A. I doubt that. For the last two or three years in Newfoundland, I found very few men who drank rum, but when I first went there I found many rum drinkers. I think they must have had a Reform Club there.

"Q. You think they have improved? A. Yes. They are comfortable in their homes.

"Q. They are saving people? A. Yes.

"Q. I mean those people who catch bait, who are paid in cash on the spot; have they any market for that except the French and Americans? A. I think not.

Nothing has been attempted since to contradict that statement. It is in accord with the nature of things. There is always danger in putting money in any man's hands, and there is also danger in poverty. The wise man saw that

poverty had its perils as well as wealth; and nothing can be worse for a people in the long run than the condition to which the fisherman of Newfoundland had been reduced. And now, believing fully in this testimony of Mr. Macdonnell, I cannot doubt that our coming among them and buying their bait, stimulating them to work, and paying them money, has led to their hoarding money; has led to the abstinence from those habits which beset much more the half employed and the idle man, who has a large season of the year with nothing to do, but has a reasonable expectation, that, what with his labor and what with his credit, somebody or other who owns a ship will support him and his family.

I would like, also, to call your attention, on this question of getting bait, which is of some importance, to the testimony of Prof. Baird, which, I suppose, none of you have forgotten, which shows that we need not catch our bait for the cod in British waters. He is asked, on page 457 of the American evidence:—

"Q. Well, now, what are the methods of preservation of this bait? We have heard of their using salt clams, etc. Has much attention been paid to the possibility of greater preservation of the bait than we have ever yet had? A. Yes. The science of preserving bait, as well as of the preservation of fish on shipboard, is very low indeed, far below what can be applied, and I have no doubt will be applied, both in keeping fish for food and in keeping it for bait.

"Q. Now, will you state what observation you have made respecting the method of preserving fresh bait from the start all the voyage through? A. As a general rule it is now preserved either by salting or freezing. Of course they keep it as long as it will remain without spoiling, and when you have to carry it beyond that time either ice it or salt it. Salting, of course, is a very simple process, but it alters materially the texture and taste to such a degree that fish or other bait that under certain circumstances is highly prized by the fish, is looked upon with a great deal of indifference when salted. Now, there are special methods of preserving the fish or bait by some chemical preparation, which preserves the fish *without giving the saline taste.* There are preparations by means of which oysters or clams or fish can be kept in solutions for six months without getting any appreciable taste, and without involving the slightest degree of deterioration or destruction. One process submitted to the group of judges of whom I was chairman was exhibited by an experimenter who placed a great jar of oysters in our room prepared in that way. I think about the 1st of August those were placed in our room, and they were kept there until the middle of September, for six weeks, during the hottest portion of the Centennial Summer, and that was hot enough. At the end of that time we mustered up courage to pass judgment upon this preparation, and we tasted these oysters and could not find them affected. We would have preferred absolutely fresh oysters, but there was nothing repugnant to the sensibilities, and I believe we consumed the entire jar. And we gave the exhibitor without any question an award for an admirable new method. That man is now using that process on a very large scale in New York for the preservation of fish of all kinds, and he claims he can keep them any length of time and allow them to be used as fresh fish quite easily. I don't suppose any fisherman ever thought of using any preservative except salt.

"Q. Well, there is a newer method of preservation is there not? A. There is a better method than using ice. The method described by the Noank witness by using what is equivalent to snow, allows the water to run off or to be sucked up as by a sponge. The mass being porous prevents the fish from becoming musty. But the coming methods of preserving bait are what is called the *dry air process* and the *hard freezing process.* In the dry air process you have your ice in large solid cakes in the upper part of the refrigerator and your substance to be preserved in the bottom. By a particular mode of adjusting the connection between the upper chamber and the lower there is a constant circulation of air by means of which all the moisture of the air is continually being condensed on the ice, leaving that which envelopes the bait or fish perfectly dry. Fish or any other animal substance will keep almost indefinitely in perfectly dry air about 40° or 45°, which can be attained very readily by means of this dry air apparatus. I had an instance of that in the case of a refrigerator filled with peaches, grapes, salmon, a leg of mutton and some beef steaks, with a great variety of other substances. At the end of four months in midsummer in the Agricultural Building, these were in a perfectly sound and prepossessing condition. No one would have hesitated one moment to eat the beefsteaks, and one might be very glad of the chance at times to have them cooked. This refrigerator has been used between San Francisco and New York, and between Chicago and New York, where the trip has occupied a week or ten days, and they are now used on a very large scale, tons upon tons of grapes and pears being sent from San Francisco by this means. I had a cargo of fish eggs brought from California to Chicago in a perfect condition. Another method is the *hard frozen* process. You use a freezing mixture of salt and ice powdered fine, this mixture producing a temperature of twenty degrees above zero which can be kept up just as long as the occasion requires by keeping up the supply of ice and salt.

"Q. How big is the refrigerator? A. There is no limit to the size that may be used. They are made of enormous size for the purpose of preserving salmon, and in New York they keep all kinds of fish.

"Q. Now, to come to a practical question, is this a mere matter of theory or of possible use. For instance, could this method be adapted to the preservation of bait for three or four months if necessary? A. The only question of course is as to the extent. There is no question at all that bait of any kind can be kept indefinitely by that process. I do not think there would be the slightest difficulty in building a refrigerator on any ordinary fishing vessel, cod or halibut, or other fishing vessel, that should keep with perfect ease all the bait necessary for a long voyage. I have made some inquiries as to the amount of ice, and I am informed by Mr. Blackford of New York, who is one of the largest operators of this mode, that to keep a room ten feet each way, or a thousand cubic feet at a temperature of 20° above zero would require about 2,000 pounds of ice, and two bushels of salt per week. With that he thinks it could be done without any difficulty. Well, an ordinary vessel would require about seventy-five barrels of bait, an ordinary trawling vessel. That would occupy a bulk something less than 600 feet, so that probably four and a half tons of ice a month would keep that fish. And it must be remembered that his estimate was for keeping fish in midsummer in New York. The fishing vessels would require a smaller expenditure of ice as these vessels would be surrcunded by a colder temperature. A stock of ten to twenty tons would in all probability be amply sufficient both to replace the waste by melting, and to preserve the bait."

"Q. Have you any doubt that some method like that will be put into immediate and successful use, if there is sufficient call for it? A. I have no doubt the experiment will be tried within a twelvemonth. Another method of preserving is by drying. Squid, fer instance, and clams, and a great many other kinds of bait can be dried without using any appreciable chemical, and can be readily softened in water. I noticed lately in a Newfoundland paper a paragraph recommending that in view of the fact that the squid are found there for a limited period of time, the people should go into the industry of drying squid for bait, so that it would always be available for the purpose of codfishing. I think the suggestion is an excellent one, and I have no doubt it will be carried out."

"Q. Now, what is the supply of bait for codfish on the American coast? A. Well, as the codfish eats everything, there is a pretty abundant stock to call upon. Of course the bait fish are abundant, the menhaden and herrring. The only bait fish that is not found is the caplin. The herring is very abundant on the American coast, and the alewives enormously abundant. Squid are very abundant of two or three species, and, of course, clams of various kinds. Thon we have one shell fish that we possess. It is never used here, although it very abundant, but it is almost exclusively the bait for trawling on the coast of Great Britain. This shell is known as the whelp or winkle.

"Q. From all you have learned, have you any doubt that, supposing the fishermen of the United States were precluded from using any bait except what could be got upon their own coast, they could obtain a sufficient supply there? A. Well, unless the American fishery should be expanded to very enormous limits, far in excess of what it is now, I can't see that there would be any difficulty.

That is, of course, not very material, because it only goes to the point that we are not dependent upon catching bait within three miles of the British coast, anywhere. We have ways of using salt bait, and the use of all these scientific methods of preserving bait, which will, no doubt, be resorted to and experimented upon, and we may be quite certain that they will, in skilful hands, succeed. Nothing further upon that point need be considered by your Honors.

I now call your attention to MACKEREL. It is a word that we have heard before. It is a word that we have become familiar with, and one which I hope we shall not view with disgust or distaste for its frequency when we shall have left this hospitable coast, and scattered ourselves to our far distant homes.

The mackerel, may it please your Honors, is a deep-sea fish. He does not lurk about anybody's premises. He does not live close in to the shore. He is a fish to whose existence and to whose movements a mysterious importance is attached. A certain season of the year he is not to be seen, and at other times, they are so thick upon the waters, that, as one of the most moderate of the British witnesses said, you might walk upon them with snow-shoes. I believe it was from East Point to North Cape. I do not know that I have got the geography quite right, but it is something like that.

Mr. THOMSON—You are only sixty miles out of the way.

Mr. DANA—Well, that is not very far, for such tales as these. Still, the story is as improbable with the limitation that my learned friend puts on it, as it was in the way I put it. However, I do not doubt that the number is extraordinary at times, and at other times they are not to be seen. We do not know much about them. We know they disappear from the waters of our whole coast, from Labrador down to the extreme southerly coast, and then at the early opening of the Spring they re-appear in great numbers, armies of them. They can no more be counted than the sand of the sea, and are as little likely to be diminished in number. They come from the deep sea, or deep mud, and they re-appear in these vast masses, and for a few months they spread themselves all over these seas. A few of them are caught, but very few in proportion to the whole number, and then they recede again. Their power of multiplication is very great indeed. I forget what Prof. Baird told us, but it is very great indeed. Methods have been taken to preserve their spawn, that it may be secured against the peril of destruction by other fish, and the perils of the sea, They are specially to be found upon the banks of the Gulf of St. Lawrence, the Bradelle or Bradley Banks, the Orphan, Miscou, Green, Fisherman's Bank, and off the coast of Prince Edward Island, and especially, more than anywhere else, about the Magdalen Islands; and in the autumn, as they are passing down to their uncertain and unknown homes, they are to be found in great numbers, directly off the western coast of Cape Breton, near the highlands opposite the group of Margaree islands, and near Port Hood; but in the main, they are to be found all over the deep sea of the Gulf of St. Lawrence. The Gulf of St. Lawrence is full of ledges, banks, and eddies formed by meeting tides, which Prof. Hind described to us, and there the mackerel are especially gathered together. The map drawn on the British side, in the British interest, shows this enormous field for the mackerel fisheries; and though very few comparatively of the banks and ledges are put down, yet in looking over this map, it seems as if it was a sort of great directory, showing the abodes of the mackerel, and also the courses that the mackerel take in passing from one part of this great sea to another. There is hardly a place where mackerel fishing grounds are not marked out here, and they are nearly all marked out at a considerable distance from the shore, all around the Magdalen Islands, for many miles; and at a distance from Prince Edward Island, and on the various banks, ledges, and shoals that are to be found; and it is there, as I shall have the honor to point out to the Court more particularly hereafter, that they have always been caught in the largest quantities, and the best of them, by American fishermen.

There are one or two experienced witnesses, from Gloucester who have dealt with the subject carefully, for their own interests, not testifying for any particular purpose, but having kept their books and accounts, and dealt with the mackerel in their own business, whose words I would like to recall to the attention of the Court for a few moments.

Captain Maddocks, of Gloucester, on page 135, of the American Evidence, testifies as follows:

"From my experience my judgment leads me to think that our vessels would get full as many, if not more, by staying outside of the three mile range altogether. By going inshore *they may sometimes get a spurt of mackerel*, but they are then liable to go further, into the harbors, and lose a good deal of time. Whereas if they would fish further off they would save a good deal of time. I think that for 10 or 20 years back they might have caught, well somewhere from a 10th to a 15th part of the mackerel within the three mile range. I don't know but they have. I don't think anything more than a 10th part, certainly."

Joseph O. Proctor, of Gloucester, on page 196 says:

"From the best of my judgment, the knowledge I have where my vessels have been, and conversation with the masters of the vessels, I believe that not one-eighth of the mackerel have been caught within, I should say less, and I should not say any more. It is nearer a tenth than an eighth.

"Q. Do you know where the bulk is caught? A. At the Magdalenes, or between the Magdalenes and Cheticamp.

Captain Ezra Turner, of Gloucester, page 226 testifies,—

"Q. Have you ever fished off Prince Edward Island? A. Yes. I have fished all round the east side, wherever anybody fished.

"Q. Did you fish within three miles of the shore there? A. No. It is a rare thing that ever you get mackerel within the three miles. When they come within three miles they rise in schools, and we never calculate to do much out of them, but from four to six and seven miles off is the common fishing ground there."

The Commissioners will recollect the testimony of Mr. Myrick, an American merchant, who had established himself on Prince Edward Island. The inshore fishery, he said, is not suited to American vessels. Our vessels are large; they are built at a distance; they are manned by sixteen or seventeen men; they cost a great deal; they require large catches, and dealing with fish in large quantities; they deal at wholesale altogether, and not at retail. Retailing would ruin them. Anything short of large catches, large amounts, would be their end, and compel all the merchants to give up the business, or to take to boat fishing, which, of course, Gloucester, or Massachusetts, or New England, or any part of the United States could not undertake to carry on here. It has been stated to the tribunal, by experienced men, as you cannot but remember, that our fishermen object to going very near shore in the Gulf of St. Lawrence. There are perils of weather connected with the coast which cannot be set aside by ridicule. Gloucester is a town full of widows and orphans, whose husbands and parents have laid their bones upon this coast, and upon its rocks and reefs, trusting too much to the appearance of fine weather, as we all did last night, waking up this morning in a tempest. Gloucester has tried to provide for these bereft people, by every fisherman voluntarily paying a small percentage of his earnings to constitute a widows' and orphans' fund. Even the tempestuous Magdalen Islands are safer for vessels than are the inshore coasts of those islands, where we are now permitted to fish; their harbors are poor, their entrances are shallowed by sand-bars, which are shifting, which shift with every very high wind, and sometimes with the season. They are well enough after you get inside of them, but they are dangerous to enter, to persons inexperienced,—dangerous to any by night; and if a vessel is caught near the shore by a wind blowing inshore, against which she cannot beat with sails, for none of them carry steam, then she is in immediate peril. They therefore give a wide berth to the inshore fisheries, in the main. They resort to them only occasionally. They are not useful for fishing with our seines. We find that the purse seines are too deep; that they are cut by the ground, which is rocky; that it is impossible to shorten them without scaring the mackerel, which must be taken by seines run out a great distance, for they are very quick of sight, and very suspicious of man; and they soon find their way out of the seines, unless they are laid a considerable distance off.

We need not catch our mackerel bait any more than our cod bait, within the three-mile limit. On the contrary, the best mackerel bait in the world is the manhaden, which we bring from New England. All admit that. The British witnesses say they would use it, were it not that it is too costly. They have to buy it from American vessels; and they betake themselves to an inferior kind of bait when they cannot afford to buy the best bait from us. And another result is that the Americans have shown for many years that what are called the shore mackerel,—that is, those that are caught off the coast of Massachusetts and several other of the New England States, are really better than the Bay mackerel. The evidence of that is the market prices they bring. It is not a matter of opinion. We have not called as witnesses persons who have only tasted them, and might have prejudices or peculiar tastes, but we have shown the market value.

James H. Myrick, page 433 American evidence, in answer to the question,—"For a few years past, which have sold for the highest price, number ones from the Bay or number ones from the American shore?" says,—"Oh, their shore mackerel have been the best quality of fish."

Benjamin Maddocks, of Gloucester, page 134, says:—

"Q. Well, I take No. 1 then. How do those marked as No. 1 Shore Mackerel compare with those marked as No. 1 Bay Mackerel? A. Well, the bay mackerel, at least I should say the shore mackerel, has been a great deal better than the bay mackerel the last seven or eight years.

"Q. That is not simply an opinion, but the market prices are better? How much more do the No. 1 Shore Mackerel bring than the No. 1 Bay Mackerel? A. Well, there has been $7 or $8 difference between them. I have seen the time when the Bay mackerel was equal to our shore mackerel. It has not been, for the last seven years.

It is also true, a matter of testimony and figures, that the American catch, the catch upon the American shore, is very large, and has increased, and is attracting more and more the attention of our people engaged in fishing, and it is only this year that the shore fishing proved to be unprofitable, and the confiding men who were led to send their vessels to a considerable extent, though not very great, into the Gulf, by reason of the British advertisements scattered about Gloucester, have come away still more disappointed than they had been by the shore fishing, because they had employed more time and more capital than their catch compensated them for. There are some statistics which I will read, taken from a prominent and trustworthy man, as to the American catch. David W. Low, on page 358 of the American evidence, states the figures as follows:

"1869.	194 vessels in Gulf, average catch 109 barrels	40,546	barrels.
"	151 " off shore " " 222 "	33,552	"
	Mackerel caught by boats and some Eastern vessels packed in Gloucester	19,028	"
	Mackerel inspected in Gloucester	93,126	
1875.	58 vessels in Gulf, average catch 191 barrels	11,078	barrels.
"	117 " Am. shore " " 409 "	47,853	"
		58,921	

"The average catch is based on the average catch of 84 vessels from 17 firms in 1869; and 28 vessels in Bay and 62 vessels off American shore from 20 firms in 1875. These firms have done better than the rest."

The statistics of John H. Pew & Sons, put in by Charles H. Pew, p. 496, for the last seven years, from 1870 to 1876, inclusive, show that the total, for that time, of bay mackerel that their own vessels caught, amounted to $77,995.22, and the shore mackerel for the same period was $271,333.54. Your Honors will recollect the statistics put in, which it is not necessary for us to transfer to our briefs, showing the exact state of the market on the subject of the proportion of American fish caught on the shores, and the proportion caught in the bay.

We have introduced a large number of witnesses from Gloucester, and I think I take nothing to myself in saying that the greater part of them, those who profess to be engaged in the trade or business at all, were men of eminent respectability, and commended themselves to the respect of the Tribunal, before which they testified. You were struck, no doubt, with the carefulness of their book-keeping, and the philosophical system which they devised, by means of which each man could ascertain whether he was making or losing in different branches of his business; and as the skipper was often part owner, and usually many dealers managed for other persons, it became their duty to ascertain what was the gain or loss of each branch of their business. They brought forward and laid before you their statistics. hey surprised a good many, and I know that the counsel on the other side manifested their surprise with some directness; but, may it please the Court, when the matter came to be examined into, it assumed a different aspect. We made the counsel on the other side this offer. We said to them "there is time enough, there are weeks, if you wish it, before you are obliged to put in your rebuttal; we will give you all the time you wish; send anybody to Gloucester you please, to examine the books of any merchants in Gloucester engaged in the fishing business, and ascertain for yourselves the state of the bay and shore fishing as it appears there." You say that bay fishing is as profitable as the shore fishing; that it has made a great and wealthy city of Gloucester, and you assume that it is owing to their having had, for the greater part of the time, a right to fish inshore. It would seem to follow from this reasoning, that whenever we lost the right to fish inshore, Gloucester must have receded in its importance, and come up again with the renewal of the privilege of inshore fishing. Nothing of that sort appears, in the slightest degree. "But," they say, "the Bay fishing must be of great importance, because of the prosperity of Gloucester." Now, the people of Gloucester have no disposition to deny their prosperity, but it is of a different kind from what has been represented. Gloucester is a place altogether *sui generis*. I never saw a place like it. I think very few of your Honors failed to form an opinion that it was a place well deserving of study and consideration. There is not a rich idle man, apparently, in the town of Gloucester. The business of Gloucester cannot be carried on, as mercantile business often is, by men who invest their capital in the business, and leave it in the hands of other people to manage. It cannot be carried on as much of the mercantile business of the world is carried on, in a leisurely way, by those who have arrived at something like wealth, who visit their counting-rooms at ten o'clock in the morning, and stay a few hours, then go away to the club, return to their counting-rooms for a short time, and then drive out in the enticing drives in the vicinity, and their day's work is over. It cannot be carried on as my friends in New Bedford used to carry on the whale fishery, where the gentlemen were at their counting-rooms a few months in the year, and when the off season came, they were at Washington, Saratoga, or wherever else they saw fit to go. And yet they were prosperous. No; the Gloucester tradesmen are hard-working men, and they gain their wealth and prosperity on the terms of being hard-working men. The Gloucester merchants, if you see fit to call them so,—they do not call themselves "merchants," but "fish-dealers,"—are men who go to their counting-rooms early and stay late. If they go up to Boston on business, they take a very early train, breakfast before daylight, and return in season to do a day's work, though Boston is twenty-five or thirty miles distant; and when their vessels come in, they are down upon the wharves, they stand by the large barges and they cull the mackerel with their own hands; they count them out with their own hands; they turn them with their own hands into the barrels, and cooper them, and scuttle the barrels, and put in the brine and pickle the fish, and roll them into the proper places; and when they have a moment's leisure, they will go to their counting-rooms and carry on their correspondence by telegraph and otherwise, with all parts of the United States, and learn the value of these mackerel. They are ready to sell them to the buyers, who are another class of persons, or they are ready to keep and sell them in the larger market of Boston. By their patient industry, by their simple hard days' works, they have made Gloucester an important place; but they have not added much to the mackerel fishery of the United States. Gloucester has grown at the expense of every other fishing town in New England. We have laid before your Honors, through Mr. Low, I think it was, or through Mr. Babson, the statistics of the entire falling off of all the fishing towns of New England; those that had dealt in mackerel fishing. Where are Plymouth, Barnsta-

ble, where Marblehead, which was known the world over as a fishing town? There are no more fishing vessels there. The people have all gone into the business of making shoes and other domestic manufactures. So with Beverly, so with Manchester, so with Newburyport, and so with the entire State of Maine, with the exception of a very few vessels on the coast. Two or three of the last witnesses gave us a most melancholy account of the entire falling off of fishing in Castine, Bucksport, and all up and down that bay and river, so that there is hardly any fishing left. When they were fishing towns, people employed their industry in it. Their harbors were enlivened by the coming and going of fishing schooners, and now there is an occasional weekly steamer or an occasional vessel there owned, but doing all its business in Boston or New York. But the fishing business of all the towns of New England, except the codfishery of Provincetown and of the towns near, has concentrated in Gloucester. It seems to be a law that certain kinds of business though carried on sparsely at periods, must be eventually concentrated. When they are concentrated, they cannot be profitably carried on anywhere else. The result is, that the mackerel fishery and cod fishery, with the exception of the remote points of Cape Cod, have concentrated in Gloucester. There is the capital; there is the skill; there are the marine railways; there is that fishing insurance company, which they have devised from their own skill and experience, by which they insure themselves cheaper than any people in the world ever did insure themselves against marine risks; so much so, that merchants of Gloucester have told us that if they had to pay the rates that are paid in stock companies, the fishing business could not be carried on by merchants who own their ships; the difference would be enough to turn the scale. Now it appears to be the fact,—I will not trouble your Honors by going over the testimony to which every Gloucester man swore; it turns out to be the fact, that the prosperity of Gloucester, while it has additional resources in its granite, and as a sea-bathing place, has been owing mostly to the prudence and sagacity, the frugality and laboriousness of the men brought up as fishermen, who turn themselves into fish-dealers in middle life, and carry their experience into it; and it is only on those terms that Gloucester has become what it is. An attempt was made at Salem, under the best auspices, to carry on this business, with the best Gloucester fishermen, and most experienced men concerned in it, by a joint stock company; but in the matter of deep-sea fishing, "the Everlasting" seems to have "fixed his canon" against its prosperity, except upon the terms of frugality, and laboriousness. It never has succeeded otherwise, and scarce on those terms, except it be with the aid of a bounty from the government.

Now, we say that the whole Bay fishing for mackerel is made prosperous simply on those terms; that it is no treaty gift that has created it, but it is the skill and industry of the fishermen, the capital invested by the owners, and the patient, constant labor and skill of the owners in dealing with their fish, after they are thrown upon their hands on the wharf, and they have paid their fishermen, that has given to it any value in the market. I do not think it is worth while to speculate upon the question whether fish in the water have any money value. I can conceive that fish in a pond and that fish that cling to the shore, that have a habitat, a domicile, like shell fish, have an actual value. They are sure to be found. It is nothing more than the application of mechanical means that brings them into your hands. But certainly it is true, that the value of the free swimming fish of the ocean, pursued by the deep sea fishermen, with line or with net, must be rather metaphysical than actual. To pursue them requires an investment of capital; it requires risk and large insurance; it requires skill, and it requires patient labor; and when the fish is landed upon the deck, his value there, which is to be counted in cents rather than in dollars, is the result of all these things combined; and if any man can tell me what proportion of those cents or dollars which that fish is worth on the deck of the ship is owing to the fact that the fishermen had a right to try for him, I think he will have solved a problem little short of squaring the circle, and his name ought to go down to posterity. No political economist can do it. I will not say that the fish in the deep sea is worth *nothing;* but, at all events, the right to attempt to catch it is but a liberty, and the result depends upon the man.

If there can be no other fishery than the one which you have the privilege of resorting to, then it may be of great value to you to have that privilege. If there be but one moor where he can shoot, the person who is shooting for money, to sell the game that he takes, may be willing to pay a high price for the privilege. But, recollect that the fishing for the free-swimming fish is over the whole ocean. The power of extending it a little nearer shore may be of some value,—I do not say that it is not,—but it strikes my mind as an absurd exaggeration, and as an utter fallacy, to attempt to reason from the market value of the fish there caught, to the money value of the privilege so extended. The fish are worth, I will say, $12.00 a barrel; but what does that represent, when the American merchants, Hall and Myrick, both tell us that the value on the wharf at Prince Edward Island is about $3.75 a barrel? Well, suppose the mackerel to be worth $3.75 a barrel on the wharf in Prince Edward Island, what does that represent? Is that a thing which the United States is to pay Great Britain for? Has Great Britain sold us a barrel of pickled mackerel on the wharf? Has anybody done it? I think not. That represents the result of capital and of many branches of labor. Then, if you ask, "What is the worth to Mr. Hall or Mr. Myrick of the mackerel on the deck of the vessel?" I say, it is next to nothing. The fish will perish if he is not taken care of. Skill is to be used upon him, then; what costs money is to be used upon him, ice and pickle, and he is to be preserved. All this to the end that he may eventually, after a great deal of labor, skill, and capital, be sent to the market. But, recollect that the vessel from whose deck he was caught cost $8,000. Recollect, that the men who maintain that crew and feed them, and enable them to clothe themselves and follow that pursuit, are paying out large sums of money. Recollect, that the fisherman who catches the fish has, as the result of many years' labor, which may be called an investment, learned how to catch him; and it is by the combination of all these causes, that at last the fish is landed. Now, in my judgment, it is purely fallacious to attempt to draw any inference from the market value of the fish to the right to extend your pursuit of those animals nearer the coast than before, or to the market value of any right to fish over a certain portion of the ocean, when all other oceans are open to you, and all other fisheries.

Your Honors, of course, recollect that the mackerel fishery, taken at its best,—I don't confine myself to the inshore fishery; I mean the mackerel fishery of the Bay and the Gulf, at its best, the whole of it, is of a greatly decreasing and precarious value. I speak only of the salted mackerel that is sent into the United States. The lake fish are fast becoming a substitute for salt mackerel. I will call Your Honor's attention to two or three rather striking proofs which were not read previously by Judge Foster. Sylvanus Smith, of Gloucester, on page 336 of the American evidence, is asked:—

"Q. What causes have been in existence interfering with the sale of salt mackerel during the past few years? A. I think there have been several causes. One is the facility of carrying our fresh fish into distant parts of the country. That has materially interfered with it. Then there is the lake herring; during the months of November and December until May they are very plenty. They are now used in very large quantities all throughout the West.

"Q. What are lake herring? A. A species of white fish, only smaller.

"Q. What do they sell for per barrel? A. This party I referred to, speaking of his trade, said that last year he used 30,000 packages. A package is a half barrel.

"Q. How are these put up? A. Pickled. And he told me they sold at $2.00 a package.

"Q. You say they have interfered with the constancy of the demand? A. I think during the months we used to depend very largely on the consumption of our mackerel, the lake herring has been one great cause for the decline during these months in the value of mackerel."

On page 468 Professor Baird testifies as follows :—

"Q. Have you any statistics respecting the Lake fishery for the years 1876 and 1877? A. I have only partial statistics for 1877. I published the statistics in detail in my report for 1872, and I am now having statistics for 1877 collected, and will have them I suppose by the end of the season.

"Q. 1872 represents but faintly the present state of things. Can you tell us how it was in 1872? A. In 1872 the American production of fish in the great Lakes was 32,250,000 lbs. That quantity of fish was taken, but how much more I cannot say. Those were marketed in Buffalo, Cleveland, Chicago, and many other stations.

"Q. Does that include the Canadian Catch? A. I presume there is no Canadian catch in that amount. Those are the figures as they were obtained by my agents, from the fishermen and dealers.

"Q. You obtained them from the dealers in the large cities? A. Yes, and the fishermen at the grounds. This year I have had every station on the American side of the Lakes visited and canvassed.

"Q. You have steady communication with and reports from the dealers? A. I have reports only when I send specially after them, as I did in 1872 and am doing this year.

"Q. How far have you got in your enquiry for *this year*? A. I have only a partial return for Chicago

"Q. What does that show? A. The total marketing of salted fish in Chicago up to the middle of October amounted to 100,000 half barrels, with about 20,000 half barrels expected for the rest of the season, or equal to 60,000 barrels of those fish for Chicago alone for the present year. The corresponding supply of barrels of fish in 1772 were 12,600 in Chicago, so that the Chicago trade has increased from 12,600 in 1872 to 60,000 in 1877, or almost five fold—4 8-10. The total catch of fish in the Lakes in 1872 was 32,-250,000 pounds. If the total catch has increased in the some ratio as that market has done at Chicago, it will give 156,000,000 *pounds of fish taken on the American side of the Lakes for the present year.*

Then there are other fresh fish that are taking the place of the salt mackerel. The question is not between British mackerel and American mackerel, but it is between mackerel and everything else that can be eaten: because, if mackerel rise in market price, and in the cost of catching, people will betake themselves to other articles of food. There is no necessity for their eating mackerel. The mackerel lives in the market only upon the terms that it can be cheaply furnished. This tribunal will recollect that interesting witness, Mr. Ashby, from Noank, Ct.; how enthusiastic he was over the large halibut that he caught; how his eyes gleamed, and his countenanced lighteued, when he told Your Honors the weight of that halibut, the sensation produced in Fulton Market when he brought him there, and the very homely, but really lucid way in which he described the superior manner by which they were able to preserve those fish in ice, and the way they were brought into market; and how the whole horizon was dotted with vessels fishing for halibut, and other fish there, with which to supply the great and increasing demand in the New York market. There is also the testimony of Prof. Baird, who speaks of various kinds of fish. It is not worth while to enumerate them all, but he speaks especially of a fish known as "mullet," on the southern coast. So long as slavery existed, it is undoubtedly true that there was very little enterprise in this direction. It suffered like everything else, but cotton, rice and sugar, staples which could be cultivated easily by slave labor. Almost every other form of agriculture, almost all kinds of maritime labor, ceased. The truth was, the slaves could not be trusted in boats. The boats would be likely to head off from South Carolina or Virginia, and not be seen again. The vessels that went to the ports of the Slave States were Northern vessels, owned and manned by Northern people. Southern people could not carry on commerce with their slaves, nor fishing with their slaves. That system being now abolished, the fisheries of the Southern States are to be developed. The negro will fish for himself. He will have no motive for running away from his own profits. The result has been that this mullet has come into very considerable importance. Professor Baird has his statistics concerning it, and he has certainly a very strong opinion that that fish is in danger of excluding salted mackerel from the Southern markets, (indeed, it is almost excluded now), and that it will work its way up to the northern markets. Some of the Southern people think very highly of it, as the best kind of fish, think it has not its superior in the ocean; but, supposing that to be local exaggeration and patriotic enthusiasm, yet certainly it is a useful and valuable fish, and the demand for it is rapidly increasing. Prof. Baird says, on page 460, that one million barrels of mullet could be furnished annually from the south shore off Chesapeake Bay to the south-end of Florida, if they were called for.

"Q. How far has the mullet come into the market now? A. The mullet does not come into the northern market at all, but in North Carolina, South Carolina and Georgia it fills the markets at the present time, excluding other kinds of imported fish. In former years there was a great demand for herring and mackerel, but the mullet is supplying the markets, because they are sold fresher and supplied at a much lower price, and they are considered by the Southern people a much superior article of food.

"Q. Is it preferred to mackerel as a salted fish? A. The persons familiar with mackerel and with mullet from whom I have made inquiries—I have never tasted salt mullet—give the preference to mullet. It is a fatter, sweeter and better fish, and of rather larger size. They grade up to 90 to a barrel of 200 pounds, and go down to three quarters of a pound, and as a salt fish the preference is given by all from whom I have enquired to the mullet.

"Q. Do you think the failure of the mackerel market in the Southern and Southwestern States is largely attributable to the introduction of mullet? A. I cannot say that, but I imagine it must have a very *decided influence.*

"Q. Can the mullet be caught as easy as mackerel? A. More easily. It is entirely a shore fish, and is taken with seines hauled up on the banks by men who have no capital, but who are able to command a row boat with which to lay out their seines, and they sometimes catch 100 barrels a day per man, and sometimes as many as 500 barrels have been taken at a single haul. The capital is only the boat, the seine 100 or 200 yards long, the salt necessary for preserving the fish, and splitting boards and barrels.

"Q. Can pounds be used? A. They have not been used, and I doubt whether they could be used. Pounds are not available in the sandy regions of the South.

"Q. They are taken by seining? A. Yes, seines can be used. This work is entirely prosecuted by natives of the coast, and about two-thirds of the coast population are employed in the capture of those fish

"Q. Then the business has grown very much? A. It has grown very rapidly.

"Q. When was it first known to you as a fish for the market? A. I never knew anything about it until 1872.

"Q. Then it has been known during only five years? A. I cannot say; it has been known to me that length of time.

"Q. During that time the business has very much increased? A. I am so informed; I cannot speak personally. All my information of it is from reports made to me in replies to circulars issued in 1872 and 1873. I have not issued a mullet circular since that time, when I issued a special circular asking information regarding the mullet.

"Q. Then it is your opinion that the mullet has became, to some extent, and will become an important source of food supply? A. It is destined, I suppose, to be a very formidable rival and competitor of the mackerel. I know in 1872 *a single county in North Carolina put up* 70,000 *barrels* of mullet, a single county out of five States covering the mullet region."

Your Honors will recollect, as a striking illustration of the truth of the power of propagation, the statement of Prof. Baird in regard to the River Potomac, where a few black bass, some half dozen, were put into the river, and in the course of a few years, they were abundant enough to supply the market. Fish culture has become a very important matter, and, what we call in New England our "ponds," small lakes and rivers, are guarded and protected, and every dam built across any river where anadromous, or upward-going fish, are to be found, has always a way for their ascent and descent; so that everything is done to increase the quantity, kind, and value of all that sort of fish, making the salted mackerel less important to the people, and in the market.

Then the improved methods of preserving fish are astonishing. I think the evidence on that point was principally from Prof. Baird, who has described to us the various methods by which fish, as well as bait, may be preserved. He told us that for months, during the hottest part of the Exhibition season at Philadelphia, during our Centennial year, fish were kept by these improved chemical methods of drying, and methods of freezing, so that after months, the Commissioners ate the fish, and found them very good eating. There was no objection whatever to them

although, of course, they were not quite as good as when they were entirely fresh. So that all science seems to be working in favor of distribution, instead of concentration, of what is valuable for human consumption; and the longer we live, and the more science advances, the less can any one nation say to the fishermen of another,—Thus far, and no farther! We turn upon such an attempt at once, and say, "Very well; if you choose to establish your line of exclusion, do it. If you choose to throw all open, do so. We prefer the latter, as the generous, the more peaceful and safe method for both parties. If you prefer the former, take the expense of it, take the risk of it, take the ignominy of it! If you give it up, and it costs you anything to do so, we will pay you what it is worth to us."

I certainly hope that after our offer to open the books of any merchant in Gloucester, or any number of merchants, to the other side, it will not be said that we have selected our witnesses. The witnesses that we brought here, both fishermen and owners, said that the bay fishery was dying out. They show it by their own statistics, and the statistics of the town of Gloucester show how few vessels are now engaged in the bay fishery; that they are confining their attention to cod-fishing and shore fishing, and fishing with nets and seines.

We did not bring the bankrupt fish dealers from Gloucester, the men who have lost by attempting to carry on these bay fisheries, as we might have done. We did not bring those who had found all fishing unprofitable, and had moved away from Gloucester, and tried their hand upon other kinds of business. We brought, on the other hand, the most prosperous men in Gloucester. We brought those men who had made the most out of the fisheries, the men who had grown richest upon them, and we exhibited their books; and as we could not bring up all the account books of Gloucester to this tribunal, we besought the other side to go down, or send down a commission, and examine them for themselves. We did not ask them to examine the books of the men who had become bankrupt in the business, but the books of those who had been prosperous in the business; and after that, I certainly think we have a right to say, that we have turned Gloucester inside out before this tribunal, with the result of showing that the bay fishing has gradually and steadily diminished, that the inshore fishery is unprofitble, that the bay fishery has been made a means of support only to the most skillful, and by those laborious and frugal methods which I have before described to this tribunal.

At this point Mr. Dana suspended his argument, and the Commission adjourned until Saturday at noon.

SATURDAY, Nov. 10, 1877.

The Commission met at 12 o'clock, and Mr. DANA continued his argument.

May it please your Excellency and your Honors:—

We are met to-day, the seventieth of our session, to hear what may be said by me in behalf of the United States, closing the argument in our favor—a post which by the kindness and partiality of my associates has been assigned to me. While without, all is cheerless and wintry, we have within the bright beams of friendly, and, if not sympathizing, at least, interested countenances. I feel most painfully that, having the last word to say for my country, I may omit something that I ought to have said; or perhaps, which is quite as bad, that I may say more or other than I might well have said. Yet the duty is to be performed.

I have no instructions from my country, gentlemen of the Commission, and no expectation from its Government, that I will attempt to depreciate the value of anything that we receive. We are not to go away like the buyer in the scriptures, saying, "It is nought; it is nought;" but we have referred to a Commission, which will stand neutral and impartial, to determine for us; and no proclamations, of opinion, however loud, will have any effect upon that Commission. My country stands ready to pay anything that this Commission may say it ought to pay, as I have no doubt Great Britain stands content, if you shall be obliged to say, what we think in our own judgment you should say, that you cannot see in this extension, along the fringes of a great garment, of our right to fish over portions of this region, anything which equals the money value that the British Dominion and Provinces certainly receive from an obligation on our part to lay no duties whatever upon their importations of fish and fish oil. But while we are not here to depreciate anything, it is our duty to see to it that no extravagent demands shall pass unchallenged, to meet evidence with evidence, and argument with argument, fairly before a tribunal competent and able. We do not mean that our side shall suffer at all from too great depreciation of the evidence and arguments of the counsel for the Crown, as we feel quite sure that the cause of the Crown has suffered from the extravagant demands with which its case has been opened, and the extravagant and promiscuous kind of evidence, of all sorts of damages losses, and injuries which it saw fit to gather and bring before this tribunal, from the fisherman who thought that his wife had been frightened and his poultry yard robbed by a few American fishermen out upon a lark, to the Minister of Marine and Fisheries of the Dominion, with his innumerable light-houses and buoys and improved harbors. We are to meet argument with argument, evidence with evidence, upon the single question submitted; and that is, as I have had the honor to state before, "Is there a money value in this extension of our right, or rather this with-

drawal of the claim of exclusion on the part of Great Britain, greater than the value which Great Britain certainly receives from our guaranty that we will lay no duties whatever upon her fish and fish oil?"

Now, may it please your Excellency, the question is not whether two dollars a barrel on mackerel, and one dollar a barrel on herring is prohibitory, because we had a right, before making this Treaty, to lay duties that should be prohibitory, if those were not. If two dollars were not, we could lay as much as we pleased; so that it would be an imperfect consideration of this case, it has been all along an imperfect consideration of this case, to ask the question whether two dollars a barrel is prohibitory, whether two dollars a barrel on mackerel or one dollar a barrel on herring can be overcome by any commercial method or enterprise of the Dominion and the Provinces. The question has been between the right to be secured against laying duties indefinitely, on the part of the United States, on the one hand, and this extension of the right of fishing a little nearer to the shores, on the other. We could, if we saw fit, make a kind of self-adjusting tariff, that whenever fish rose above a certain price, then the Dominion and Canadian fish might be admitted, and otherwise not; or we could hold it in our hands, and legislate from day to day as we saw fit. Before leaving this question of the money value of the withdrawal of the claim of exclusion from a portion of this coast by Great Britain, I must take the liberty to repeat to this Court, that I may be sure that it does not escape their fullest attention, that the right to exclude us, independent of the Treaty of 1818, we do not, and never have acknowledged; and by the Treaty of 1818, we arranged it as a compromise on a disputed question. That claim to exclude is contested, difficult of interpretation, expensive and dangerous. The geographical limit is not easily determined; in respect to bays and harbors, it is entirely undetermined, and apparently must remain so, each case being a case a good deal *sui generis*; and the meaning and extent of the power and authority which goes with that geographical extension beyond the shore, whatever it may be, is all the more uncertain and undetermined. Under the Treaty of 1818, my country certainly did agree that she would not fish nor assert the claim to the right of fishing within three miles of a certain portion of this great Bay. Great Britain, by the Treaty of 1871, has withdrawn all claims to exclude us from that portion: and we agreed that if there is any pecuniary value in that beyond the pecuniary value of what we yield, we stand ready to make the requisite compensation. It is extremely difficult, certainly to my mind, and I cannot but think, from conversation and reading, that it must be to others, to determine the pecuniary value of a mere faculty, as we may call it, a faculty according to the Roman law, a liberty, perhaps, of endeavoring to catch the free swimming fish of the ocean. What is its pecuniary value? How is it to be assessed and determined? Why, it is not to be assessed or determined by the amount of fish actually caught. That may be very small, or may be very large. The market value may be raised or decreased by accident; a war may so cut us off from making use of the privilege, that we should take nothing. It does not follow, therefore, that we are to pay nothing. Some cause, some accident, some mistake of judgment may send a very large fleet here, at a very great expense of men and money; we may make a very large catch, more than we can dispose of, but the pecuniary value of that catch is no test of the value of the liberty of trying to catch the fish. Then, what is the test? Is the use made, a test? Although, at first glance, it might seem that that was scarcely a test; yet I think that, on the whole, in the long run, if you have a sufficient period of time to form a fair judgment, if your judgment is based upon the use made by persons who are acting for their own interests in a large market, then you may form some judgment from the use actually made. This case has been likened by the counsel for the Crown to one where an individual has hired a farm, and on the farm there is a house or dwelling, and he has not used it. Of course he has to pay for it, whether he uses it or not. It is at his disposal; it belongs there; it is fixed there, and he may enter it when he pleases, and it is of no account whether he does use it or does not. But if the question was, whether a certain region of a city and the buildings thereon were of real value or not, and it was brought up as an argument against them, that they were not wholesome and not habitable, certainly the fact that in the market for a long period of years, purchasers or tenants could not be found, would be a very strong argument against their value.

Now, with reference to these fisheries, what is the value of the mere faculty or liberty of going over these fishing grounds, and throwing overboard your costly bait, and embarking your industry, capital, and skill, in the attempt to catch the fish? We venture to say that we have had many years of experience, and that there have been long periods of time when those fisheries have been opened to us, and they have been closed for short periods of time; that from 1871 down to the present time, we have had a fair test; and when we show, by undisputed testimony, that the citizens of the United States, during long periods of time, and as a result of long experience, have come to the conclusion that they are not of sufficient value to warrant them, as merchants and as men acting for their own interests, to make much use of them, I submit that we have brought before the Tribunal a perfectly fair argument, and a very valuable test; because it is not what one man will do with one house; it is not what one ship-master or one ship-owner may fancy about the inshore or the outshore fisheries; but it is a question of what a large number of men, acting for their own interests, in a very large market, full of competition, will do. If, on inquiring into the state of that market, and the conduct of such men, who cannot be governed by any peculiar and special motive bearing upon the case, we have produced a fair and influential consideration, we claim that that is entitled to its fair weight. You might well say, perhaps, of one fisherman of Gloucester, or of two, that so deep was their hostility to the British Provinces, that they would be willing to abstain from using these fisheries, just for the purpose of reducing the amount that this Tribunal might find itself called upon to adjudge. But, if there should be one such man, so endowed with disinterested malice, I am quite certain that this Tribunal will not believe so of the entire fishing community of buyers and sellers, fishermen and merchants, acting for a series of years, in view of their own interests. If, therefore, we have shown, as we certainly have, that the use of this Bay fishery, as an entirely, the whole of it, deep-sea and inshore alike, has steadily diminished in market value, that our ship-owners are withdrawing their vessels from it, that fewer and fewer are sent here every year, and that they have said, man after man, that they do not value the extension of the territorial privilege, where that extension is always inshore, bringing them into more dangerous and less profitable regions,—that being the case, we ask your Honors to consider all this as fair proof of the slight value which is actually put, by business men, acting in their own interests, upon what has been conceded to us.

Now, what is this that has been conceded to us, or rather, what is this claim of exclusion from which Great Britain has agreed to withdraw herself during the period of this Treaty? What is the privilege? It is the privilege of trying to catch fish within that limit. That is all it is. All attempt to measure it by the value of the fish in barrels brought into the United States is perfectly futile and fallacious. A barrel of fish salted and coopered and standing on the wharf in Gloucester represents something very different from the value of a right to cross over a portion of the seas and attempt to catch the fish. It represents capital; it represents the interest on a vessel costing $8,000; it represents the interest upon the whole outlay of a permanent character, and it represents the absolute cost of all the outlay which is of a perishable character; it represents the wages of skilled labor; it represents mercantile capacity; and if you eliminate from the value of the mackerel standing upon the wharf at Gloucester all these elements, and turn me back to the mere fact that there was some mackerel, more or less, thin, meagre, fat, or heavy, as we please, to be found by the diligent and skillful manner within that little fringe of this great garment, what do you show me at all by which I can estimate its value? And that is the whole of it. Furthermore, if you take, instead of that, the

value of the mackerel as it stands upon the wharf at Prince Edward Island, soon after it is caught, $3.75, that represents, again, the interest on the cost of the ship, and all the outfit and all the labor, and all the skill, and all the risk. Eliminate them, and what have you left? You have nothing left but the right or liberty to do something within certain limits; and that right is one any attempt to exclude us from which, is very dangerous, uncertain, and precarious. I do not know what to liken it to. It certainly is not to be compared at all to a lease, because the lessor furnishes everything that the lease requires. Now, if in company with this privilege, Great Britain had furnished the fish, so that we should not have to employ vessels, or men, or skill, or labor, or industry, furnished them to us on the wharf at Prince Edward Island, then there might be some analogy between that and a lease. What is it like? Is it like the value of a privilege to practice law? Not quite, because, there always will be lawsuits, but it is not sure that there always will be mackerel. Suitors, irritated men, may be meshed within the seine which the privileged lawyer may cast out; but it does not follow that the mackerel can be. On the contrary, they are so shrewd and so sharp that our fishermen tell us that they cannot use a seine within their sight; that they will escape from it. But the lawyer is so confident in the eagerness of the client for a lawsuit, that, instead of concealing himself, and taking him unawares, he advertises himself and has a sign of his place of business. Suppose we were to compare it to the case of a lawyer who had a general license to practice law in all parts of a great city, but not a monopoly. Everybody else had the same right; but he was excluded from taking part in cases which should arise in a certain suburb of that city,—not the best, not the richest, not the most business-like,—and which had lawyers of its own, living there, accustomed to the people, who maintained the right to conduct all the lawsuits that might arise in that district. What would it be worth to a lawyer who had the whole city for the field of labor,—plenty to do, to have his right extended into that suburb. What would it be worth if that suburb was an indefinable one, not bounded by streets, but by some moral description, about which there would be an eternal dispute, and about which the lawyer might be in constant trouble with the policeman? What would be its value? Who can tell? Or, a physician or merchant? Suppose a merchant is asked to pay for a license to buy and sell, to keep a retailer's shop; everybody else has the same right that he has, and half the people are doing it without any license; but he is asked to pay for a license. What is it worth to him? Why, not much, at best. But suppose that the license was confined to the right to deal in Newfoundland herring. While everybody else could deal with other fish, his license extended his trade to Newfoundland herring alone. Why, his answer would be, "There are plenty of herring from other places that I can deal with. There is a large catch in the Gulf; there is a large catch on the Labrador shore, and what is it worth to me, with my hands full of business, to be able to extend it a little farther, and include the dealing with this particular kind of fish?

None of the analogies seem to me to hold. Your Honors can do nothing else than, first to look at the practical result in the hands of business men; and the result is this: to those who live upon the shore and can go out day after day and return at night, in small boats, investing but little capital, going out whenever they see the mackerel, and not otherwise, and coming back to finish a day's work upon their farms,—to them it is profitable; for almost all they do is profit; but to those who come from a distance, requiring a week or a fortnight to make the passage, in large vessels, which the nature of the climate and of the seas requires should be large and strong and well manned, who have the deep sea before them, and innumerable banks and shoals, where they can fish,—to them, the right to fish a little nearer inshore is of very much less value. That is the position of the American. The other is the position of the Englishman. And the fact that we have steadily withdrawn, more and more, from that branch of the business, is a proof that is of little value.

Then, beyond that, I suppose, you must make some kind of estimate, for I am not going to argue that the faculty is of no value. I suppose the right to extend our fisheries so far is of some value. I can find no fair test of it. But recollect, Mr. President, and gentlemen, as I say again, that it is but a faculty, which would be utterly useless in the hands of some people. Why, it has been found utterly useless in the hands of the inhabitants of this Dominion. What did they do with it until they took to their day and night boat fishing? What has become of their fishing vessels? Gone! The whole inshore and outshore fishery became of no value to them, until they substituted this boat fishing, which we cannot enter into. Then, having before you this very abstract right or faculty, obliged to disconnect from it everything except this,—that it is an extension of the field, over which we had a right to work,—you can get nothing, I think, upon which you can cast a valuation. Nor is it strictly analogous to a field for labor, because a field for labor is a specific thing. When you buy it, you know what it will produce; and if you sow certain seed, you will get certain results; and then having deducted the value of your labor, and skill, and industry, and capital, and allowed yourself interest, the residue, if any, is profit. That depends upon the nature of the soil with which you have been dealing. But nothing of that sort can be predicated of the free-swimming fish. They are here to-day and there to-morrow; they have no habitat; they are nobody's property, and nobody can grant them.

I have dealt with this subject as I said we were to deal with it; not to depreciate it unreasonably, but to analyze it, and try to find out how we are to measure it. And having analyzed it in this way—which I am sure is subject to no objection, unless I carry it to an extreme,—the methods which I have used in themselves are subject to no objection; it cannot be strange to Your Honors that the people of the United States said, through their government, that in securing from Great Britain her withdrawal of this claim of exclusion from these three miles, we did it, not for the commercial or intrinsic value of the right, so much as because of the peace and freedom from irritation which it secured to us. And that leads me to say, what, perhaps, I should have otherwise forgotten, that in estimating the value to the people of the United States of the right to pursue their fisheries close to the shore in certain regions, you are not to estimate what we have gained in peace, in security from irritation, from seizures, and from pursuit. Those are the acts and operations of the opposite party. It is the value of the right to fish there, alone, that you are to consider. Why, if you pay to an organ-grinder a shilling to go out of your street when there is sickness in your house, it does not follow that his music was worth that price. Nobody would think of considering that a test of the value of his music, if a Commission was appointed to determine what it was. So, here; what we were willing to do to get rid of a nuisance, of irritation, of dangers of war, of honest mistakes, and opportunities for pretended mistakes,—what we were willing to pay for all that, is no proof of the price at which we set the mere liberty of being there peacefully and in the exercise of a right.

The people of the United States can never look upon this exclusion, under the Treaty of 1818, as anything more than a voluntary surrender, on their part, for a Treaty purpose, over a certain limited region, of what they believed to be their right,—their right by virtue, as I had the honor to say to this Tribunal yesterday, of the grants in the charters of Massachusetts and the other New England Provinces, of an unlimited right to fish over all this region,—a right which we won by our own bow and spear; the whole privilege being contested between the French and English, all of which might have become French, I do not think I am going too far in saying, had it not been for the prowess and determination of New England. I reminded your Honors yesterday of instances in which we had contributed to force out the French from this country, to make it British, to make the seas British seas, and the fisheries British fisheries, in trust for the Crown and for ourselves. I may add one case, more interesting and bearing directly upon this Province, and that is, the final expulsion of the French, which was carried out at Grand Pré and its neighborhood; and

whatever of reproach may be cast upon those who did it by the harp of the poet, or the pen of the philanthropist, I cannot but remember that that reproach must be born mainly by my own Massachusetts. For it was Massachusetts troops and Massachusetts ships, under a Massachusetts commander, that forced those people away from their shores. But the historian will not forget that, whatever may have been the right or the wrong of that proceeding, its result was, that it put an end forever to the machinations of the French with the Indians against the peace and the security of this Province, and the Province of Cape Breton, and left them and their appurtenances wholly and entirely British.

Your Honors will be glad to know that I am now going to take up the last point of importance in our case; and that is, the value of the free trade which this Treaty has given to all the people of the Provinces. Recollect what that value is. It is true that in 1871, when we made this Treaty, our duties were two dollars a barrel on mackerel and one dollar a barrel on herring; but our right was to make these duties whatever we pleased,—absolute exclusion, if two dollars and one dollar did not exclude. We had a right to legislate with a simple view to our own interests in that matter; and neither the Crown nor the Dominion could be heard on the floor of Congress. But we have bound our hands, we have pledged ourselves that we will put no duties on any of their fish of any kind, fresh or cured, salted or otherwise, or their fish oil. They may, so long as the treaty lasts, be imported into any part of the United States without any incumbrance or duty whatever. Now, that the United States is the chief market for the mackerel of these Provinces, I suppose it cannot be necessary for me to refer to any evidence to remind your Honors. We have had before us the merchants who deal most largely in Prince Edward Island, Mr. Hall and Mr. Myrick, and we have had two or three or more merchants of Halifax, who did not come here for the purpose of testifying against their own country, and in favor of the United States; and from all this evidence it appears conclusively that, with the exception of some bad mackerel, ill-pressed or ill-cured, and liable to be injured by heat, that may be sent to the West Indies to be consumed by slaves, the entire product goes to the United States. There is no market for it in Canada proper; and the merchants here, the dealers in fish, lie awaiting the telegraphic signal from Boston or New York to send there whatever mackerel there is, now that they are free from duty, which is saved to them. I therefore think I may safely pass over the testimony introduced to prove that the United States is the great market. Some statistics were prepared to show that a duty of two dollars a barrel was prohibitory. In my view, it is quite immaterial. I cannot see how it is material, because, having the power to lay any duties we pleased, we have agreed to lay none, and the benefit to Great Britain, to these Provinces, and to this Dominion is the obtaining of a pledge not to put on any duty, high or low, from a people who had the right to exclude the fish utterly, or to make their utter exclusion or their admission, dependent upon our sense of our own interests from day to day. Why, until recently, the corn-laws of England were based upon this principle, that they should exclude all foreign corn, as it is called in old mother English, all foreign "wheat," so long as England could supply the market, and whenever England failed to fully supply the market, then the foreign corn was gradually let in, according as the market price rose. We might do that; we might do what we pleased; but we have tied our hands, and agreed to do nothing.

The evidence presented by my learned friend Judge Foster, and by my learned friend Mr. Trescot, to show that two dollars a barrel was prohibitory, on the testimony of these gentlemen from Prince Edward Island, and from the leading dealers in Provincetown and in Gloucester, was certainly abundantly sufficient. I think those gentlemen from Prince Edward Island said that if those duties were reimposed, they should retire from the business. Mr. James H. Myrick (page 432) in answer to the question:—"I understand you to say that if the duty on mackerel was reimposed in the United States your firm would, except for a small portion of the season, give up the mackerel business and turn to something else?" said—"That is my opinion decidedly."

Mr. Isaac C. Hall, (page 485) says:

"Q. Now, you take No. 3 mackerel, what would be the effect of a duty of $2 a barrel in the United States markets? A. We could not catch them and ship them there unless there was a great scarcity there as happens this season.

"Q. Practically what would become of your business of catching mackerel if the duty of $2 a barrel were re-imposed? A. Well, when a man runs his head against a post he must get around the best way he can."

"Q. You are satisfied you could not add the duty to the price of the mackerel in the United States market? A. No it can't be done."

Then Mr. Pew, of Gloucester, testifies to the same effect; but I suppose there can be no doubt, under this weight of testimony, that the money charge against Great Britain is for the privilege of exemption from prohibitory duties, whatever may be prohibitory, whether it be two dollars or more.

Now, how was it, with this plain fact in view, that the learned counsel for the Crown were able to produce so many witnesses, and to consume so much time, in showing that they did not, after all, lose much by two dollars a barrel duty? Why, my learned friends who have preceded me have exposed that very happily. I fear if I were to say anything I should only detract from the force of their argument; but I think it is fair to say, that it will rest on our minds after we have adjourned and separated, as a most extraordinary proceeding, that so many men were found in various parts of the Island, and from some parts of the mainland, who came up here and said that the fact that they paid a duty of two dollars on a barrel of mackerel before they sold it in the States, which is their only market, did not make any difference to them. They said it did not make *any* difference. They did not say it made little difference, but they said it did not make *any*. Now, if they had said,—"We can catch the fish so much cheaper because this is our home; we can catch them so much cheaper, because we catch them in cheap vessels and with cheap materials, close by where we live, that we can afford to undersell, to some extent, the American fishermen; and therefore the two dollars a barrel is not all to be counted as a burden," that would be intelligible. But these fishermen suddenly, by the magic wand of my learned friend, the Premier of the Island, and my learned friend who represents—I do not know in how high a position—the Province of New Brunswick, were all turned into political economists. "Well, my friend," says the learned counsel for Prince Edward Island, with that enticing smile which would have drawn an affirmative answer from the flintiest heart,—"My dear friend, about this two dollars a barrel duty, does not that affect your profit in selling in Boston?" "No," says the ready witness. "And why not?" "Why, *because the consumer pays the duty.*" Then the next witness, under perhaps the sterner—but still equally effective—discipline of the counsel from New Brunswick, has the question put to him, and he says, "No;" and when he is asked how this phenomenon is to be accounted for, he says, too, that "the consumer pays the duty;" until, at last, it became almost tedious to hear man after man, having learned by heart this *cantalina*,—"the consumer pays the duty,"—perfectly satisfied in their own minds that they had spoken the exact truth, say that it did not make any difference. What school of politicians, what course of public lectures, what course of political speaking, what course of newspaper writing, may have led to that general belief, or at least expectation, of those fishermen who came here as political economists, of course it is not for me to say. But I have observed one thing, that even with my limited knowledge of political economy, (which, I confess, is very

limited,) and with my moderate powers of cross-examination, not one of those witnesses could explain what he meant by the phrase, "the consumer pays the duty;" nor could he answer one question that went to test the truth of the maxim. "Suppose the duty had been five dollars a barrel, would it have been true that the consumer paid the duty, and that it would not disturb you at all?" Well, they did not know but that, in that case, it might be a little different. "But the principle would be the same?" No, they didn't know how that would be. "Will the demand continue at that price?" That, they did not know, but they assumed it would. The truth was, as the Court must have seen, that they were simple, honest men, who had a certain phrase which they had learned by heart, which they used without any evil intent, which they supposed to be true, and which, to their minds, cleared the matter all up. They seemed to think there was a certain law,—they did not know what,—a law of nations, a law of political economy, by which it came to pass, that, whenever they brought a barrel of mackerel to Boston to sell, the purchaser went kindly to the custom-house and paid the duties, and then, having paid the duties, was prepared to deal with the owners of the fish on the same terms as if he had not done so, buy the fish, and pay them just what he would pay an American; and by some law, some inexorable law, the duties were paid by this man; and, the duties having been paid by him, the owners might go into the market to sell as low as anybody else. I think the question was not put, but it might have been put to them:—"Suppose the duty, instead of being laid by the United States, had been laid by the Provinces. Suppose the Dominion, for some reason or other, had laid a tax of two dollars a barrel on the exportation of fish to the United States,"—where would this political economist from Gaspe and from Shediac have been then? Why, certainly he would have had to pay his two dollars a barrel before his fish left the Provinces, and he would have landed in Boston with his barrel of mackerel, so far as the duties went, two dollars behind the American fisherman.

I suppose it to be the case, that the British subject can catch his fish and get them to Boston cheaper than the American can. We have better vessels, we pay higher wages, we must have larger, stronger, vessels, to come here and go back, to and fro; we cannot fish in boats; they can catch cheaper; and, therefore, it is true that in fair, open competition, they have an advantage. I give them that credit on this calculation, and I hope your Honors will remember it when you come to consider what they have gained by the right to introduce their fish on free and equal terms with us. They are persons who can cateh cheaper and bring cheaper than our own people. However, without reasoning the matter out finely, we must come to this result: that if the Americans can supply the market at the rate of twelve dollars a barrel, and make a reasonable profit, and the Canadian can furnish his fish at the rate of eleven dollars and make a reasonable profit, and has two dollars duty to pay, he is one dollar behind, and so on. This is an illustration. It must ordinarily be so. And the only time when it can be otherwise, is when the American supply fails, and fish become very scarce. I am sure that when I began the investigation of this case, I should have thought that it was in the main true, that, as fish became scarce on the American coast, and from the American fishermen in the Bay everywhere, the British fishermen coming in there, could, perhaps, afford to pay the duty and still sell. But such is not the result. The figures have shown it. That has been proved. The difficulty is, that mackerel is not a necessity. It is not British mackerel against American mackerel, but it is British salted mackerel against every eatable thing in nature, that a man will take to, rather than pay very high prices. And it is true that fresh fish are more valuable and more desirable than salt fish; that fresh fish are increasing in number; that they are brought into market in quantities, ten, twenty, a hundred per cent larger than they ever were before, and that the value of the salted mackerel is steadily and uniformly decreasing.

They brought men here also, who stated, under the same influence, that they would rather see the duties restored, and have the three-mile fishery exclusively to themselves, than to have what they now have. But I observed that the question was always put to them in one form: "Would you rather have the two dollar duty restored?" The question was never asked them: "Would you rather go back to the state of things when the United States could put what duty upon your fish they might see fit, and preserve your monopoly of the three miles?" No man would have answered that question in the affirmative. I venture to say, may it please this learned tribunal, that no man of decent intelligence and fair honesty could have answered any such question affirmatively. And those who said they would rather go back to the same state of things, testified under a great deal of bias; they testified under a very strong interest, on a subject right under their eyes, which they felt daily, and which they may have been made to feel by the urgency of others. They did not suffer at all. It was not they who suffered from the attempt to exclude us. It was amusement to them, though it might have been death to some of us; and they imagined that if they did not have the duty to pay, which they all based their answer upon, of course they would rather go back to free trade and exclusion, for in their minds it amounted to that. They had not the duty to pay, although one was laid, and of course with no duty to pay, thay would rather go back to that old state of things, and have the exclusive right to fish within three miles. I think that illusion may be safely predicated of nearly all the witnesses brought upon the opposite side, by the counsel for the Crown.

A good deal of time was taken up on each side in presenting extracts from the speeches of politicians and parliamentarians, and men in Congress, as to what was the real value of free trade in fish, and the real value of the right to fish within three miles. Some extracts were read by the learned counsel for the Crown, from speeches made by certain members of the American Congress, who had a point to carry, and some arguments, much stronger, were produced by us from members of the Dominion Government, who also had a point to carry. I do not attach the very highest importance to either of them. I hope I am guilty of no disrespect to the potentates and powers that be, in saying that, because I have always observed that men in public life who have points to carry, will usually find arguments by which to carry them, and that their position is not very different from that of counsel, not before this tribunal, but counsel in court, strictly speaking, who have a point to maintain, and who have a verdict to get, because, woe to the statesman whose argument results in a majority of negatives, because he and his whole party, under the Dominion system, go out of power. It is not so with us. Our members of Congress speak with less responsability. They do not represent the government in the House, nor do they represent the opposition in such a sense that they are bound to take charge of the government the moment those in charge fail of retaining public approval. Our politicians even in Congress, are a kind of "free-swimming fish." They are rather more like a horse in a pasture than like those horses that are carrying the old family coach behind them. They feel more at liberty. When we consider that the Dominion Parliamentarians speak under this great responsibility, and meet an opposition face to face, who speak under equal responsibilities, when we consider that fact, and the number of them, and the strength of their declarations, all to the effect that the Provinces could not survive our duties any longer, and that in giving up to us the right to fish within the three miles, much was not surrendered, I think your Honors, without reading it all over, or comparing these arguments, argument for argument, may say at once that whatever weight is to be attached to them, far more weight is to be attached to the utterances of the British officers, than to the few American politicians, who may have lifted up their voices on this subject, in their irresponsible way. Moreover,—your Honors cannot have forgotten it,—the fishermen of Provincetown and Gloucester remonstrated against this Treaty of 1871. They remonstrated against it as against their interests. Be it so. They were good judges of their interests. They stated that taking off the duties would make the fish cheap. They thought so; and they did not consider that the right to fish

(and they were fishermen, and knew their business) within the three miles was any compensation for that. And the remonstrance was made at the time, and it was earnest. The men went to Washington to enforce it. While men dealing in fish remonstrated against this concession, the officers of the British Crown, who were responsible, and whose constituents were fishermen and fish-owners, along a certain line of the Provinces, were contending earnestly for the Treaty as beneficial, absolutely, to the Provinces.

Well, it has been said that they knew all the time that there was money to be paid. They knew no such thing. They knew there might, or might not be money to be paid, because this Tribunal does not sit here to determine the *quantum* that the United Ssates shall pay, but first and foremost, to determine whether anything shall be paid, and that they could not pass any judgment upon. It certainly has abundantly appeared in this case that the exportation of fish into the United States, and the value of the fish here has risen and fallen steadily, and almost uniformly with the right of free trade, or the obligation to pay the duty. From 1854 to 1866, when there was free trade in fish, and we had the right to fish where we pleased, and they had free trade, and sent their fish to the American markets, immediately their mackerel fishery increased in value. Their boat-fishing, instead of being a matter of daily supply for the neighborhood, developed into a large business. The boats were owned by merchants, large quantities were shipped from them, and the business increased two-fold, three-fold, ten-fold, as one of their own witnesses has stated, stimulated by the free American markets. I am reminded that the witness said it had increased an hundred-fold. Your Honors will perceive my moderation in all things. The witness to whom I refer is the fellow-citizen of our friend the Premier of the Island, Mr. John F. Campion, and I think he recognized him immediately upon his appearance on the stand:—

"Q. You say that the number of boats and men engaged in the shore fishery have increased; has the catch increased to any appreciable extent? A. It has in creased in the same ratio as the boats.

"Q. In quite the same ratio? A. Yes.

"Q. To what extent did you say the number of boats had increased—100 per cent? A I would say that this has been the case within the last ten years."

"*One hundred per cent,*" says Mr. Campion, from Prince Edward Island. He says this increase has taken place within the last ten years, but he does not undertake to define how far that increase began before 1866, whether it continued in the interval between 1866 and 1871, and how far it was resumed afterwards. But we find that five years after the conclusion of the Washington Treaty, the boat-fishing had increased one hundred per cent., and we know that it is the freedom of trade in fish that has made the boat-fishing of those islands; that has brought about their increase in size, which every witness has testified to who has been asked the question. I do not know whether my learned friends have asked the question or not, but we have asked it, and it having been testified to by two residents there, Mr. Hall and Mr. Myrick, and the Government of Great Britain having had ten days allowed them to bring rebutting testimony, brought none, we may, therefore, consider that matter as settled, that their growth has been largely in boat-fishing,—in the number of boats, the number of men employed, the quantity of the catch, and the amount of capital invested,—and that an examination will show that it is to the freedom of trade in fish that they owe it entirely.

I will read a few words to Your Honors from Mr. Hall's testimony, who has very large experience, living, or if not living, doing business on the northern part of the bend of Prince Edward Island:—

"Q. The boat fisheries of Prince Edward Island have increased and flourished very much for the last few years? A. Yes, very much. They have good reasons for it.

"Q. What reasons? A. A better class of fishermen. When we first started business we had, of course, to work with green hands. Like every other business, it has to be learned, and men have to be prepared for it. Then when the duties were put on the best fishermen left us and went aboard American vessels. They could ship from the Island or go to Gloucester and get good vessels and have their fish go into the United States and sell for their whole value. We had no market and had inferior men. Now, since we have a free market, these men have been coming back. The character of the men and their ability to fish has increased very much. So much so that I honestly think you can calculate the catch of the same number of men now at 25 or 33 per cent more than it was formerly.

"Q. To what do you attribute this greater supply of boat fishermen and better quality? A. These men find they can fish here. This is their home in many cases. A great many get boats and find they can do very well here now fishing, and they stock at home and fish from the shore

"Q. Now if the Island were cut off from the United States market, what would become of this boat fishing, and what would become of the fishermen? A. Well, these fishermen would probably go back to their old business. I would not want to fish if I had to pay the duty on mackerel."—*American evidence, p.* 483.

Then we have the testimony of Mr. James R. McLean, of Souris, P. E. I., called by the other side, and coming from the strongest point in favor of compensation, that is, the bend of the Island:—

"Q. We had to pay $2 a barrel duty on the mackerel we sent to the United States, and the men would not stay in the Island vessels when they saw that the Americans were allowed to come and fish side by side with the British vessels, and catch an equal share of fish; of course this was the result. The fishermen consequently went on the American vessels; our best men did so, and some of the best fishermen and smartest captains among the Americans are from Prince Edward Island and Nova Scotia."

There has been put into my hands what may be called an "account stated" on this subject of the balance between what is gained by the Provinces by the removal of the duties, and what we gain by the extension of your right to fish. The principle on which it is made up is most unfavorable to us; I do not think it is a sound one, but some persons may. At all events, it is the most unfavorable to us;

GREAT BRITAIN,

To UNITED STATES, Dr.,

To saving of duties on fish and fish oil for 12 years, averaged from the returns of '74, '75, and '76 from Appendix O.	$4,340,700.00
CR.	
By value of mackerel caught within 3 miles of coast for 12 years, at $3.75 per barrel, allowing one-third to have been taken within 3 miles of the shore, and assuming the catch for each year as equal to that given in the Port Mulgrave returns for 1874, (63,078½ bbls.)	$946,177.50
Balance due United States	$3,394,522.50

We were obliged to take Port Mulgrave returns for the year 1874, because, as your Honors will recollect, nothing could extract the returns for 1875 and 1876 from the hands of the British counsel. No words of

advice, no supplication, no bended knees, nothing could get from them those returns, so favorable to the United States, and we took the returns of 1874.

But, supposing it to be true that the exporter does not pay all the duties,—of course, nobody believes that he pays nothing; but, give him the fairest possible chance, supposing he pays one quarter, and the consumer pays three-quarters, the result then is, that against the $946,179.50 credited to Great Britain, we put one-quarter of the United States' duties remitted, $1,085,175, and it leaves a balance of $138,997.50 in favor of the United States.

So that, bringing this matter as far as statistics can bring it, getting the value of the fish in Prince Edward Island, irrespective of the labor put upon it afterwards, assuming one-third of the fish to be caught within the three-miles, and to be of equal value with those caught outside, which certainly is not true; and supposing that of the duty of two dollars a barrel only one-quarter is paid by the consumer, still the balance remains in favor of the United States. If, gentlemen of the Commission, such is to be the mode of treating this subject, by taking values and balancing one against the other, that is the result.

I do not suppose, myself, it is possible to arrive at any satisfactory result by any such close use of statistics, on the other side or on ours. But a few general principles, a few general rules for our guidance, certainly are to be found in all this testimony and in all this reasoning. You have the United States able to put on what duties it pleased. You have its actual duties at two dollars per barrel, substantially prohibitory, which everybody said was prohibitory, except those deeply instructed political economists who come here with the impression that some good friend paid the duties for them, to enable them to get into market on equal terms with everybody else. That you have with certainty. Against that, you have the most speculative opinion in the world, and that is as to the value to us of a franchise or a faculty, or a privilege, or a liberty to pursue the free swimming fish of the ocean a little further than ordinarily pursue him, with every vessel of ours coming into competition with fishermen from boats, who have every advantage over us, and to ascertain the value of that franchise, privilege, faculty, or whatever you may call it, irrespective of all the capital or industry that must be employed in its exercise.

Will your Honors, before I take my seat, allow me to recapitulate, at the risk of tediousness, so that there may finally be no misapprehension, the points upon which the United States expects a favorable decision from this Tribunal? I mean, not merely a decision in favor of peace, which we all hope for, but, technically, I mean a decision of this sort: that, having before you a matter of clear money, and of the absolute right to lay duties without restriction, and a duty always laid of two dollars a barrel, from which the Dominion is now protected, and free admission to a market, which is their only market, you cannot find in the value of this faculty or privilege,—taken in its historic view, taken with all its circumstances, its uncertainties, its expenses, the perils of exercising it, and all,—that you cannot find in that an amount of money value which equals the money value which the Dominion certainly does receive.

Bringing it down, then, to a very few points, our position is this: We had, from the beginning, down to 1818, a right to fish all over this region, without any geographical limitation; we held it as a common heritage with all British subjects; we helped to conquer it, to bring it into the possession of Great Britain; we always regarded it as ours. When we had the war of the Revolution, we put that and everything else at stake. I concede it. The war did not destroy it. War never does. It is not the declaration of war that transfers a city from you to your enemy, it is the result of the war. Every war puts at stake the whole territory. During the wars the boundaries of the two nations are the line of bayonets, and nothing more nor less. But when the war ends, if it is a conquest, the conquered party has no territory to bound; he depends on the will of the conqueror. If there is no conquest, and the Treaty is made upon the principle of *uti possidetis*, then the line of bayonets, when the war closed, is the boundary. If peace is made upon a special arrangement, or on the principle of *in statu quo ante bellum*, then the powers are restored to their old rights. The peace which followed our Revolution was upon the latter principle. There was no conquest,—certainly none by Great Britain over us,—and peace was made upon the principle *in statu quo ante bellum*, except that we arranged for convenience, the boundary line a little different from what it was before the war. Everything else stood as it stood before, on the principle *in statu quo ante bellum*. And so stood the fisheries, which were just as much our possession, our property, and always had been, as anything else that we held. We held them under our charters, and we held them by right to the last, and the Treaty was careful to say so; because, as pointed out by Lord Longhborough in the House of Lords, and by Lord North in the House of Commons, who was the instrument in the hands of the King in bringing about the unhappy war, (no one, I think, considers it was "unhappy" now, on either side.) They said,—This treaty does not concede the right to the Americans to fish within three miles; it acknowledges it as an existing right, as one that they always had, and it makes the usage to fish by the Americans as the final proof, in all disputed questions of geography, political or natural. And so it rested, down to 1818. When the Treaty of Ghent was made, in December, 1814, at the close of our war, the parties came together. The Americans utterly refused to hear a word calling in question their right to the fisheries, or of geographical limits. Mr. Adams had his famous controversy with Earl Bathurst, in which that question was so fully argued, summarized in one portion of Mr. Wheaton's work on international law, which has been the study of statesmen ever since, and still more fully, perhaps, in Mr. Adams's book, which has been alluded to, in the controversy between himself and a certain politician who had undertaken to write a copy of a letter different from the original, but where he went into the whole question from beginning to end.

But, in 1818, when Great Britain was at peace with all the world, and when the two nations stood face to face over this subject, Great Britain claiming largely, we did not know what, fifty miles, sixty miles, unlimited King's Chambers, when vessels were arrested sixty miles from the shore, on the ground that they were in the King's Chambers, when they claimed that the Gulf of St. Lawrence was the King's Chamber, where we had no right to fish, when the three-mile line was a new thing in international law; when each nation found it could not compel the other, and both were desirous of peace, both had seen enough of fighting to desire that there should be no more fighting between brethren, that they should not shed brothers' blood over any contestation in a mere matter of money or interest, and not so much a matter of honor, of sentiment, as it might have been at any moment, if any blood had been shed,—then the two Great Powers came to a compromise, and Great Britain agreed by implication that she would not assert any claim of exclusion anywhere beyond the ordinary lines. Not a word was said on that subject. She never surrendered those extreme claims in terms, any more than she surrendered, in terms, the right to board our ships, and take from them, at the discretion of the commander, any man whom the officer thought spoke the English tongue as an Englishman, and not as an American. It was never conceded to us, although we fought a war upon it; but no one believed it would ever be attempted again to be put in force. But, as to what was specifically done, it was a compromise. Great Britain was not to exclude us from the Magdalen Islands, within the three mile line, or any geographical limit of the Magdalen Islands, or from Labrador, from Mount Joly northward indefinitely, or from certain large portions of the coast of Newfoundland; and, on the other hand,

we agreed that England might exclude us,—it was a treaty agreement,—during the continuance of the treaty, from the rest of the Gulf of St. Lawrence, within three miles of the shore. Unquestionably, as the letters of Mr. Gallatin and Mr. Rush, who made the treaty, show, we thought we had gained all that was of value at that time. It was not until about the year 1830 that this great change in the fisheries themselves came in; when they ceased to be exclusively cod fisheries, and became mainly mackerel fisheries. Then the importance of landing upon the shores to dry our nets and cure our fish was reduced to nothing, I mean, practically nothing. We put it in the treaty of 1871, but it has never been proved that we made any use of that liberty or power.

The advent of the mackerel,—one of those strange mutations, which seem to govern those mysterious creatures of the sea,—the advent of the mackerel to this region, and to Massachusetts Bay, put a new countenance upon all this matter. It undoubtedly gave an advantage to the British side, and put us at once to somewhat of a disadvantage. Then came the demand of the islanders, and of the people of the Dominion, and others, to carry into effect this exclusive system, to drive our fishermen off, not only from the three mile line, as we understand it, but from the three mile line as any Captain of a cruiser chose to understand it. Nobody knew what the three mile line was. Was it to be drawn from headland to headland? They so claimed. They made maps and marked out a line, running the whole length of Prince Edward Island, within three miles of which we must not go. They made other lines, so that the Bay of St. Lawrence, instead of being an open bay, an international bay, for the use of all, was cut up into preserves for fish, for the sole use of the inhabitants of the Dominion, by these artificial lines, drawn upon no international authority; and we never could know where we were, whether we were liable to seizure or not; and we could not predict what decisions the Courts might make against us in case we were seized. It was a dangerous, a most unjust and unhappy state of things, the attempt to carry out the claim of exclusion at all, and nobody felt it more than Great Britain. She felt that it was, as one of the Captains of the Royal Navy said upon the stand the other day, immensely expensive to Great Britain to keep up this armament and this watch along the coast by British ships, and more particularly by the small Provincial cruisers. It was perilous to confide to these men, the new-born officers of the Provincial cruisers, the right to decide questions of international law, questions of the construction of the treaty, at their discretion, upon the quarter deck, with a deep interest to secure what they were in search of, that is vessels that could be seized. Then there was a guard of police to be maintained along the shore, and information to be conveyed from point to point. The result was irritation, collision, honest difference of opinion; the American fisherman saying, "I am more than three miles from that coast, I know," and the British Commander saying, with perhaps equal honesty, "You are less," and neither able to determine it; and the vessel is seized and carried into port, and nobody ever can determine where that vessel was when she was seized. And then we had pretty burdensome duties laid upon us by the Legislatures of these Provinces. The burden of proof was thrown upon every ship to prove that she was not subject to conviction, and she was liable to three-fold costs if she failed; she could not litigate the question without bonds for costs, and it seems to have been left to the discretion of the captor when he should bring his captured ship into port, until we hear at last a Judge in one of the Provinces calling for an explanation why it was that an American ship, unjustly seized and discharged by him, had not been brought before him for months, until the voyage was destroyed, the men scattered, the cargo ruined, and the vessel greatly deteriorated; and no answer was given, nor did their majesties, the commanders of the cutters, think it necessary to give any, and I do not suppose it was. The whole subject became a matter of most serious diplomatic correspondence, and, as I had the honor to suggest, (and it was too painful a suggestion to repeat), a very little change in the line of a shot might have brought these two nations into war; because, when passion is roused, when pride is hurt, when sympathies are excited, it is hard to keep peace between even the best governments and most highly educated peoples. They feel the point of honor, they feel the sentiment, that the flag has been insulted, that blood has been shed. The whole subject became too perilous to allow it to stand any longer. Great Britain was also led into difficulties with her Provinces, by reason of their efforts to make the most of their three mile exclusion, to which she was utterly indifferent. The Provinces saw fit to make their lines as they pleased, and when they could not bring their great capes or headlands of the bays near enough together to exclude us, then they increased the line of separation, which the law established. If "the mountain would not go to Mahomet, Mahomet must go to the mountain." If the bay persisted in being no more than six miles wide, then the provincials met it by a statute that it would do if it was ten miles wide; and they were telegraphed instantly from England, "That will not do; you must not treat the American people in that way. Go back to your six mile line," and they obeyed at once. Then they attempted to reconcile the whole matter by the aid of a suggestion from Great Britain to give us licenses to fish within the three miles, upon a nominal rent. "They have always fished there," she said. "We cannot have peace unless they do. We have tried to exclude them, and it is in vain. We must give up this exclusion; but we do not want to give it up and surrender it for nothing. We do not care for their money, but let them pay us a nominal license fee as a recognition of our right to exclude." Very well; they put the fee at fifty cents a ton, and many Americans paid it; not, they said, because they considered the right to fish further than they had fished to be worth that amount, but peace was worth it, security was worth it. To escape the claws of the cutters and local police, to avoid the uncertainty of a conflict of judicial opinions, such as I have had the honor to lay before you, they did pay, to some extent, the charge for the license.

Then, as I have said, in that unaccountable and unaccounted for manner, the license fee was increased from fifty cents to a dollar a ton, and from a dollar a ton to two dollars a ton, with the certain knowledge that as only a portion had paid the fifty cents, and a much smaller portion had paid the one dollar, probably none would pay the two dollars, and so substantially it turned out. Now, why did they do it? I do not know, as I said before. I charge nothing upon them. I only know the result was, that we could not afford to pay the license. It was no longer what the British Government intended it should be, a license fee of a merely nominal sum, as an acknowledgment of the right, but it put us, unlicensed, entirely in their power. Then, they let loose upon us their cutters, and their marine police. Well, the two nations saw it would not do; that the thing must be given up, and we came first to the Treaty of 1854, and for twelve years we had the free scope of all these shores to fish where we liked, and there was peace, and certainly the British Government had free trade, and there was a profit to them, and I hope profit to us; and then we terminated that Treaty, because we thought it operated unequally against us. We got nothing from the extended right to fish, while they got almost everything from the extended free trade. Then came back the old difficulties again. We returned to our duties, two dollars a barrel on mackerel, and one dollar a barrel on herring, and they returned to their system of exclusion, and their cutters, and their police, and their arrests, and their trials. It became more and more manifest that they could not use their fisheries by their boats to profit, and we could not use them by our vessels to profit, and all things bearing together, also the great difficulty that lay between us and Great Britain with reference to the *Alabama* cases, led to this great triumph, gentlemen, because, I do not care which party got the

best of it at this or that point, it was a triumph of humanity. It was a triumph of the doctrine of peace over the doctrines of war. It was a substitution of tribunal like this for what is absurdly called the "arbitration of war."

And now, gentlemen, that being the history of the proceedings, we have laid before you, on behalf of the United States, the evidence of what Great Britain has gained in money value by our tying our hands from laying any duties whatever, and she has laid before you the benefits she thinks we have gained by the right to extend our fisheries along certain islands and coasts, and you are to determine whether the latter exceeds the former. Great Britain, I suppose, stimulated solely by the Dominion, called for a money equivalent, and we have agreed to submit that question, therefore, we have nothing further to say against it. We stand ready to pay it if you find it, and I hope with as little remark, with as little objection, as Great Britain paid the debt which was cast upon her by another tribunal. The opinion of counsel sitting here for seventy days in conducting the trial, and in making an argument on the side of his own country, is extremely liable to be biased, and I therefore do not think that my opinion upon the subject ought to be laid before this tribunal as evidence, or as possessing any kind of authority. I came here with a belief much more favorable to the English cause,—I mean, as to what amount, if any, Great Britain should receive, from that with which I leave the case. The state of things that was developed was a surprise to many; the small value of the extension of the geographical line of fishing to our vessels,—I mean, to vessels such as we have to use,—to the people of the United States, and the certain value that attaches to the Provinces in getting rid of duties, has given this subject an entirely new aspect, and has brought my mind very decidedly to a certain opinion; and I am not instructed by my government to present any case that I do not believe in, or to ask anything that we do not think is perfectly right, and the counsel for the United States are of one opinion, that when we ask this Commission to decide that there is no balance due to Great Britain, in our judgment, whatever that judgment, may be worth, it is what justice requires the Commission should do.

I have finished what is my argument, within the time which I intended last night; but, Mr. President and gentlemen, I cannot take leave of this occasion, and within a few days, as I must, of this tribunal, without a word more. We have been fortunate, as I have had the honor to say already, in all our circumstances. A vulgar and prejudiced mind might say that the Americans came down into the enemy's camp to try their case. Why, gentlemen, it could not have been tried more free from outside influence in favor of Great Britain had it been tried in Switzerland or in Germany. This city and all its neighborhood opened their arms, their hearts, to the Americans, and they have not, to our knowledge, uttered a word which could have any effect against the free, and full, and fair decision of our case. The counsel on the other side have met us with a cordiality which has begun friendships that, I trust, will continue to the last. I say here and now, on behalf of my country, that we have had a trial under circumstances perfectly equal. We have had the utmost freedom. We have felt the utmost kindliness everywhere. I can say, in respect to my associates in this case, (leaving myself out), that America has no cause to complain that her case has not been thoroughly investigated by her agent and counsel, and fully and with great ability presented to the Court; and I am certain that Great Britain and the Dominion, represented here by an agent from the Foreign Office, devoted to the work before him, assisted by the constant presence of a member of the Dominion Parliament, largely acquainted with this whole subject, and with five counsel, one from each Province of the Dominion, all capable, all indefatigable, with knowledge and skill, cannot complain that they have not been fully and ably represented. But, after all, the decision,—the result, depends upon you three gentlemen who have undertaken, two of you, at the request of your respective countries, and His Excellency at the request of both countries, to decide this question between us.

It has been said, I have heard it, that your decision will be made upon some general feeling of what, on the whole, would be best for the peace of the two countries, without much reference to the evidence, or to the reasoning. Mr. President and gentlemen, we repudiate any such aspersion upon the character of the Court. We know, and we say it in advance, not that we *hope* this tribunal will proceed according to the evidence, and decide in accordance with the evidence, and the weight of reasoning, but it must be so, and we congratulate Your Honors and Your Excellency in advance, that when this decision shall have gone out, whether it be for the one side, or for the other, whether it be a pleasure or a pain to the one side or the other, or both, that it will be decided upon those principles which it is manifest the treaty determined it should be decided upon, not from some local or national view of policy for the present or future, not upon something which some hope may by-and-by result in something better than the present treaty, but that you will confine yourselves to exactly what the treaty asks and empowers you to do, to determine what now shall be the pecuniary result; and I again congratulate this tribunal in advance, that its determination, will be such, that whatever may be the result, and whatever the feeling, the two countries will know that the case has been heard under circumstances the most favorable possible to fairness, before a tribunal of their own selection, and that each of Your Honors will know that you have been governed by principle, and by that rule of conduct which alone can give a man peace at the last.

FINAL ARGUMENTS ON BEHALF OF HER BRITANNIC MAJESTY.

No. VII.

MR. WHITEWAY.

THURSDAY, Nov. 15, 1877.

The Conference met.

Mr. Whiteway addressed the Commission as follows :—

The duty devolves upon me in taking my part in the closing of this case, which has now engaged your most earnest attention for a period of over five months, of addressing you, first, on behalf of Her Majesty's Government, and in the discharge of that duty it has not been assigned to me, nor is it incumbent upon me to refer to the various Treaties which, from time to time, have existed between Great Britain and the United States, relating to those important fisheries, which are the subject now under consideration. I apprehend that it is of little import, in respect to this case, whether the Reciprocity Treaty abrogated the Treaty of 1818, as contended for by the learned counsel on the opposite side; relegating our position to the status existing under the Treaty of 1783; or what effect the war of 1812 had upon the then existing Treaties. These are questions outside the matters now under discussion, and I shall not deal with them. It is sufficient for me to take the Washington Treaty of 1871, which has been correctly termed "the charter of your authority," the bond under which you are acting, and make it the foundation of my argument. I am sure that no one who had the privilege of being present, and the opportunity of listening to the able exposition of my learned friend, the Hon. Mr. Foster, the racy, humorous and slashing speech of my friend Mr. Trescot, and the classical and philosophical composition of Mr. Dana, could but feel that the United States had been represented by able and efficient men, possessing all the ability and earnestness which could possibly be conceived to be necessary, in order that the case of the United States might be placed before this Commission in the best possible light; and I heartily believe that there is existing between the Agents and the Counsel, engaged in the conduct of this most important cause, an unanimous desire and an earnest zeal that justice may be meted out, and that your verdict may be such as will be satisfactory to each High Contracting Power, and have a material and lasting effect in the promotion of peace and harmony, between Her Majesty's subjects on the one part, and the citizens of the United States on the other. Reviewing, however, the speeches of the learned gentlemen to whom I have referred, it does appear to me that there has been a vast deal of irrelevant matter introduced; and that the real issues involved have been, in a manner, ignored, and cast into the background. Substantially no defence has been offered on behalf of the United States which materially affects the issue. Is there a substantial claim of Great Britain or not? It seems generally admitted that there is a right to receive something, and the question for you now to decide is not as to whether any sum is to be awarded to Great Britain, but simply as to the amount at which Her claim should be assessed.

I now propose to discuss briefly the main issues involved, namely: the advantages derived, respectively, by each of the high contracting parties, under the Treaty of Washington; and the arguments which I desire to advance in support of the claim of Her Majesty's Government, I may here observe, will be confined entirely to that branch of the enquiry which has reference to Newfoundland; and I shall limit my observations to a consideration of such facts as have a direct practical bearing on the substantial advantages for which compensation is claimed. It has not been assigned to me to treat in any manner of the historic or diplomatic features of the case; these subjects, as far as it may appear requisite, will be, I do not doubt, ably and powerfully dealt with by my learned friends who will follow me on the British side.

It would be an unwarranted occupation of the time of this Commission for me now to revert to that interlocutory judgment which was delivered on the 6th of September last, by which it was decided that: "it is not within the competence of this Tribunal to award compensation for commercial intercourse between the two countries, nor for the purchasing bait, ice, supplies, etc., etc., nor for the permission to transship cargoes in British waters." I may safely leave it to the consideration of Your Excellency and Your Honors, to what extent this decision shall weigh with you in arriving at the award which will be given by you. Narrowed and limited, however, as the subject of this investigation now is, as compared with what we supposed it would be at the outset. I must confess that I was not prepared for the summary disposal by my learned friend, Mr. Foster, of the claim made on behalf of Newfoundland. As I understand, in his speech, he asserts that that claim is presented, not for the privilege of fishing in the territorial waters of that Island, but for the privilege of enjoying commercial intercourse with the people; and that the latter has been eliminated from this controversy by the decision of the 6th September. Further, he says, that there has been no fishing done by the United States citizens in the waters of Newfoundland, except the catching of a small quantity of halibut, and the jigging of a few squid after dark. Were such in reality the nature of the claim, it would be difficult to conceive how such could be seriously preferred in an international enquiry of such importance; but surely my learned friend must have neglected to peruse the Case presented, and to attend to the evidence adduced in support of it, (which I cannot conceive him to have done) or he must have felt his inability to meet it with direct facts or arguments, and deemed it a wiser course to keep it conveniently in the background by dismissing it with a few depreciatory remarks. Much testimony is, however, before you, proving that United States citizens have prosecuted what are to them most valuable fisheries, in the inshore waters of Newfoundland, to which evidence I shall presently draw your attention; but even supposing there had been up to the present time no such fishing, I cannot conceive, nor do I believe you will be of opinion that Article XXII, of the Treaty, will admit of the construction that a claim for compensation should be ignored for a privilege conferred upon the United States for a term of years, even if that privilege had not been availed of for a portion of the time. It does not follow but that, immediately your award is given, the privilege would be exercised to the greatest possible extent for the residue of the term, when we should be left utterly without remedy.

I propose then, first, to consider what has been conceded to the United States as concerns Newfoundland, and what is the value of that concession; and, secondly, what has been conceded by the United States to Newfoundland, and the value thereof.

The fisheries of Newfoundland are of historic celebrity, and have been so since the day when Cabot, with his five vessels, steering north-west, on June 24th, 1497, caught the first glimpse of Terra Nova; and rejoicing in his success, named the high projecting promotory, which now bears the name of "Bona Vista;" and it is recorded that in such abundance were the codfish seen, that Sebastian Cabot called the country *Baccalaos*, in allusion to the circumstance; a name which still designates an island upon the coast. Of that period, which embraces the first century after the discovery of Newfoundland, we learn that by degrees there came to be attached to the codfisheries on the Banks and around the coasts more and more importance; and that in 1578, according to Hackluyt, no less than 400 vessels were annually engaged in this employ. From thence, until the Treaty of Utrecht, 1713, the French, always discerning the enormous value of these fisheries, availed themselves of every opportunity and pretexts, for further and further acquisitions, and for securing a foothold in the Island as a basis for fishing operations. By that treaty Great Britain was solemnly confirmed in the exclusive sovereignty of the entire territory, but the French were recognized as having the right of fishing concurrently with the English along certain portions of the shore, and in the use of the shore as far as was needed for certain purposes connected with the fisheries.

It is needless for me here to refer to the various treaties respecting the fisheries, which have been from time to time concluded between Great Britain and the United States, and between Great Britain and France since that date, suffice it to say that, prior to 1871, the United States enjoyed a liberty to fish between Quirpon and Cape Ray on the West coast, and between Cape Ray and the Rameau Islands on the South coast. By the Treaty of Washington, of the 8th May, 1871, United States citizens acquired the right to take fish of every kind between Rameau Islands and Cape Race on the South coast, and between Cape Race and the Quirpon Islands, comprising a large area of the most valuable inshore fisheries of the world.

We find a steady increase in the products of Newfoundland fisheries, from 590,460 quintals of codfish exported in 1805, to 1,609,724 quintals exported in 1874. The exports of herring have also increased, from 36,259 barrels in 1851, to 291,751 barrels in 1876, and the value of exports of fish and products of fish, from $4,466,925 in 1851, to $8,511,710 in 1874. This, then, is the enormous annual product of the British fisheries of Newfoundland, almost the sole support and sustenance of about 160,000 people. And this, be it remembered, is exclusive of what is taken on the coast of that Island at St. Pierre and Miquelon, on the coast of Labrador, and on the Grand Bank and other Banks by the French and by the Americans, of the amount of which we have no exact evidence before us; and it is also exclusive of the large quantity of bait fishes exported from Newfoundland to supply the French at St. Pierre. This result is the product of the labors of the Newfoundland fishermen, taken wholly from waters within three miles of the shore, except, for I wish to be particularly correct, the trifling quantity of about eight or ten thousand quintals of codfish, which Mr. Killigrew and Judge Bennett say may possibly be taken outside that limit. I wish particularly to impress upon this Commission the fact of the cod-fish being so taken close inshore, because it has been asserted, both in the United States Answer and in the Arguments of my learned friends on the other side, that the codfishery is a deep-sea fishery, and not carried on within territorial waters. Add to this, then, the large catch of fish by the French vessels upon the coast, and of the French and United States vessels upon the Banks, the former, according to the statistics handed in by Professor Hind, averaging for a period of 8 years—217 vessels with 8729 men; the latter forming a very large portion of the entire fishing fleet of the United States. Some approximate idea may thus be arrived at of the great wealth extracted from the Newfoundland fisheries. And it will no longer be a matter of surprise that this well-named Eldorado should have excited the cupidity of the French and of the United States.

The above includes the whole fishery of Newfoundland, Labrador, and the Banks, it will be seen what proportion of it is exclusively taken within the inshore limits thrown open to United States citizens by the Treaty of Washington, by the statements of Judge Bennett and Mr. Fraser, whose evidences will be found on pages 134 and 169, and who testify that it amounts, according to the statistical returns of the Island, to $6,000,000 per annum, taken by 15,000 men, excepting, as I before mentioned, about eight or ten thousand quintals, which may possibly be taken outside the three mile limit, and in some cases, as Judge Bennett tells us, within hailing distance of the fishermen's homes.

I have so far given concisely the result of these fisheries in the past, and their present annual product, from which may be formed an idea of their probable yield in the future, and these annual results are derived from the evidence of witnesses, whose testimony is incontrovertible,—which no attempt has been made to assail. I would now draw attention to the evidence of scientists, who have been examined before this Commission. Professor Baird, called on the part of the United States, says that "he, with a force of experts, naturalists and gentlemen interested in the biology of fishes, has been engaged for five years in the prosecution of enquiries into the condition of the fisheries, and that his principal object has been to ascertain what natural, physical, or moral causes influenced fish. "I think," says he, "the cod at the head of fish at the present day. There is no fish that furnishes food to so many people, the production of which is of so much importance, or which is applied to such a variety of purposes. The commercial yield is very great, and its capture is the main occupation of a large portion of the inhabitants of the sea-coast region of the Northern Hemisphere." As far as he can ascertain, there is a partial migration of the codfish. They change their situation in search of food, or in consequence of the variation of temperature, the percentage of salt in the water; or some other cause, and at the south of Cape Cod the fishery is largely off-shore; that is, the fish are off the shore in the cooler waters in the Summer, and as the temperature falls towards Autumn, they come in and are taken within a few miles of the coast. The fish generally go off-shore in the Winter, *but on the south coast of Newfoundland they maintain their stay inshore*, or else come in in large abundance; and the Professor refers to the coast of Labrador and Newfoundland *as specially favored localities,—as places inshore* where, among others, the largest catches of cod are taken, and, says the Professor, (p. 478 of United States evidence,) "it is certainly a notorious fact that herring are much more abundant on the coast of Newfoundland than they are on the coast of the United States; though whether the herring that are wanted on the United States coast could or could not be had in the United States, I cannot say, but I do think that herring are vastly more abundant in Newfoundland and the Bay of Fundy, than they are farther south."

Professor Hind, upon the same subject, says that he has given his attention especially to ocean physics, the habits of fish, and has made a particular study of the action of the Arctic current, and the effect of the Gulf Stream, for a number of years; agreeing with Prof. Baird, he gives the cod a primary position among fishes, and that it requires water of a low temperature. It always seeks the coldest water whenever ice is not present. (P. 3, Appendix Q.), he says also, "It is only where extreme cold water exists that cod is found throughout the year; and upon the American coast it is only where the Arctic current strikes that cod is found through the year."

A close study of history and authentic Fishery Records has enabled him to pronounce with authority that there are certain localities where the cod fisheries are inexhaustible, as the Straits of Belle Isle, the Grand Bank of Newfoundland, and to use the Professor's words, "*that amazing fishing ground on the south coast of Newfoundland.*" "*There is no portion of the world,*" *he says*, "*where there is such an amazing supply of cod. It has been so for* 300 *years and upwards. Compared with European fisheries, the Newfoundland and Labrador are far*

superior in every respect." That the Newfoundland coast fishery is, on an average, compared with the Norwegian fisheries, including the Lofoden Islands, (which Prof. Baird speaks of as being one of the most important and productive fishing grounds), as five is to three, or where 5 quintals of fish are taken at Newfoundland, 3 are only taken on the coast of Norway, including the Lofoden Islands. He says the Bays and all along the coast of Newfoundland, and also part of the Grand Bank, may be considered as the great spawning grounds of the cod, *and the great cod-fishery of the world*; the conformation of the coast, the depth of water, the deep Bays and Inlets, and the numerous islands surrounding Newfoundland, are peculiarly adapted to constitute that coast as the home of the codfish. (Hind, p. 6, Appendix Q.)—" I think there is no part of the world where, owing to the orographic features of the coast line, all the conditions of life for the cod are developed to such an extent as in the north-east coast of Newfoundland, the northern portion of the Grand Banks, and the southern part of the Island."

The diagram carefully prepared by Professor Hind, showing the progress of the Newfoundland fisheries from 1804 to 1876, is conclusive evidence of their continuously increasing value and importance. I do not wish to delay the Commission by referring to that most interesting evidence of Professor Hind, where he graphically describes the myriads of diatoms amid the icebergs of the Arctic seas, and traces, link by link, the chain of connection between the lowest minute forms of life, and the food of all fish inhabiting the cool temperature of the Arctic current; following the course of that current along the shores and banks of British North America, teeming with cod and other cold water fishes—but let us proceed, and see what practical men say on the subject, captains of United States Bankers. (Capt. Molloy, British Affidavits, p. 50, No. 53), says:—" From my experience and observation, I am of opinion that the Bank fishery off the coast of Newfoundland is capable of vast expansion and development, towards which the privilege of baiting and refitting in the harbours of Newfoundland is indispensable."

And Capt. Joseph P. Deneef, (British affidavits, No. 52, p. 50, Appendix G.,) confirms this statement in every particular.

It is sufficient for me to observe that the scientific researches and study of these learned professors, and the practical experience of these United States masters of vessels, combine to prove the vast source of wealth now existing in the Newfoundland waters, and the probability, nay, almost certainty, of their being still a richer mine of fishery-wealth than is apparent from their present partially developed state. My learned friend, Mr. Dana, admits the codfishery to be the great fishery of his countrymen, and, quoting the late Mr. Howe, he alleges the impossibility of its depletion.

I now come to the question of bait fishes, and the taking of them by Americans on the coast of Newfoundland. It was attempted to be shown by my learned friends on the other side that salt bait is better and less expensive than fresh. In the establishment of either of these positions a very short review of the evidence of their own witnesses will show that they have utterly failed. Major Low, put forth as an important witness upon this subject, had been one year fishing in the Gulf, three years fitting vessels for the fishery, two years a warrior, then a town clerk in Gloucester, and now an official in the post-office. Such a variety of occupations, no doubt, gave him knowledge to speak with authority. He produces from the books of Mr. Steele, an account of a codfishing voyage in the *Pharsalia*, in 1875, (p. 360, Appendix L.) fishing with fresh bait; and another account of a vessel, the *Madame Roland*, in 1873, (p. 363, *ibid.*) fishing with salt bait, and because the result of the *Madame Roland's* voyage in 1873 realized more than that of the *Pharsalia* in 1875, this, in the Major's opinion, is clear, conclusive evidence, that salt bait is better than fresh. But did it never occur to him that the codfishery in one year might be very prosperous, and in another unsuccessful? That two vessels in the same year might fish very near each other, even with the same appliances, and that one might be fortunate, the other not so. But the gallant Major then makes a great discovery, that in the fresh bait voyage there are some damaged fish, and he at once jumps to the conclusion that it is because fresh bait is used Here is the evidence in answer to my learned friend, Mr. Dana, (p. 362) :—

" Q. Before you leave that, I want to ask you in reference to an item there—'damaged codfish?' A. 13,150 pounds of damaged cod at one cent. $131.50.

" Q. Why should there be this damaged codfish? What is the cause of it?

[Here the gallant Major desires to make a favourable impression, but he evidently does not desire to ruin our case entirely, and he answers reluctantly.] A. Well, I have my own opinion of the cause.

But he is pursued by my learned friend, and with crushing effect he answers:—

" Q. What do you believe to be the cause? A. I believe the cause is going in so much for fresh bait.

This is terrible.

" Q. How should that damage the codfish? A. My opinion is that the salters salted it with the idea that they would not go in so much, and didn't put so much salt on it. When she went into port so much, going into the warm water it heated.

But upon cross-examination, he says, (p. 394 and 395, *ibid.*) :—

" Q. Now, look at the trip of the 'Pharsalia,' at which you were looking just now. A. I have it before me.

" Q. You see there is an item headed 'damaged fish, at one cent a pound.' You see that? A. Yes.

" Q. Will you find in the trip book, which you presented here, another case of a Grand Bank fishing vessel fishing with fresh bait, where there has been any damaged fish for these three years, '74, '75 and '76? A. The schooner 'Knight Templar.' (Reads items of outfit, among others an item showing she was on a salt bait trip.)

" Q. Then there is damaged fish on a salt bait trip? A. Yes.

" Q. Now find another case on a fresh bait trip. [Witness refers to book.]

"Q. I don't think you will find any. You see, fish may be damaged on board a salt bait vessel fishing on the Banks as well as on a fresh bait trip? A. I see it.

" Q. Now you find there are damaged fish as well with salt bait fishing as with fresh? A. I do find it.

" Q. And it is upon that one case of damaged fish with fresh bait that you arrive at this conclusion? A. I could not account for it in any other way.

" Q. But it is this one case that you draw the conclusion from? A. Yes.

" Q. And you would lead the Commission to believe, then, that fish was liable to be damaged because of vessels going in for fresh bait, because of this one vessel on this one cruise? A. No, I don't, now. I have seen that other case.

" Q. You withdraw what you said before? A. I withdraw as far as that is concerned."

The gallant Major has at last collapsed.

Mr. Atwood is also a great authority upon this point. He evidently belongs to the old school, being 70 years of age. He had not fished on the Banks for five and twenty years, his last voyage was November, 1851, and was really incapable of expressing an opinion from experience—having never used fresh bait. He endeavoured to lead you gentlemen to believe that it was the opinion of all vessel owners, and agents of vessels in Provincetown, that the going in for fresh bait was of no advantage, and that they purposed discontinuing it. He said that he had interviewed the agent of every vessel in Provincetown, but upon cross-examination, it really appears, that out of twenty-three or twenty-four agents of vessels, he had held communication with four only—Cook, Waugh, Paine, and Joseph,

(p. 58, *ibid.*) and it would seem that Mr. Atwood had certain theories, and that he tried to enforce his opinion upon others as to this question of fresh bait. But what say practical witnesses, who have been called on the part of the United States and examined by my learned friends upon this subject. Edward Stapleton has been using fresh bait, obtained on the coast of Newfoundland, for the last three years—and carrying on the Bank fishery—and says at page 12 :—" If a vessel alongside of you has fresh bait, you are not going to catch your share of fish with salt bait. And at page 18 :—

" Q. You consider salt bait superior to fresh bait, I believe ? A. Oh, no, I think fresh bait is the best.
" Q. You do admit, then, that fresh bait is the best? A. Oh, certainly, when other vessels on the Bank have it.
" Q. When codfish see fresh bait they prefer it to salt bait? A. Yes.
" Q. Consequently you admit that it is of some advantage to you to be able to go to the coast of Newfoundland, and get fresh bait? A. Oh, yes, certainly it is."

Mr. Francis M. Freeman also says, at page 80 :—

" Q. Is salt bait just as good as fresh ? A. Fresh bait is the best.
" Q. Is it not more generally used? A. When you can get it.
" Q. If you can it is much better than salt? A. Yes.
" Q. Practically, the salt bait cannot compete with the fresh bait? A. No. It is not as good as fresh.
" Q. Don't the vessels that run over here from the United States and get bait from Nova Scotia use fresh bait altogether? A. Yes, the Cape Ann vessels do.
" Q. Don't they from Gloucester as well ? A. The Gloucester vessels use fresh bait altogether.
" Q. Then you consider salt bait preferable? A. No, I never said so.
" Q. The fresh bait you consider preferable? A. Certainly.
" Q. But surely you don't mean to say that fresh bait is better than salt bait ? A. Yes.
" Q. Do you mean to say that you can catch more fish with fresh bait? A. Always.
" Q. You can catch them faster ? A. Yes.
" Q. You are certain of it ? A. Yes."

Mr. Lewis, at page 90, says, in answer to the query :

" Q. It has been stated before us that trawls require fresh bait. Has that been your experience ? A. It is better to have fresh bait.
" Q. Witnesses have told us that with trawls the bait lies on the bottom, and if it is not fresh the fish will not take it ? A. They will not take it as well as fresh bait, but they will take it if they cannot get anything else, and if they cannot get fresh bait."

Mr. Orne, (at page 131, United States evidence,) makes the following statement :—

" Q. You left Gloucester with salt bait ? A. No, I took enough fresh herring to bait my trawls once ; this was in 1870. If I remember right, I went to the Grand Bank for halibut. I did not get a trip until after I had gone in for fresh bait."

Having thus referred to the opinions of some of the witnesses called by the United States themselves, and there are others who testify to the same effect, I will now call your attention to the evidence of those called on behalf of Her Britannic Majesty's Government.

Mr. John Stapleton, page 229, British evidence, stated that "there is only a certain season on the Grand Bank that the squid is there. When it is there they get it there, but when they cannot they come inshore and get it. They either buy herring or mackerel, or they catch squid. Whatever they can get by catching or buying, they put in ice and then go back." And in answer to the query, " Why cannot they prosecute the Bank fishery without this?" he answered, " Well, the fish won't bite without something."

" Q. Cannot they bring these from their own country ? A. Yes, that is all very true. It may be that the first trip, when they went from home, they had bait. But that will last for only one or two baitings. And if they cannot get bait on the Bank then they have to haul up anchor and get it inshore.
" Q. Well, it is necessary for them, then, to buy bait from you ? A. Well, the salt bait will not catch the fish while there is other bait there.
" Q. For trawling it is absolutely necessary to have fresh fish ? A. Yes, if it was not necessary, they would not come."

Mr. William McDonald, at page 311, *ibid*, says :—

" Fresh bait is absolutely necessary to take codfish. Bank fishing could not be successfully carried on without it ; American captains say they have to get fresh bait or they can catch no fish.
" Q. How did you catch the cod ? A. We caught them with trawls.
" Q. What kind of bait did you use ? A. Fresh bait,—herring.
" Q. Cannot you catch cod equally well with salt bait? A. No.
" Q. How do you know ? A. I have tried it.
" Q. Tell us the result of your experience ? A. I have been on the Banks with nothing but pogies for bait,—we generally took a few barrels with us to start upon,—and run out our trawls, having the salt bait, and there appeared to be not one fish round, for we could not feel a bite or get a fish. I have then ran to land, got herring and gone out to the same ground as near as possible, and put out the trawls and had an abundance of fish, where previously with salt bait we got not a fish. Even if you bait your hook with a piece of salt pogie, and put a small piece of fresh herring on the point of the hook, you will have a fish on it.
" Q. Your evidence amounts to this, that fresh bait is absolutely necessary to catch codfish ? A. Most undoubtedly.
" Q. And without fresh bait Bank codfishing cannot be successfully carried on ? A. I am quite sure of it.
" Q. You are quite sure of it ? A. I am quite certain of it from practical experience. I gave tried it.
" Q. For how many years ? A. Four or five years. It is some time ago, but I believe from what American captains say, that it is worse now. They have to get fresh bait or they cannot catch any fish, they say.
" Q. If the American vessels were not allowed to enter Newfoundland, Nova Scotia and Cape Breton for fresh bait, they could not carry on the cod-fishery ? A. No ; it would be impossible. Any man with common sense knows that. They might carry it on to a certain extent, but not successfully.
" Q. Have you ever conversed with American captains ? Do you know whether that is their opinion ? A. Yes.
" Q. They have so expressed themselves to you ? A. Yes a number of times. There is not a year goes by but I talk with 50 of them.
" Q. That is the general opinion of those acquainted with the fisheries ? A. Yes it is the general opinion.
" Q. Did you ever hear a man hold a different opinion ? A. I don't think I ever knew any man who held a different opinion.
" Q. If witnesses came here and told a different story, what would you say ? A. I don't know how they could."

Mr. William Ross, Collector of Customs in this city, says, at p. 349 :—

"I think for the successful prosecution of the cod fishery fresh bait is absolutely necessary. I should think a vessel using fresh bait would catch at least double the quantity of fish."

And not to weary the Commission, I will merely add that numerous other witnesses have spoken to the same effect.

Now, as to the comparative cost of salt and fresh bait, I cannot do better than instance the case of the *Pharsalia*, as Major Low has selected her as the most expensive trip, with fresh bait, made by any of Steele's vessels during three years,—1874-'5-'6. His evidence, at page 394, United States evidence, is as follows :—

"Q. Well, now, what induced you to make the selection of this trip as an illustration of the cost of a vessel using fresh bait and going to the Grand Banks? A. Because it covered so many ports which she entered, and the different rates charged for ice and bait.

"Q. Is it not the most expensive trip that is in that book? A. I think not.

"Q. Turn up the other that is more expensive? See if you can find a more expensive trip than that? What years does that book cover? A. '74, '75 and a portion of '76.

"Q. Now, is not this the most expensive trip made by any vessel using fresh bait during these years? A. After referring to the book,—it may be. From what examination I have made, I think it may be.

"Q. As far as you have gone, you find it to be the most expensive trip? A. Yes."

The *Pharsalia's* trip, therefore, appears to have been the most costly one he could find, as regards fresh bait.

At page 360 of the United States evidence it will be seen that the whole cost of fresh bait, for one voyage, according to Major Low's account of the *Pharsalia*, is $251.97, including ice, port charges, commission to agents, &c. This is certainly much above the average. Now, then, let us see the cost of supplying a Grand Bank cod-fishing vessel with salt bait. At page 362, United States evidence, the same witness, quoting from Mr. Steele's books, puts the price of slivers at $8.00 per barrel, and of salt clams at $11.00 per barrel. Francis Freeman at page 80, who has had several vessels upon the Grand Bank fishing, says (at page 82), that the average quantity of salt bait taken by a vessel of from 65 to 80 tons, would be 50 barrels. Joshua Payne, another United States witness, who also fitted out vessels for the Grand Bank, says that one of his vessels took 40, another 60, and another 75 barrels. Assuming this average given by United States witnesses themselves to be correct, and accepting the valuation given by Major Low, and the fact stated by him in his account of the *Madame Roland*, that one-half was slivers and one-half clams, we get the following result :—

For a Trip with 50 Bbls. of Salt Bait.		
25 at	$ 8.00	$200
25 "	11.00	275
		$475.00
For a Trip with 40 Bbls. of Salt Bait		$380
" 60 " "		570
" 75 " "		739

These then, according to the statements made by United States witnesses themselves, are the costs incurrred by vessels for their supply of salted bait, as against $251.97, as shown before, for fresh bait.

I have, then, clearly established, out of the mouths of their own witnesses, that fresh bait is superior to salt, and costs far less money. But it is quite unnecessary for me to argue as to the comparative value of fresh and salt bait. We have, in evidence, from the American witnesses, the plain, simple fact, that the obtaining of bait from the coast of Newfoundland was adopted as a practice about four years ago ; that it has increased annually, until in the present year nearly all the American vessels have gone to the coast for that purpose. The practice has become all but universal, and business men are not likely to do that which is inimical to their interests;—what further evidence or proof can be required on this question ?

I will now proceed to consider the position taken by my learned friend, Mr. Foster, when he asserts that the United States fishermen do not proceed to the coast of Newfoundland to fish for bait, but to buy it. I entirely join issue with my learned friend on this point. Apart from the bait actually caught by them, the arrangement under which the Americans obtain the bait, which they allege that they buy, is to all intents and purposes, and in law, a *taking* or fishing for it themselves within the words of the Treaty. It has been asserted that nearly one-half of the crews of American vessels fishing upon the Banks consist of men from the Provinces and from Newfoundland ; if then, a master of a vessel so manned, proceeded to Fortune Bay with his herring seine on board, or hiring a herring seine there, then and there with his crew caught the bait he required—would it be contended, that because British fishermen were engaged in the hauling of that bait, that therefore it was not taken by the American masters? Surely such a position would be absurd.

Now in reality what is the difference between this mode of proceeding and that practiced by the Americans for procuring bait? Let us see what is done according to the evidence. In some cases (and these are few), the American proceeds to St. Pierre, and there meeting a Newfoundland fisherman, owner of a herring seine, and who possesses a thorough knowledge of the localities where the herring are to be taken—he agrees with him for a certain sum for his services, and it may be for one or two men besides and for the use of his seine, to proceed to the fishing ground and there to secure the necessary quantity of bait required by the Banker. Or in other, and the large majority of cases, the American vessel proceeds to the residence of such fisherman on the coast of Newfoundland, and there makes a similar arrangement. Having arrived at the herring ground the owner of the seine with his one or two men and the assistance of some of the American crew, haul and put on board the American vessel all the bait that he requires, and sometimes receives his payment according to the number of barrels required for baiting a vessel, and sometimes in a lump sum. Again in other cases where squid is required and caplin, he goes to a harbor, states that he requires so much bait and then and there enters into a contract with a man to go and catch it for him, for which he is paid according to the quantity caught. It would be a subtle distinction to draw between the man thus hired in Newfoundland outside the crew of the vessel, to catch bait and the British subject who was hired in Gloucester to proceed to, Newfoundland and do the very same work. How very different this contract is from a contract of sale and purchase. If the herring or other bait had been previously caught, barreled, and in his store ready to be sold to the first purchaser who would give him his price, then it would be a simple commercial transaction, but here the article required is a fish freely swimming in the sea. The American desires to capture it, and whether he captures it through the instrumentality of a British subject or other person, and reduces it into his own possession for his own use, it is immaterial, and never could there be a more suitable application of the maxim of law *qui facit per aliam facit pe se*, than in the instance now before you. But this is not the only way in which bait is taken by the Americans on the Newfoundland coast. They have of late taken seines on board their own vessels, proceeded to Fortune Bay, and there not only have they

taken bait for their own purposes, but they have taken it and proceeded to St. Pierre, have sold it to the French fishermen, thereby directly competing with the Newfoundlanders in a trade formerly entirely their own, and doubtless as it is a lucrative business, the Americans will more and more practice it. They also catch bait fishes to a large extent. I would now call your attention to the evidence which sustains the position I have thus assumed.

Mr. Killigrew, at p. 158 of the British evidence in answer to the question :—

"Q. How do they obtain caplin and squid? Do they take this bait themselves or purchase it from the people? A. It is in this way :—they generally hire a man who owns a seine, and the crew of the American vessel goes with him. This man receives so much for the use of his seine and for his services.

"Q. This has reference to caplin? A. Yes.

"Q. How do they obtain squid? A. They purchase it if they can; otherwise they catch it themselves."

Mr. Bennett, at p. 140 of the British evidence :—

"Q. I want to understand whether in those localities American fishermen have been constantly coming in during the summer for bait? A. Yes; every day during the season.

"Q. The bait was sometimes purchased from the people and sometimes caught by themselves? A. I think they always combined the two together. When taking the herring themselves with seines their crew would haul in the herring with the assistance of the seining master, and when jigging for squid the crew jig what they can and the skipper buys what he can. When seeking caplin they assist in the same way; some vessels bring their own seines for the purpose of taking caplin.

"Q. What are the habits of squid? A. Squid are never taken around Newfoundland except near the shore, on ledges, generally in a harbor or entrance to a harbor."

Mr. John F. Taylor, p. 296 of the British Evidence :—

"At Newfoundland Americans sometimes fish for bait inshore."

Mr. Patrick Leary, p. 66 British Affidavits :—

"I supplied him (James Dunphy) with bait. In 1870 and 1875 I gave him 40 barrels of caplin each year. He found the crew, and I found the seine and gear. He paid me eight dollars each year for my services."

John McInnis, a witness called on behalf of the United States, p. 192 and 195, says :—

"Q. How many barrels of bait do you take each time? A. Sometimes 50 barrels, and sometimes 40. Some vessels take 60 barrels.

"Q. Do you pay so much a barrel or employ a man and pay him so much in the lump? A. We will employ a man that has a seine, and he will go catching herring for so much; it may be $30, $40 or $50, for all we want. If we want 40 barrels, we will give, say $40; if they are scarce, perhaps more. He will take a seine, and perhaps be two or three days looking after them.

"Q. You say, 'I will give you $30 or $40 (as the case may be) to go and catch me so many barrels?' A. Yes; that is the way it is done, and then sometimes we give $10 for ice.

"Q. Do you give any assistance in catching them? A. Sometimes we do.

"Q. You were asked as to the mode of getting bait, whether you employed those men that went for herring. Do you pay them wages or pay them after the fish are caught? A. We employ them before they go.

"Q. But you don't pay them wages? A. Yes, we have to pay them. If he goes and loses two or three days we have to pay him.

"Q. You don't pay them whether they catch or not? A Yes. Sometimes if I employ a man to go and catch them if he loses three or four days sometimes I pay him."

Philip Pine, planter, residing at Burin Bay, Newfoundland, says, p. 61 British Affidavits :—

"I am acquainted with the fisheries of Newfoundland by following the same and supplying therefor since I was seventeen years of age.

"I have observed a great number of United States fishing vessels in this neighborhood, there being as many as forty sail here at one time. These vessels came here for bait and for ice."

Richard McGrath, Sub-Collector H. M. Customs, residing at Oderin, Newfoundland, p. 64 *ibid.*:—

"I have seen United States vessels in this neighborhood. In 1874 four or five of these vessels called in at the back of Oderin Island, having procured ice in Burin, and twelve miles from here hauled caplin for bait."

Robert Morey, Supplying Merchant, and Planter, residing at Caplin Bay, Newfoundland, p. 67 *ibid.*:

"I have become acquainted with the fisheries of Newfoundland from being connected therewith since I was a boy. I have during the last two years seen a number of United States fishing vessels in this neighborhood. Last season I can safely say I saw upwards of a hundred of such vessels either in this harbor or passing close by; there were five or six of these vessels in this harbor last year—they came for bait—for caplin during the "caplin school," and squids afterward. This bait they hauled themselves in part, and jigged squids. I saw six dories belonging to one of their vessels on the "jigging ground" busily employed jigging for squids. They also purchase bait from our people, being always in a hurry to get their bait as quickly as possible to proceed again to the Banks. Caplin they regularly haul for themselves when caplin is abundant, which it always is until the season advances. Each vessel takes about eighty barrels fresh caplin, which they preserve in ice purchased from our people. The bait hauled and jigged by these United States fishermen was taken in the harbor close to shore."

Peter Winser, planter, residing at Aquaforte, Newfoundland, p. 68 *ibid.*:—

"I have been connected with the fisheries of Newfoundland by either prosecuting the same or supplying therefor since I was fourteen years of age."

"I have seen United States fishing vessels in this harbor the past season as well as the year previous, getting bait; they jigged squids themselves in part, and what they were short of catching they purchased from our fishermen. Caplin they hauled themselves, using a seine belonging to a person residing in this harbor, which was worked by American fishermen, except one young man, the son of the seine owner. Four of these vessels have been in this harbor at one time catching bait; as many as fifteen have been at one time in Cape Broyle; I saw ten there one day whose crews were all engaged catching squids. In this immediate vicinity there were last summer not fewer than seventy of these United States vessels in our harbors during the caplin school; and I am well informed that between St. Johns and Trepassy not fewer than two hundred have frequented the harbors for the supply of fresh bait, which they procured partly by catching for themselves and partly by purchasing. I am led to believe that it is the intention of the United States vessels to come in upon our shores and into our harbors to catch bait to convey to their schooners on the Banks, so that they may prosecute the codfishery uninterruptedly. The supply of bait by each United States vessel per trip is about as follows :—40 barrels caplin during the caplin scoool, and as I was told by one of the captains, 50 barrels squids. United States vessels make two and three trips for bait."

I might multiply these instances *ad infinitum*, but I will only further call your especial attention to the affidavits read at the end of the rebuttal testimony, on behalf of Her Majesty's Government, (No. 1 to 8, Appendix Q.,) which amply prove the state of affairs above referred to, and that United States vessels have this year been engaged in Fortune Bay trawling bait with very large seines, and supplying the French.

I would add with reference to the evidence of Mr. Joseph Tierney, quoted by Mr. Foster in his speech, that immediately after the answer with which Mr. Foster concludes his extract, the following question and answer occurs in cross-examination :

"Q. You employ them and they go and catch so much bait for you? A. Yes, that is the custom; that is, out of Gloucester."

We have it also in evidence from witnesses of the United States, that when vessels proceed to prosecute the codfishery in the Gulf of St. Lawrence, they take herring nets with them, and by that means, themselves, catch the bait they require. This is a practice which has existed for a number of years, and it must not be forgotten that the right to obtain bait on the coast of Newfoundland is an entirely new privilege, and is it to be supposed for a moment that the same mode of operation which they have adopted with regard to the codfishery in the Gulf will not be that which the bankers will practice on the coast of Newfoundland. I cannot conceive it possible that my learned friend, Mr. Foster, will seriously contend, under the circumstances set forth in the above quoted evidence, that the Americans obtaining in this manner that which is indispensable for their efficient prosecution of the codfishery, should by a subtlety of reasoning which I contend is utterly unsustainable, be permitted to enjoy that which is of such infinite advantage to them, without yielding any equivalent whatsoever. Would this be in accordance with the simplest principles of right, equity, or justice?

But apart from the aspect of the case to which I have just alluded, there is another feature to which I must draw your most serious attention. Prior to your decision of the 6th September, it was assumed alike by the Newfoundlanders and Americans that the right of traffic, trans-shipment, &c, was conceded by the Treaty of Washington to American fishing vessels. But as by that decision it has been ruled that this has not been conceded, and that according to the construction of that decision by the learned agent for the United States, there has been granted "no right to do *anything* except water-borne on our vessels, to go within the limits which had been previously forbidden." I must ask you to assume that hereafter there will be no breach of the treaty in this sense by American citizens. What would be the effect of this according to the strict letter of the bond? American fishermen must have the fresh bait, as I have shown, and the only way in which they will be able to obtain it will be by catching it for themselves. I must then claim from you an assessment of the value of this privilege on the basis that during the ensuing years of the operation of the Washington Treaty, United States citizens will be under the necessity of catching for themselves the bait which they have not the legal right to buy. Surely my learned friends do not ask this Commission to assume that American citizens will hereafter surreptitiously avail themselves of privileges which do not of right belong to them, and that on this account the compensation now fairly and justly claimed on behalf of Newfoundland should be in any way reduced by reason thereof.

And now, one word with regard to the winter herring fishery in Fortune Bay. It appears that from 40 to 50 United States vessels proceed there between the months of November and February, taking from thence cargoes of frozen herring, of from 500 to 800, or 1000 barrels. On this point, I would refer you to the affidavits by Mr. Hickman, Mr. Giovannini, Mr. Hubert, and others—pages 53, 57 and 59, of British affidavits. According to the evidence, these herring have hitherto generally been obtained by purchase. The trade is evidently increasing, as it seems that during the present year one vessel loaded 6,500 barrels. Mr. Pattillo, an United States witness, appreciated the right to catch so highly that he risked the confiscation of his vessel, rather than abandon his determination to catch a cargo for himself. It is hardly possible, then, to conceive that the Americans will continue to buy, possessing as they now do, the right to catch.

I desire next to pass on and consider the question as to the Americans exercising the privilege which has been conferred upon them, of prosecuting those prolific codfisheries which I have shown to exist in the inshore waters of Newfoundland, where they have now the liberty to fish.

The number of United States vessels engaged in the codfishery on the Grand Bank, and frequenting the coast of Newfoundland for bait, according to the evidence, would appear to be from 400 to 500 at the present time. Mr. Fraser, at p. 173 British evidence, estimates the number at 500. The demands of a population of over 40 millions, necessarily call for an extensive area for the fishing industry of the United States, and wherever they can pursue their labors with success, there will the United States fishermen be found. And the inshore fisheries of Newfoundland, containing an area of upwards of 11,000 square miles, is a valuable acquisition to their present fields of operation. The French enjoy a similar liberty on the north-east and west coasts of the Island, to that which the United States now have upon the east and south coasts. The latter are more productive fishing grounds, and are in closer proximity to the Grand Bank and other banks. By the evidence before you, it appears, and the fact is, that the French can, and do, carry on an extensive fishing business on the coasts where they have a right to fish. They send their vessels of from 200 to 300 tons from France, which anchor and lay up in the harbors, fishing in their boats in the neighborhood, close inshore during the Summer, and returning to France with their cargoes in the Fall of the year. Again, other smaller French vessels pursue the codfishing all around the west coast; and as to the value set upon these fisheries by the French, some approximate idea may be arrived at from the jealousy with which their right has been guarded by their government throughout the long and frequent negotiations which have from time to time taken place between France and Great Britain upon the subject. It is true that heretofore the cod and halibut fishery has not been prosecuted by United States fishermen to any considerable extent on most parts of the coast of Newfoundland, but still there is evidence of their having fished successfully on the southern coast. William N. Mulloy, of Gloucester, master mariner, states in his affidavit, p. 51, British affidavits:—

"I know of two United States vessels that fished for codfish inside the Keys, St. Mary's, that is on the inshore ground. I fished there myself."

Philip Snook, swears, page 57, British Affidavits:—

"United States fishing vessels have fished on the inshore fishing grounds, but I ca not give particulars further than that I have seen them so fishing off Danzig Cove, near south point of Fortune Bay,"

George Sims, p. 133, British Affidavits, says:—

"I have seen United States fishing vessels and crews catching codfish on the Newfoundland inshore fishing grounds, but cannot state the number, having made no records."

George Bishop, of Burin, p. 131, British Affidavits, also states:—

"American vessels have fished for codfish on our grounds off Cape St. Mary's. American masters partially refit their vessels occasionally at this port, but have not here trans-shipped their cargoes."

William Collins, page 62, British Affidavits, says:—

"American fishermen do sometimes fish on the "inshore fishing ground" of Cape St. Mary's. I have seen as many as three of these vessels fishing there."

Samuel George Hickman, residing at Grand Bank, Newfoundland, p. 58, says:—

"I have seen our shore surrounded by American fishermen fishing for halibut and codfish, but cannot say that all these vessels were inside three miles of a line from headland to headland; I have frequently seen United States vessels fishing between Pass Island and Brunette Island, in some instances these vessels have been fishing up the Bay among the skiffs. I cannot speak of the quantity or value of their catches, but I do know that they destroyed the halibut fishery about Pass Island, and largely damaged the codfishery of Fortune Bay; one of their captains told me "it was no use for our fishermen to go fishing after United States fishermen."

George Rose, of Little Bay, Fortune Bay, p. 54, says:—

"United States fishing vessels have fished about Pass Island, and formerly made good catches there Capt. Jacobs, of schr.———, is said to have been offered nine thousand dollars for his load taken about Pass Island. American fishing vessels fishing off and about Pass Island fished for halibut and codfish, but chiefly for halibut. My estimate of the value of their catch is at least equal to ten thousand dollars per annum, and such fishery was conducted exclusively within three miles of our shores."

There is no reason for supposing that the United States will not exercise the privilege which they have, to an equal, or even greater, degree than the French use theirs. The prospects for lucrative results are more promising to the United States than to France. The fishing grounds are better and more convenient. During the years 1871-2-3, when the United States first had the privileges granted by the Washington Treaty, there was but an occasional United States vessel which went to Newfoundland for bait. From 1873 to 1876, the number increased every year; and in 1877, the present season, it is stated in evidence that an immense number,—one witness, I believe, says nearly all the Grand Bank vessels have supplied themselves there with fresh bait; and some have been employed in catching herring and conveying them to St Pierre and Miquelon, for the purpose of sale to the French. They then enter into direct competition with our people. This probably is only a prelude to that competition in the Brazilian, West Indian and European markets which we shall have to contend against. The Americans have, by virtue of the right to land and cure their fish, the same advantages which we possess for supplying those markets, which now are the outlet of our products. This business, by Americans, is evidently a growing one, and as they acquire more and more intimate knowledge of the coast, its harbours and fishing grounds, and their extent and productiveness, as they find out, which they will do, that they can obtain their fish close upon the coast, with all the conveniences which our inshore fishery affords, including the ready facilities for obtaining bait close at hand, with excellent harbors available for the security of their property. Is it possible to conceive that there are not those who will prefer this investment of their capital rather than incur the risk of life and property, and those expensive equipments which are incident to vessels engaged on the Bank fishery?

Mr. Foster in an early portion of his speech undertakes to show "why the fishermen and people of the United States have always manifested such a feverish anxiety," to gain access to the inshore fisheries. His explanation is that at the time the various Treaties which contain provisions respecting the Fisheries were concluded, the mackerel fishery in the Gulf of St. Lawrence as an industry was unknown, and that their efforts were directed to maintain their claim to the deep sea fisheries. As a matter of fact, the mackerel fishing by United States vessels in Canadian waters sprung up at a period subsequent to the Convention of 1818. With the circumstances under which this branch of the fishing business was commenced I am unacquainted, but doubtless a more intimate knowledge of the value of the inshore fisheries acquired by constant resort under the privileges accorded by the Convention to the coasts of British North America, coupled with the requisite knowledge of the localities, harbors and fishing grounds, led those fishermen who had previously confined their operations to the cod, halibut and hake fisheries, to enter upon the new, and as it has subsequently, proved lucrative pursuit of the mackerel. This development of the American mackerel fishery in the Gulf of St. Lawrence affords a fair illustration of that which will take place with regard to the Newfoundland inshore fisheries. Unquestionably the proceedings of this Commission, and the testimony which has been taken of the most successful and enterprizing fishermen will be studied by those engaged in the fishing business. New ideas will be suggested to them, and wherever there appears to be a profitable field for the investment of capital, it will find its way in that direction, and to those places which may hitherto have been unknown or unappreciated by them.

I have only now to deal with the privileges conferred upon Newfoundland by the United States, and their value. As to the value of the United States fishing to us, that question has been summarily disposed of by learned friend Mr. Dana, as of not much account. It has not been deemed worthy of consideration by any of the learned counsel on the opposite side, nor has it been attempted to set it forth as of any worth to us. Therefore it is unnecessary that I should further comment upon it, beyond calling your attention to the mass of unanimous testimony that Newfoundland vessels never have or can make profitable use of it.

The question of free-market in the United States for fish and fish oil I may also dispose of in a short space. It will be fully dealt with by my learned friend Mr. Thomson. I will merely draw attention to certain facts in evidence in order that his arguments hereafter may be more easily applied to the Newfoundland branch of this case. The principal markets for Newfoundland cured codfish are the Brazils, West Indies, and Europe. The American market is very limited. By a return filed in this case (Appendix I) headed, "Return showing the value of fish and products of fish imported from the United States of America, and exported to the United States and other countries from the colony of Newfoundland during each year from 1851 to 1876 inclusive," it appears that during these 26 years, which of course include 12 years under the Reciprocity Treaty, the average annual export from Newfoundland to the United States amounted to $323,728 as against $6,043,961, exports to other countries. It appears also that the United States market is decreasing; for the average annual export to that country for the 7 years between the Reciprocity Treaty and the Washington Treaty, was $348,281, as against $6,876,080 to other countries, whilst the average annual export for the three years under the Treaty of Washington, viz., 1874, 1875, 1876, was $222,112 to the United States as against $7,792,879 to other countries; and further that there has been a steady falling off in the exports to the United States from $285,250 in 1874, to $155,447 in 1876. To what cause this is attributable it is difficult to say; but it may be to some extent accounted for by the increased facilities which the United States now possess and use under the Treaty of Washington, and by means of which they are enabled to supply their own wants in codfish. On the other hand it has been proved that a very considerable market for small codfish has been opened up in Newfoundland to United States Banking vessels. That fish which was heretofore thrown overboard as unsuitable for the American market is now carried to Newfoundland and sold at remunerative prices. Captain Mulloy, (a master of a United States banker), Mr. Charles Barnet, and others state as follows: The former at page 51, British affidavits says:—

"The quantity of small cod-fish caught by each Banker during the season will be fully two hundred and fifty quintals upon an average of every two loads of cod-fish caught upon the Banks. The number of United States vessels prosecuting the cod-fishery on the Banks off Newfoundland each season from the port of Gloucester is about three hundred, there are vessels fitted out from other ports in the United States besides Gloucester, but not to so large an extent. The average catch per vessel on the Banks will be two thousand five hundred quintals codfish, the value of which will be about twelve thousand dollars to the owner.

"Prior to 1874, United States bankers threw away all fish less than 22 inches split, or twenty-eight inches as caught; now the small fish is brought into Newfoundland ports, and there sold, slightly salted, to advantage. I, last year, sold one hundred and fifty quintals of such fish at nine shillings and sixpence per quintal. The privilege of selling oil in Newfoundland ports is of importance—also as providing necessary funds for the purchase of bait, and for refitting."

And the latter at page 81 :—

"Deponent bought small cod-fish and cod oil from United States fishermen last year in payment of bait, ice, and cost of refitting their vessels; in some instances, deponent purchased small cod-fish, for which he paid in cash. The total quantity of small cod-fish purchased by deponent last year from United States fishermen was upwards of three hundred quintals, for which he paid prices ranging from eight shillings to eleven shillings per quintal of 112 lbs., green fish.

"Deponent also purchased a considerable quantity of cod oil from United States fishermen, particulars of which he has not at hand."

Also, Richard Cashin, page 69, British Affidavits :—

"United States fishermen have sold small cod-fish and cod oil in this neighborhood. I have purchased cod-fish and cod-oil from them. The prices paid have been eight and nine shillings per cwt. for green cod-fish, and two shillings and sixpence per gallon for cod-oil. Eighty quintals fish, and two and one-half tons oil is what I purchased."

And Richard Paul, page 63, British Affidavits :—

"American fishermen have sold fish and oil in this neighborhood. I only know of their selling thirty-seven quintals at 7s. per quintal, and seventy gallons of oil at half-a-dollar. I understand from their statements the past season, that hereafter, they intend to sell to our people all the cod-fish they catch under twenty-two inches in length."

Philip Hubert, Sub-Collector Customs, Harbour Briton, Fortune Bay, page 54 :—

"American fishermen have sold small cod-fish in this Bay; some vessels sold one hundred quintals, the price ranging from seven to ten shillings per cwt., green."

In addition to which there are numerous Affidavits in support of the same fact as regards the general sale of small codfish.

Previously to the Washington Treaty, there had been a duty of $1.30 per quintal on Fish imported into Newfoundland, which of course is now removed as far as concerns the United States. The utilization of this small fish is unquestionably an important item of gain to them. If there is a benefit to Newfoundland in a free market with the United States it has been reduced to its very minimum by the United States Government taxing the tins in which salmon is put up, and by the refusal to admit seal oil, an article of extensive export from Newfoundland, as a fish oil although in their own commercial language it is placed under that category. This, however, I presume, is a matter over which you have no jurisdiction; neither have you over the question of $128,185 duties paid in the United States on fish and fish products imported from Newfoundland between 1871–1874, (referred to on page 173 British Evidence) when the United States were allowed to enjoy the benefits of the Washington Treaty on the distinct understanding that the enjoyment should be reciprocal, but which understanding was subsequently repudiated by the the United States, and the above mentioned amount of duties levied during those years remains un-refunded to the present day.

There is a ground of defence relied upon by my learned friends opposite, as to which I wish to offer one or two remarks. They contend, as I understand them, that the fishermen of Newfoundland are benefitted by Americans coming to the coast and trading with the people; that that trading breaks down a system of business which they allege to exist between the merchant and the fisherman, by which the latter is held in bondage to the former; and as a proof of the existence of such a system, they put in evidence a memorial from the people of Placentia, dated August 19th, 1800, praying for the establishment of certain fishery regulations which then existed in St. John's. The memorial will be found at (p. 167, British Evidence.) I will not detain you by reading it. It is a singular mode of proving a present condition of affairs in 1877, to produce what may or may not be a statement of facts in 1800. I should not have considered the point worthy of notice, had not my learned friends brought it forward on more than one occasion, in terms which I conceive to be unwarranted. I will therefore only remark, that these assertions are amply disproved by the statements of Judge Bennett, Mr. Fraser and Mr. Killigrew, who have sufficiently proved the business operations of the country. But when I hear, on the one hand, my learned friend, Mr. Dana, loud in his assertions and professions as to all the good which Americans have done, and all that they are going to do, visiting our coast with money in their hands, and with the best of intentions; and I see on the other hand, what they have really done, and what they are attempting to do,—to take our fisheries without an equivalent,—I am forcibly reminded of that line in the old Latin Poet, "Timeo *Danaos* et dona ferentes!"

But I have up to the present treated this subject from a commercial standpoint only. This is presenting it in its narrowest and most contracted aspect. I claim from this Commission a consideration of the privileges conceded by Article 18 of the Treaty of Washington, from a broad and national point of view. The United States, with its enormous population, ever increasing, demands extended resources from whence to draw those supplies of fish food which she needs. She requires to build up and maintain her position as a great maritime and naval power.—the largest and most extended field for the training of her seafaring people. The fisheries have ever been the nurseries for seamen. The extension of the fishing limits of the United States affords an investment for additional capital, and occupation for an energetic and enterprising people. The acquisition she has made under the Treaty of Washington adds to her national greatness. She has expanded beyond her former limits; her ships now float freely and unrestricted over the whole North Atlantic coastal waters. These considerations cannot fail to have weight with you. I ask whether, having now secured the privileges which she thus enjoys, would she yield them up for nought? or would she not rather brave every contingency for their preservation? If you believe such to be the case, it affords some additional basis upon which you may calculate what she should now pay for the sterling advantages she has acquired.

I have thus endeavored to state concisely the ground on which her Majesty's Government sustains the claim preferred on behalf of Newfoundland. The particulars of that claim, amounting to two million eight hundred and eighty thousand dollars, are set forth in the case of Her Majesty's Government. I have proved to you the enormous value of those fisheries, heretofore the exclusive property of 160,000 people, which fisheries are now thrown open to a great and enterprising nation. I have proved that from twenty-five to thirty-three per cent. of the $6,000,000 annually produced is profit. (See evidence of Mr. Fraser, Mr. Killigrew, and Judge Bennett, (British evidence,) and (Mr. Munn, (British affidavits, p. 48). You have the clear proof that from 400 to 500 United States vessels take from the Newfoundland coast that bait which is absolutely necessary, in order to a successful prosecution of the cod-fishery on the Banks. Every United States witness produced and examined upon this point has told you of the importance attached to the cod-fishery, and the profitable results accruing from its prosecution. It is for you, sirs, to

say what is a fair equivalent for the United States to pay for the privilege of fishing in common with us in these profitable waters, and obtaining from our shores that bait which is indispensable, to enable them to carry on and develop that Bank fishery which a master of one of their own vessels refers to us as "being capable of *unlimited* expansion and development."

I have shown you how the citizens of the United States have used these fisheries in the past, how they are using them in the present, and the fair and legitimate conclusion that they will draw from them in the future, all that capital and energy can bring forth. The "Case filed by Her Majesty's Government," the "Answer of the United States," and the "Reply," with the evidence, is before you. By that evidence your award will be governed. I ask neither for liberality nor generosity, but—I ask for a fair equivalent for the privileges conceded. I have only to add that when I have seen around me during this enquiry the array of eminent Counsel and attachés, as well on the part of the United States as of Canada, when I have felt that no one amongst them had but a general knowledge of that most ancient colony which I have the privilege of representing at this Commission, and that I alone am intimately acquainted with her resources, and that a fair and true representation of her interest and claim depended solely upon my exertions, I must confess that I have felt a grave responsibility resting upon me, but I cannot sever my connection with this Commission without acknowledging how much that burden has been lightened by the courtesy which you have extended, and by the anxious solicitude which you have evinced to obtain all the information necessary to enable you to arrive at a just and equitable award. I have implicit confidence that you will conscientiously discharge the important duty devolving upon you, and I heartily join in the hope that your labors will result in harmonizing any present discordant feelings which may exist among those more immediately concerned, and the establishment of a lasting peace and good will.

MR. DANA:—Will your Honors allow me one word, in order to set right a matter of fact, to which my learned friend referred; on a matter relating not to testimony or law, but to the counsel of the United States. I understood him to say, it was generally admitted by the counsel of the United States here, that Great Britain has a claim for something to be paid, and that the only question was as to the amount. Was I correct in understanding you so?

MR. WHITEWAY:—Yes.

MR. DANA:—Then I wish to correct that as a matter of fact.

MR. WHITEWAY:—It seems to be generally admitted, I say. The language used by yourself and brother counsel led me to that conclusion.

MR. DANA:—The counsel for the United States, Mr. Foster, Mr. Trescot, and myself, all supposed we had said—certainly that was our opinion, and what we intended to say,—that we believed that what Great Britain or the Provinces received by a guarantee on the part of the United States, that no duty shall be laid on fish or fish oil, coming from the Provinces into the United States for the period in question, exceeded in value what we received by a guarantee from Great Britain, that we might fish within the limits in these British waters;—that is all I wish to set right. There is nothing in the argument of the learned counsel which gives us the least right to claim a reply. I think that he has confined himself strictly and honorably within the limits of the pleadings.

FINAL ARGUMENTS ON BEHALF OF HER BRITANNIC MAJESTY.

No. VIII.

MR. DOUTRE.

FRIDAY, NOV. 16, 1877.

The Conference met.

Mr. DOUTRE addressed the Commission as follows :

With the permission of your Excellency and your Honors, I will lay before this Tribunal, in support of Her Majesty's claim, some observations, which I will make as brief as the nature of the case admits, and in order that these remarks may be intelligible, without reference to many voluminous documents, I solicit your indulgence while going once more over grounds familiar to the Commission.

As soon as the war, resulting in the independence of the confederated colonies, came to an end, the United States sought for a recognition of their new existence from Great Britain and the Treaty of Paris of 1783 was agreed to. As an incident to the main object of that Treaty, Art. 3 states : "The people of the United States shall continue to enjoy unmolested the right to take fish of every kind on the Grand Bank and on all other banks of Newfoundland; also in the Gulf of St. Lawrence, and at all other places in the sea, where the inhabitants of both countries used at any time heretofore to fish; and also the inhabitants of the United States shall have liberty to take fish of every kind on such part of the coast of Newfoundland as British fishermen shall use (but not to dry or cure the same on that island), and also on the coast, bays and creeks of all other of His Britannic Majesty's Dominions in America; and the American fishermen shall have the liberty to dry and cure fish in any of the unsettled bays, harbors and creeks of Nova Scotia, Magdalen Islands, and Labrador, so long as the same shall remain unsettled; but so soon as the same, or either of them, shall be settled, it shall not be lawful for the said fishermen to dry or cure fish at such Settlement without a previous agreement for that purpose with the inhabitants, proprietors, or possessors of the ground."

We have heard from counsel representing the United States very extraordinary assumptions, both historical and political, concerning the circumstances under which this Treaty was adopted. At the distance of nearly a century, fancy can suggest much to literary or romantic speakers, especially when it concerns a subject on which they are not called upon to give any evidence,—on which they can build an interesting record of their own opinions, before this Commission. We had to deal with a very complex matter of business,—one which probably has never engaged the research of a judicial tribunal,—and we thought this was enough for the efforts of humble men of business, such as we claim to be. Our friends on the American side treated us with a poetical account of the capture of the Golden Fleece at Louisburg, by Massachusetts heroes, in order to show how their statesmen of a previous generation had misconceived the nature of their primitive, conquered and indisputable right to our fisheries, without indemnity in any shape. British historians, statesmen or orators would probably have little weight with our friends in their estimate of Treaty negotiations. With the hope of obtaining a hearing from our opponents let us speak through the mouth of American diplomatists or statesmen.

It will strike every one that in the concessions contained in our Treaty of 1783, Great Britain did not extend to American fishermen all the rights belonging to her own subjects in these fisheries,—a fact sufficient in itself to preserve to Great Britain her sovereignty in that part of her dominions.

When the war of 1812 was brought to an end, the United States had not lived long enough, as an independent nation, to create that pleiad of eminent jurists, publicists and Secretaries of State, who have since brought them up to the standard of the oldest constituted States of Europe. The characteristic elation of the nation who had but recently conquered their national existence, marked the conduct of the United States government during the negotiations of the Treaty of Ghent in 1814. They persistently refused to recognize a rule of international law, which no one would now dispute, and which was, however, fully admitted by some of the United States representatives at Ghent, that war abrogates all treaties between belligerents.

Henry Clay, one of those representatives, at Ghent, answered in the following manner, the proposition of the British Plenipotentiaries, who desired to include the Fisheries in that Treaty as appears in the Duplicate Letters; The Fisheries and the Mississippi. By J. Q Adams. P. 14 *in fine* :—

"In answer to the declaration made by the British Plenipotentiaries respecting the fisheries, the undersigned (U. S. Representatives) referring to what passed in the Conference of the 9th of August, can only state that they are not authorized to bring into discussion any of the rights or liberties which the United States have heretofore enjoyed in relation thereto. From their nature and from the peculiar character of the Treaty of 1783, by which they were recognized, no further stipulation has been deemed necessary by the government of the United States, to entitle them to the full enjoyment of all of them."

In order to fully understand the views entertained by the British and American plenipotentiaries, a few extracts from the correspondence between American diplomatists, published from 1814 to 1822, and contained in the book of Mr. Adams, will show the course adopted at Ghent, by himself and his colleagues.

(Extract from Protocol of Conference held 1st Dec., 1814, at Ghent, p. 45.)

"The American plenipotentiaries also proposed the following amendment to Article 8th, viz.: 'The inhabitants of the United States shall continue to enjoy the liberty to take, dry, and cure fish, in places *within the exclusive jurisdiction of Great Britain*, as secured by the former treaty of peace; and the navigation of the river Mississippi, within the exclusive jurisdiction of the United States, shall remain free and open to the subjects of Great Britain, in the manner secured by the said treaty."

The following is the answer made by the British Plenipotentiaries:—

(Extract from Protocol of Conference, 10th Dec., 1814, Ghent, p. 46.)

"His Britannic majesty agrees to enter into negotiation with the United States of America respecting the terms, conditions, and regulations, under which the inhabitants of the said United States shall have the liberty of taking fish on certain parts of the coast of Newfoundland, and other his Britannic majesty's dominions in North America, and of drying and curing fish in the unsettled bays, harbors, and creeks, of Nova Scotia, Magdalen Islands, and Labrador, as stipulated in the latter part of the 3d article of the treaty of 1783, in consideration of a fair equivalent, to be agreed upon between his majasty and the said United States, and granted by the said United States for such liberty aforesaid,"

The American Plenipotentiaries replied as follows:—

(Extract from American Note after Conference, of 12th Dec., 1814, p. 49.)

"For the purpose of meeting what they believed to be the wishes of the British government, they proposed the insertion of an article which should recognize the right of Great Britain to the navigation of that river, and that of the United States to a liberty in certain fisheries, which the British government considered as abrogated by the war. To such an article, which they viewed as merely declaratory, the undersigned had no objection, and have offered to accede. They do not, however, want any new article on either of those subjects; they have offered to be silent with regard to both."

The British note of the 22nd of Dec. contained the following declaration:—

(Extract from British Note of 22nd Dec., p. 50.)

"[So far as regards the substitution proposed by the undersigned, for the last clause of the 8th article, as it was offered solely with the hope of attaining the object of the amendment tendered by the American plenipotentiaries at the conference of the 1st instant, no difficulty will be made in withdrawing it. The undersigned, referring to the declaration made by them at the conference of the 5th of August, that the privileges of fishing within the limits of the British sovereignty, and of using the British territories for purposes connected with the fisheries, were what Great Britain did not intend to grant without equivalent, are not desirous of introducing any article upon the subject.]"

And the Americans thus replied:—

(Extract from the American Note, 25th Dec., 1814, p. 54, 55.)

"At the first conference on the 8th of August, the British plenipotentiaries had notified to us, that the British government did not intend, henceforth, to allow to the people of the United States, without an equivalent, the liberty to fish, dry and cure fish, within the exclusive British jurisdiction, stipulated in their favor, by the latter part of the third article of the treaty of peace of 1783. And, in their note of the 19th of August, the British plenipotentiaries had demanded a new stipulation to secure to British subjects the right of navigating the Mississippi: a demand which, unless warranted by another article of that same treaty of 1783, we could not perceive that Great Britain had any colorable pretence for making. Our instructions had forbidden us to suffer our right to the fisheries to be brought into discussion, and had not authorized us to make any distinction in the several provisions of the third article of the treaty of 1783, or between that article and any other of the same treaty. We had no equivalent to offer for a new recognition of our right to any part of the fisheries, and we had no power to grant any equivalent which might be asked for it by the British government. We contended that the whole treaty of 1783 must be considered as one entire and permanent compact, not liable, *like ordinary treaties*, to be abrogated by a subsequent war between the parties to it; as an instrument recognising the rights and liberties enjoyed by the people of the United States as an independent nation, and containing the terms and conditions on which the two parts of one empire had mutually agreeed thenceforth to constitute two distinct and separate nations. In consenting, by that treaty, that a part of the North American continent should remain subject to the British jurisdiction, the people of the United States had reserved to themselves the liberty, which they had ever before enjoyed, of fishing upon that part of the coasts, and of drying and curing fish upon the shores; and this reservation had been agreed to by the other contracting party. We saw not why this liberty, then no new grant, but a mere recognition of a prior right, always enjoyed, should be forfeited by a war, any more than any other of the rights of our national independence, or why we should need a new stipulation for its enjoyment more than we needed a new article to declare that the king of Great Britain treated with us as free, sovereign and independent states. We stated this principle, in general terms, to the British plenipotentiaries, in the note which we sent to them with our project of the treaty; and we alleged it as the ground upon which no new stipulation was deemed by our government necessary to secure to the people of the United States all the rights and liberties, stipulated in their favor, by the treaty of 1783. No reply to that part of our note was given by the British plenipotentiaries; but, in returning our project of a treaty, they added a clause to one of the articles, stipulating a right for British subjects to navigate the Mississippi. Without adverting to the ground of prior and immemorial usuage, if the principle were just that the treaty of 1783, from its peculiar character, remained in force in all its parts, notwithstanding the war, no new stipulation was necessary to secure to the subjects of Great Britain the right to navigating the Mississippi, as far as that right was secured by the treaty of 1783; as, on the other hand, no stipulation was necessary to secure to the people of the United States the liberty to fish, and to dry and cure fish, within the exclusive jurisdiction of Great Britain. If they asked the navigation of the Mississippi as a new claim, they could not expect we should grant it without an equivalent: if they asked it because it had been granted in 1783, they must recognise the claim of the people of the United States to the liberty to fish and to dry and cure fish, in question. To place both points beyond all future controversy, a majority of us determined to offer to admit an article confirming both rights; or, we offered at the same time to be silent in the treaty upon both, and to leave out altogether the article defining the boundary from the Lake of the Woods westward. They finally agreed to this last proposal, but not until they had proposed an article stipulating for a future negotiation for an equivalent to be given by Great Britain for the navigation of the Mississippi, and by the United States for the liberty as to the fisheries within the British jurisdiction. This article was unnecessary, with respect to its professed object, since both governments had it in their power, without it, to negotiate upon these subjects if they pleased. We rejected it, although its adoption would have secured the boundary of the 49th degree of latitude west of the Lake of the Woods, because it would have been a formal abandonment, on our part, of our claim to the liberty as to the fisheries, recognised by the treaty of 1783.

Mr. Gallatin wrote to the Secretary of State on the 25th of Dec., the day following the signature of the Treaty as follows:—

(Extract from Letter of Mr. Gallatin to Secretary of State, 25th Dec. 1814, p. 58.)

"On the subject of the fisheries, within the jurisdiction of Great Britain, we have certainly done all that could be done. If, according to the construction of the treaty of 1783, which we assumed, the right was not abrogated by the war, it remains entire, since we most explicitly refused to renounce it, either directly or indirectly. In that case it is only an unsettled subject of differences between the two countries. If the right must be considered as abrogated by the war, we cannot regain it without an equivalent. We had none to give but the recognition of their right to navigate the Mississippi, and we offered it. On this last supposition, this right is also lost to them; and in a general point of view, we have certainly lost nothing."

Mr. Russell, who gave rise to all this correspondence, wrote from Paris on the 11th of Feb. 1815, in the following terms to the Secretary of State:—

(Extract from Letter of Mr. Russell to the Secretary of State, 11th Feb., 1815, p. 66.

"I could not believe that the indepeudence of the United States was derived from the treaty of 1783; that the recognition of that independence by Great Britain, gave to this treaty any peculiar character, or that such character, supposing it existed, would necessarily render this treaty absolutely inseparable in its provisions, and make it one entire and indivisible whole, equally imperishable in all its parts, by any chance which might occur in the relations between the contracting parties.

"The independence of the United States rests upon those fundamental principles set forth and acted on by the American Congress, in the declaration of July, 1776, and not on any British grant in the treaty of 1783, and its era is dated accordingly.

"The treaty of 1783 was merely a treaty of peace, and therefore subject to the same rules of construction as other compacts of this nature. The recognition of the independence of the United States could not well have given it a peculiar character, and excepted it from the operation of these rules. Such a recognition, expressed or implied, is always indispensable on the part of every nation with whom we form a treaty whatsoever."

(Idem, p. 69.)

"It is from this view of the subject that I have been constrained to believe that there was nothing in the treaty of 1783 which could not essentially distinguish it from ordinary treaties, or rescue it on account of any peculiarity of character from the jura belli, or from the operation of those events on which the continuance or termination of such treaties depends."

"I know not, indeed, any treaty, nor any article of a treaty, whatever may have been the subject to which it related, of the terms in which it was expressed, that has survived a war between the parties, without being specially renewed, by reference or recital in the succeeding treaty of peace. I cannot, indeed, conceive the possibility of such a treaty, or of such an article; for, however clear and strong the stipulations for perpetuity might be, these stipulations themselves would follow the fate of ordinary unexecuted engagements, and require, after a war, the declared assent of the parties for their revival."

(Idem, p. 75.)

"I have in this view of the subject been led to conclude that the treaty of 1783, in relation to the fishing liberty, is abrogated by the war, and that this liberty is totally destitute of support from prescription, and, consequently, that we are left without any title to it whatsoever."

(Idem p. 77.)

"Considering, therefore, the fishing liberty to be entirely at an end, without a new stipulation for its revival; and believing that we are entirely free to discuss the terms and conditions of such a stipulation, I did not object to the article proposed by us, because any article on the subject was unnecessary, or contrary to our instructions, but I objected specially to that article, because, by conceding in it, to Great Britain, the free navigation of the Mississippi, we not only directly violated our instructions, but we offered, in my estimation, a price much above its value, and which could not justly be given."

(Idem p. 87.)

"I have always been willing to make any sacrifice for the fishing privilege, which its nature, or comparative importance could justify, but I conscientiously believe that the free navigation of the Mississippi, and the access to it which we expressly offered, were pregnant with too much mischief to be offered, directly, under our construction of the treaty; or, indirectly, as they were in fact offered, as a new equivalent for the liberty of taking and drying fish within British jurisdiction."*

Mr. Russell was supported by Henry Clay in these views.

Our learned friend, Mr. Dana, mentioned the circumstances under which England was carrying on the negotiations at Ghent. She was engaged in a continental war, with the most illustrious warrior of modern times, and the Americans were more or less exacting according to her embarrassments. We have this described at p. 233 of Mr. J. Q. Adams Correspondence, as follows:

"Subsequently, however, the overthrow of Napoleon having left us to contend single-handed with the undivided power of Great Britain, our government thought proper to change the terms offered to the British Government, and accordingly sent additional instructions to Ghent, directing our commissioners to make a peace if practicable, upon the simple condition, that each party should be placed in the same situation in which the war found them.

"At the commencement of the war, the British had a right, by treaty, not only to navigate the Mississippi, but to trade with all our Western Indians. Of course our commissioners were instructed to consent to the continuance of this right, if no better terms could be procured. Under these instructions a proposition relative to the Mississippi and the fisheries, similar to that which had been rejected, was again presented, adopted, and sent to the British commissioners. But it did not restore the right to navigate the Mississippi in as full a manner as the British Government desired, and on that account, we presume, was rejected."

The following dates will explain the meaning of the paragraph referring to Napoleon. The mission to Ghent had met before the disasters to French arms which resulted in the abdication of Napoleon on the 4th of April, 1814. Napoleon was conveyed to Elba in May following. With the slow communications of the time, the Americans learned only in June of the victories of England, which seem to have given a certain tone of firmness to her negotiations at Ghent. The treaty was signed on the 24th Dec., 1814. On the 1st March, 1815, Napoleon escaped from Elba and landed at Frejus. Americans regretted having precipitated their negotiations, and not being in a position to avail themselves of the renewal of war on the Continent to insist on better terms, many expressed their grief in unmeasured tones; but it was too late.

Each of the contracting parties persisting in their views, the subject of the fisheries was excluded from the Treaty of Ghent; but the United States soon learned that England was right, and they had to resort to the *ultima ratio* of another war to enforce their opinions, not only against Great Britain, but also against the universal sense of other nations. We read in the same book p. 240, that in the summer of 1815, British armed cruisers warned off all American fishing vessels on the Coast of Nova Scotia, to a distance of sixty miles from the shores, and thereby says our writer, the British Government proved significantly what they had meant by their side of the argument. On this, the Americans solicited and obtained the Convention of 1818. The first article of that treaty explains the circumstances under which it was come to:

"Whereas differences have arisen respecting the liberty claimed by the United States for the inhabitants thereof to take, dry, and cure fish on certain coasts, bays, harbours and creeks of His Britannic Majesty's dominions in America, it is agreed, between the High Contracting Parties, that the inhabitants of the said United States shall have, forever, in common with the subjects of His Britannic Majesty, the liberty to take fish of every kind on that part of the southern coast of Newfoundland, which extends from Cape Ray to the Rameau Islands, on the western and northern coast of Newfoundland, from the said Cape Ray to the Quirpon Islands, on the shore, of Magdalen Islands, and also on the coasts, bays, harbours, and creeks, from Mount Joly, on the southern coast of Labrador, to and through the Straits of Belle Isles, and hence northwardly indefinitely along the coast, without prejudice however to any of the exclusive rights of the Hudson Bay Company; and that the American fishermen shall also have liberty, forever, to dry and cure fish in any of the unsettled bays, harbours, and creeks of the southern coast of Newfoundland; here above described, and of the coast of Labrador; but so soon as the same or any portion thereof, shall be settled, it shall not be lawful for the said fishermen to dry or cure fish at such portion so settled, without previous agreement for such purpose with the inhabitants, proprietors, or possessors of the ground. And the United States hereby renounce forever, any liberty heretofore enjoyed or claimed by the inhabitants thereof, to take, dry or cure fish on or within three marine miles of any of the coasts, bays, creeks, or harbours, of His Britannic Majesty's dominions in America not included within the above mentioned limits. Provided, however that the American fishermen shall be admitted to enter such bays or harbours, for the purpose of shelter, and of repairing damages therein, of purchasing wood and of obtaining water, and for no other purpose whatever. But they shall be under such restrictions as shall be necessary to prevent their taking, drying or curing fish therein, or in any other manner whatever abusing the privileges hereby reserved to them."

The difference between this Convention and the Treaty of 1783 consists in the exclusion of the Americans from the shore and bay fisheries which they enjoyed under the Treaty of 1783. This was more than sufficient to mark the abandonment by the Americans of the position assumed at Ghent, that war had not abrogated their fishing liberties under that treaty. It is, in fact, owing to that important difference that I have at this moment the honor of addressing myself to this distinguished tribunal.

Six years after the adoption of this Convention, in 1824, differences grew out of the three miles limit, though it does not appear to have arisen from the headland question, or fishing in bays.

Mr. Brent (as quoted at p. 8 of U. S. Brief) speaks of American citizens who have been interrupted "during the present season, in their accustomed and lawful employment of *taking and curing fish* in the Bay of Fundy and upon the Grand Banks, by the British armed brig 'Dotterel,' &c.

Mr. Addington answers (p. 8 and 9 of U. S. Brief), that the complainants are not entitled to reparation for

the loss they have sustained, having rendered themselves obnoxious, having been taken, some *flagrante delicto*, and others under such circumstances that they could have no other intention than that of pursuing their avocations as fishermen, within the lines laid down by treaty as forming boundaries within which pursuit was interdicted to them.

The United States Brief which is now confessed to have been inspired by a misapprehension of the facts, states (p. 9) that the claim to exclude the American fishermen from the great bays, such as Fundy and Chaleurs and also from a distance of three miles, determined by a line drawn from headland to headland across their mouths, was not attempted to be enforced until the years 1838 and 1839, when several of the American fishing vessels were seized by the British Cruisers for fishing in the large bays.

This admission coupled with the complaint of 1824, makes it evident that indisputable portions of the Convention had been violated, since American vessels had been seized in Two-Islands Harbor, Grand Manan. This was, even with the present American interpretation of the Convention of 1818, as to headlands, an evident trespass on prohibited grounds; and the rescue of the vessels seized by the fishermen of Eastport, and other similar instances, should not be mentioned otherwise than as acts of piracy, which a powerful nation may disregard for peace sake, but will resent when treasured injury explodes on other occasions.

It has been the policy of certain American Statesmen to lay the blame of most of their fisheries difficulties on the shoulders of colonists, in order to obtain their easy settlement, at the hands of a distant, and *(quoad lucrum)* disinterested, Imperial and supreme power. From a natural connection between causes and effects, our maritime provinces most in proximity to the United States, had to bear the brunt of a triangular duel, the chief part of which fell to Nova Scotia, who showed herself equal to the occasion. It can be shown that what was styled as almost barbarian legislation, on the part of the Nova Scotia Parliament, exists at this very hour, in the Legislation of the United States. And it is not a reproach that I am casting here against the United States. They have done like other nations, who made effectual provisions, against the violators of their customs, trade or navigation laws, and they could not do less or otherwise than the legislature of Nova Scotia.

The Customs Statute of the Dominion, 31 V. c. 6, (1867) contains similar provisions to those of the Fishing Act of the same Session, ch. 61, ss. 10, 12, 15. and lays upon the owner and claimant of goods seized by Customs officers, the burden of proving the illegality of the seizure; it obliges the claimant of any vessel, goods or things seized, in pursuance of any law relating to the customs, or to trade or navigation, to give security to answer for costs. Other parts provide for all the things contained in the Nova Scotia Statute, so much animadverted upon, as being contrary to common law principles, but which are applicable to British subjects as well as to foreigners. The Imperial Act, 3 & 4 Will. 4 c. 59 ss. 67, 69, 70, 71, consolidated former Acts, dating as far back as when the 13 revolted Colonies were part of the Empire, contains similar provisions as our Dominion Acts concerning Customs and Fisheries, and as the Nova Scotia Statute of 1836. I had intended to cite some words of the American law on the subject, but the volume is not at hand. I supplement the omission by—1. Gallison, p. 191; 2. Gallison, p. 505; 3. Greenleaf, Sect 404, and note 2, p. 360; 5. Wheaton, Sect. 407, p. 461, and Sect. 411, p. 463.

MR DANA:—Mr Doutre, do you not consider that to the same effect as if the Judge says that the Government must make out a *prima facie* case.

MR. DOUTRE:—I have only read a small portion of the decision; but the seizure constitutes a *prima facie* case.

MR. DANA:—Oh, no.

MR. DOUTRE:—Seizure was made for open violation of the law, and it is for the claimant to show that he did not violate the law.

MR. DANA:—The Decision is that the Government must make out a *prima facie* case.

MR. DOUTRE:—It is impossible for me to satisfy your mind on that point; the report is very long, and if you read it you will be convinced that I am right.

MR. DANA:—It says the Government are obliged by statute to prove a *prima facie* case.

MR. DOUTRE:—These cases are all of a similar character. I admit that the ordinary rules of evidence are here reversed. The reason is that the maintenance of the ordinary rules, concerning evidence, would work great mischief, if applied to such matters as these.

Mr. FOSTER:—This is a judgment based on suspicion, in the opinion of the Court, and not on the opinion of the boarding officer.

Mr. DOUTRE:—The boarding officer makes the seizure, and reports that he has made it, and unless the defendant comes and shows that the seizure has been illegally made; the Court ratifies the seizure, and condemns the goods or ships seized.

MR. DANA:—Are you speaking of war, now?

Mr. DOUTRE:—No, of profound peace.

Mr. DANA:—This was in time of war, and in the very case you cite, it is said that the acts must be established by the Government which has to make out a *prima facie* case.

Mr. DOUTRE:—I will take the law of the United States on this point as establishing my view. I will now give the reasons why such legislation has been adopted in England, in the United States and in Canada, in an extract taken from a judgment rendered by the distinguished Chief Justice of Nova Scotia, Sir William Young, in Dec. 1870, in *re* Schooner *Minnie*, Court of Vice Admiralty:—

"It must be recollected that Custom House Laws are framed to defeat the infinitely varied, unscrupulous and ingenious devices to defraud the revenue of the country. In no other system is the party accused obliged to prove his innocence—the weight of proof is on him, reversing one of the first principles of criminal law. Why have the Legislatures of Great Britain, of the United States, and of the Dominion alike, sanctioned this departure from the more humane, and, as it would seem at the first blush, the more reasonable rule? From a necessity, demonstrated by experience—the necessity of protecting the fair trader and counter-working and punishing the smuggler."

Mr. DANA:—That is a British decision which you have read?

Mr. DOUTRE:—Yes; a British Colonial one.

The provisions of the Nova Scotia Statute were intended to apply to a class of cases belonging to something similar to customs regulations, and are inseparable from them, and if ever our American friends desire to enforce on their coasts the three miles limit, which their answer and brief recognize as resting on the unwritten law of nations, they will have to extend to this matter their customs law above cited, as did the Legislature of Nova Scotia.

The learned Agent of the United States went very far from any disputed point to gain sympathy, by a reference to what, in the United States Answer to the case, is called an inhospitable statute. He says:—

"A Nova Scotia statute of 1836, after providing for the forfeiture of the vessel found fishing, or preparing to fish, or to have been fishing within three miles of the coast, bays, creeks or harbors, and providing that the master, or person in command, should not truly answer the questions put to him in such examination by the boarding officer, he should forfeit the sum of one hundred pounds, goes on to provide that if any goods shipped on the vessel were seized for any cause of forfeiture under this Act, and any dispute arises whether they have been lawfully seized, the proof touching the illegality of the seizure shall be on the owner or claimant of the goods, ship, or vessel, but not on the officer or person who shall seize and stop the same."

These are the very expressions which the learned Agent for the United States employed when he animadverted

on that Statute. He also states that he is not aware whether a Statute similar to this one, which existed in Nova Scotia in 1868, has been repealed. In 1867, however, Nova Scotia, New Brunswick and the two Canadas were confederated together, and the matters relating to the fisheries and customs were then transferred to the Dominion of Canada, which has ever since exercised the sole power of legislation over those subjects. The best answer that can be given to Mr. Foster and his colleagues on this point may be quoted from high authority. The Agent for the United States, about the period of his arrival here to attend to his duties before this Commission, published in the "American Law Review," a journal which speaks with quasi-judicial authority in Massachusetts, an article on the *Franconia*, having a prominent bearing on this case now before the Commission. I only mention this fact in order to show the high character of the *Review*. This journal, alarmed at the views proclaimed by President Grant, published a very able article on the subject, the writer being an eminent and able lawyer; and this article deals with the question of preparing to fish, as well as with the question of trade, both of which have been discussed by my learned friend the Agent for the United States. In dealing with the claim of the right, on the part of American fishermen, to lie at anchor, clean and pack fish and purchase bait, prepare to fish and trans-ship cargoes, the writer says:

Mr. DANA:—Will you have the kindness to state by whom these views are set forth?
Mr. DOUTRE:—I am not quite sure of the name.
Mr. DANA: It is not Mr. Foster.
Mr. DOUTRE: No.
Mr. DANA: You do not know the author.
Mr. DOUTRE: I think I do.
Mr. FOSTER: Unless that is Prof. Pomeroy's argument, it is something I have never before heard of.
Mr. DOUTRE: It is his argument, I am informed.
Mr. DANA: I wish also to say that this *Review* has no quasi-judicial authority. It is private property, and edited by private persons.
Mr. DOUTRE: I thus consider all publications of this nature.

"All these acts are plainly unlawful, and would be good grounds for the confiscation of the offending vessel, or the infliction of pecuniary penalties. The treaty stipulates that "American fishermen shall be admitted to enter such bays and harbors for the purpose of shelter, of repairing damages therein, of purchasing wood, and obtaining water, and for no other purpose whatever." Even assuming, as has sometimes been urged, that the words "For no other purpose whatever" refer exclusively to matters connected with the business and process of fishing, the prohibition still covers all the acts enumerated. To use the bays and harbors as places of convenience in which to clean and pack fish, to procure bait, to prepare to fish, or to land cargoes of fish, would be an invasion of the exclusive fishing rights within the territorial waters secured to British subjects and denied to American citizens. "Preparing to fish," if permitted, would render it almost impossible to prevent actual fishing. When, from considerations of policy, statutes are made to declare some final result illegal, the legislature uniformly forbids the preliminary steps which are directly connected with that result, lead up to it, and facilitate its accomplishment. Thus, if Congress should absolutely prohibit the landing of certain goods in our ports, the United States Government would doubtless listen with amazement to a complaint from foreign importers that "preparing to land" was also prohibited. All customs and revenue regulations are framed upon this theory. The provision of the Imperial and Canadian statutes making it a penal offence for American vessels "to prepare to fish" while lying in territorial waters, seems, therefore, to be a "restriction necessary to prevent" their taking fish therein, and for that reason to be lawful and proper."

The claim of right to sell goods and buy supplies, the traffic in which the Nova Scotia Act was intended to prevent, is thus commented on:—

"This particular claim has not yet been made the subject of diplomatic correspondence between the two governments, but amongst the documents laid before Congress at its present session is a consular letter from which we quote:—

"It (the Treaty of 1818) made no reference to and did not attempt to regulate the deep sea fisheries which were open to all the world. * * * * It is obvious that the words 'for no other purpose whatever,' must be construed to apply solely to such purposes as are in contravention to the treaty, namely: to purposes connected with the taking, drying, or curing fish within three marine miles of certain coasts, and not in any manner to supplies intended for the ocean fisheries, with which the treaty had no connection.

"All this is clearly a mistake, and if the claims of American fishermen, partially sanctioned by the United States executive, rest upon no better foundation they must be abandoned. In fact, the stipulation of the treaty in which the clause occurs, has reference alone to vessels employed in deep sea fishing. It did not require any grant to enable our citizens to engage in their occupation outside the territorial limits, that is upon the open sea; but they were forbidden to take, dry, or cure fish in the bays and harbors. They were permitted, however, to come into those inshore waters for shelter, repairs, wood and water, "and for no other purpose whatever." To what American vessels is this privilege given? Plainly to those that fish in the open sea. To say that the clause "for no other purpose whatever" applies only to acts connected with taking, drying, or curing fish within the three miles limit, which acts are in terms expressly prohibited, is simply absurd. It would be much more reasonable to say that, applying the maxim *noscitur a sociis*, the words "for no other purpose whatever" are to be construed as having reference solely to matters connected with regular fishing voyages, necessary, convenient or customary in the business of fishing, and are not to be extended to other acts of an entirely different and purely commercial nature.

"President Grant declares that so far as the Canadian claim is founded upon an alleged construction of the convention of 1818, it cannot be acquiesced in by the United States. He states that during the conference which preceded the signing of this treaty, the British Commissioners proposed a clause expressly prohibiting American fishermen from carrying on any trade with British subjects, and from having on board goods except such as might be necessary for the prosecution of their voyages. He adds:—

"This proposition which is identical with the construction now put upon the language of the convention, was emphatically rejected by the American Commissioners, and thereupon was abandoned by the British plenipotentiaries, and Article I, as it stands in the convention was substituted."

"The President has been misinformed. The proposition alluded to had no connection with the privilege given in the latter part of Article 1 to enter bays and harbors for shelter and other similar purposes; but referred expressly and exclusively to the grant contained in the former part of the Article of a right to take, dry and cure fish on the coasts and in the bays of Labrador and Newfoundland. This is apparant from a reference to the negotiations themselves. On September 17, 1818, the American Commissioners submitted their first *projet* of a treaty. The proposed article relating to the fisheries was nearly the same as the one finally adopted, including a renunciation of the liberty to fish within three miles of other coasts and bays. The proviso was as follows:—

"Provided however that American fishermen shall be permitted to enter such bays and harbors for the purpose *only* of obtaining shelter, wood, water and *bait*.

"The British counter *projet* granted a liberty to take, dry, and cure fish on the coasts of Newfoundland and Labrador within much narrower limits than those demanded by the American plenipotentiaries. It admitted the fishing vessels of the United States into other bays and harbors, 'for the purpose of shelter, of repairing damages therein, of purchasing wood, and obtaining water, and for no other purpose.' It also contained the following clause:

"It is further understood that the liberty of taking, drying and curing fish granted in the preceding part of this article shall not be construed to extend the privilege of carrying on trade with any of his Britannic Majesty's subjects residing *within the limits hereinbefore assigned to the use of fishermen of the United States*. And in order the more effectually to guard against smuggling, it shall not be lawful for the vessels of the United States *engaged in the said fishery* to have on board any goods, wares, and merchandise, except such as may be necessary for the prosecution of the fishery."

"Messrs. Gallatin and Rush replied, insisting upon a privilege to take, dry, and cure fish on the coasts of Newfoundland and Labrador within the limits first demanded by them, and added as the last sentence of their letter: The clauses making vessels liable to confiscation in case any articles not wanted for carrying on the fishery should be found on board, would expose the fishermen to endless vexations. On the 13th October, the British Commissioners proposed Article I, as it now stands, which was accepted at once. There was no discussion of an alleged right of American fishermen to engage in trade, and no further allusion on the subject. Indeed, throughout all these conferences the American Commissioners were labouring to obtain as extensive a district of territory as possible on Newfoundland, Labrador, and the Magdalen Islands for inshore fishing, and paid little attention to the privilege—then apparently of small value, but now important—of using other bays and harbours for shelter and kindred purposes. The British agents on the other hand endeavoured to confine the former grant within narrow bounds, and to load it with restrictions. The rejected clause, concerning trade and carrying goods, was one of these restrictions, and in its very terms referred alone to the vessels taking, drying and

curing fish on the portion of the Newfoundland and Labrador coasts made free to our citizens. It should be noticed that the proviso finally adopted omitted the right originally demanded by the Americans of entering other bays and harbors for bait, and is identical with the one at first submitted by the British plenipotentiaries, strengthened by the addition of the word "whatever" after the clause "for no other purpose." It is evident, therefore that the British Government is not estopped from opposing the claim now set up by American fishermen, and sustained by the President, and any thing that occurred during the negotiations preliminary to the treaty.

"We must fall back, then, upon the accepted doctrines of International Law. Every nation has the undoubted right to prescribe such regulations of commerce carried on its waters, and with its citizens, as it deems expedient, even to the extent of excluding entirely some or all foreign vessels and merchandise. Such measures may be harsh, and under some circumstances a violation of inter-state comity, but they are not illegal. At all events, it does not become a government to complain, which now maintains a tariff prohibitory as to many articles, and which at one time *passed a general embargo and non-intercourse Act.* There seem to be special reasons why the Dominion authorities may inhibit general commerce by Americans engaged in fishing. Their vessels clear for no particular port; they are accustomed to enter one bay or harbor after another as their needs demand; they might thus carry on a coasting trade; they would certainly have every opportunity for successful smuggling. Indeed, this would legitimately belong to the local customs and revenue system, and not to the fisheries. *We are thus forced to the conclusion that American fishermen have no right to enter the bays and harbors in question and sell goods or purchase supplies other than wood and water.*"

It is not necessary to add a word to the able and impartial language quoted, except to suggest that if the author had been now writing, he might have found a more forcible example of inhospitable legislation than the "general embargo and non-intercourse act," namely, the attempt to evade the plighted promise of the nation, to remove the taxation from fish, by taxing the cans,—useless for any other purpose,—in which the fish are sent to market.

While restoring to the legislation of Nova Scotia its true character, this article shows also which of the two decisions rendered, one by Mr. Justice Hazen, the other by the distinguished and learned Chief Justice, Sir William Young, must be held to be the correct one, on *preparing to fish.* The latter's judgment receives from this impartial source an authority which it did not require to carry conviction to all unprejudiced minds.

The necessity for the Nova Scotia Statute of 1836, so much complained of became apparent within a pretty short period.

In 1838, as mentioned in the United States Brief, p. 9, several American vessels were seized by British cruisers, for fishing in large bays. Between the dates of the Nova Scotia Statute and these seizures, the American Secretary of State had issued circulars enjoining American fishermen to observe the limits of the treaty, but without saying what these limits were. Why did he abstain from giving his countrymen the text of the Convention of 1818, Article 1st? They could have read in it that the United States had renounced forever the liberty of taking, drying or curing fish within three marine miles of any coast, bay, creek or harbor, and that they could not be admitted *to enter such bays or harbors*, except for shelter, or repairing damages, or obtaining wood and water, *and for no other purpose whatever.* Every fisherman would have understood such clear language. Statesmen only could imagine that "bays" meant large bays, more than 6 miles wide at their entrance.

It was the privilege of eminent politicians, but not of the fishermen, to handle that extraordinary logic which involves the contention—1st, That for the purpose of fishing, the territorial waters of every country along the sea-coast extend 3 miles from low-water mark. 2nd, That "in the case of bays and gulfs, such only are territorial waters as do not exceed 6 miles in width at the mouth upon a straight line measured from headland to headland. 3rd, That "all larger bodies of water connected with the open sea, form a part of it." These words are taken from the Answer to British Case, pp. 2, 3). The framers of the Convention of 1818 must have meant those large bays, when they excluded American fishermen from *entering* into any bay, etc. The most that the fisherman could have said, after reading the text, would be that it must have been an *oversight*,—and he would never have thought of taking the law in his own hand and disregarding a solemn contract entered into by his Government. But, with his common sense, he would have said: The Convention could not mean the small bays, since I am told by American lawyers that it did not require a treaty to protect the small bays against our interference. (See the Answer to the Case at page 2.) The word bay could not mean anything but those large bays, which, in the absence of Treaty stipulations, might by some be considered as forming part of the open sea. And acting on this plain interpretation of the most clear terms, the fisherman would have abstained from entering into any bay except for the purposes mentioned in the Convention. Old fishermen would, in addition, have taught the younger ones that there was a paramount reason why the American framers of the Convention of 1818 could have no desire to open the large bays to their fishermen, for the reason that up to 1827 or 1828, that is until ten years after the Convention, Mackerel had not been found in large quantities in the Gulf of St. Lawrence.

If then the circulars of the Secretary of the Treasury, to American fishermen, failed to put the latter on their guard, when the Nova Scotia Legislature showed such firm determination to enforce the rights of her fishermen and coerce the American to obedience to law and treaties, the responsibility of any possible conflict fell upon the American and not upon the British authorities.

Our friend, Mr. Dana, expressed with vehemence of language which impressed us all, the serious consequences which would have followed, if a drop of American blood had been spilt in these conflicts. We have too good an opinion of our American cousins to think that they would have been much moved if one of their countrymen had been killed, while in the act of violating the law, in British Territory. The United States have laws as well as other nations against trespass, piracy and robbery, and it is not in the habit of nations to wage war in the protection of those of their countrymen who commit any of these crimes in a foreign land. The age of fillibustering has gone by and no eloquence can restore it to the standard of a virtue.

However, a state of things which is calculated to create temptations such as were offered to American fishermen, in Canadian waters, should be at all times most carefully avoided, and it was the desire of both British and American statesmen to remove such dangerous and inflammable causes of conflict, which brought us to the Reciprocity Treaty of 1854.

By that Treaty, British waters in North America, were thrown open to United States citizens, and United States waters north of the 36th degree of north latitude were thrown open to British fishermen, excepting the salmon and shad fisheries, which were reserved on both sides. Certain articles of produce of the British Colonies and of the United States were admitted to each country, respectively, free of duty.

That Treaty suspended the operation of the Convention of 1818, as long as it was in existence. On the 17th of March, 1865, the United States Government gave notice that at the expiration of twelve months, from that day, the Reciprocity Treaty was to terminate. And it did then terminate and the Convention of 1818 revived, from the 17th March, 1866.

However, American fishermen were admitted, without interruption, to fish in British American waters, on payment of a license, which was collected at the Gut of Canso, a very narrow and the nearest entrance to portions of these waters. Some American vessels took licenses the first year, but many did not. The license fee having been raised afterwards, few vessels took a license and finally almost all vessels fished without taking any. Every one will understand the impossibility of enforcing that system. All American vessels having the right to fish in British American waters, under the Convention of 1818, those who wanted or professed to limit themselves to fishing outside of the 3 miles limit had the right to enter on the northern side of Cape Breton without taking a license. As long as that license was purely nominal, many took it in order to go everywhere without fear of cruisers or molestation. When our license fee was doubled and afterwards trebled, the number of those who took it gradually dwindled to nothing. The old troubles and irritation were renewed, and many fishermen have explained, before the Commission

how embarrassing it was, in many instances, to know, from the deck of a vessel, how far from the shore that vessel stood. Three miles have to be measured with the eye, not from the visible shore, but from low water mark. There are coasts which are left dry for several miles by the receding tide. When the tide is up, landmarks may be familiar to the inhabitants of the shore or frequent visitors of its water; but for the fisherman who comes there for the first or second time, or perhaps for the tenth time, but after intervals of years, it may be a difficult task to determine where he can fish with safety. And what can be more tempting, I should say tantalizing, than to follow a school of mackerel, which promises a full fare in one day and a speedy return home, with the mirage of a family to embrace and of profits to pocket? Should men be exposed to such temptations, when commercial intercourse and money, as an *ultima ratio* present so many modes of removing restrictions? Is there any one of these varied modes of settlement which is worth the life of a man?

Great Britain and the United States owed it to their noble common ancestry and to their close relationship, not to listen to the evil advice of passion, and to show to the world a new battlefield, where cool judgment and good will are the most successful arms.

With the termination of the Reciprocity Treaty, reappeared the cruisers and cutters among the fishermen, and irritation seemed to have acquired vigor and intensity during the suspension. Other international differences had grown up, from the beginning of the civil war, and had accumulated, during the whole of that war, to such an extent that a spark might start a serious conflict. Fortunately cool heads were predominant in the two governments; the Joint High Commission was appointed, and the Washington Treaty reduced to a money question, what, in former times, would have cost the lives of thousands of men and would have, besides, entailed on both sides an expenditure of money ten times more considerable than the compensatory indemnities resulting from that Treaty. Ten articles of that Treaty concern the fisheries, from the 18th to the 25th, both inclusive, and the 32nd and 33rd. In addition to the liberties granted to them by the Convention of 1818, Americans are admitted, by art. 18, to fish everywhere, in common with British subjects, without being restricted to any distance from the coast, with permission to land for the purpose of drying their nets and curing their fish, provided they do not interfere with the rights of private property.

On the other hand British subjects are admitted, by art. 19, to the same liberties on the eastern sea coasts and shores of the United States, north of the 39th parallel of north latitude.

Art. 21 declares that as long as the Treaty shall subsist, fish *oil* and fish of all kinds (except fish of the inland lakes and of the rivers falling into them, and except fish preserved *in oil*) being the produce of the fisheries of the United States or of the Dominion of Canada, shall be admitted into each country, respectively, free of duty.

By Art. 22 it is agreed that Commissioners shall be appointed to determine, having regard to the privileges accorded by the United States to the subjects of Her Majesty, the amount of any compensation which ought to be paid in return for the privileges accorded to the citizens of the United States, under article 18,—and that any sum of money which the Commissioners may so award shall be paid, in a gross sum, within twelve months after the award given.

Article 33 stipulates that the fisheries articles shall remain in force for the period of ten years from the date at which they may come into operation, by the passing of the requisite laws, on both sides, and further, until the expiration of two years after notice given by either of the parties of its wish to terminate the same.

The Treaty came into operation on the 1st July, 1873. Great Britain claims from the United States a sum of $14,880.000 for the concession of the privileges granted to the citizens of the United States for the period of twelve years.

On the part of the United States it is contended that the liberty of fishing in their waters and the admission of Canadian fish and fish oil, duty free, in the markets of the United States is equivalent to what Great Britain obtains by the treaty.

The questions now to be enquired into are: 1st. Is the British claim proved, and to what extent? 2nd. Have the United States rebutted the evidence adduced on behalf of Her Majesty, and have they proved a set-off to any and what extent?

Wherever Americans have expressed a disinterested opinion about the Gulf and other Canadian fisheries, they have never underrated their value, as they have in this case, where they are called upon to pay for using them.

At a time when no diplomatist had conceived the idea of laying the claim of the United States to these fisheries, on the heroic accomplishments of our army and navy from the old British colony of Massachusetts, as we have heard from the eloquent and distinguished United States counsel, before this Commission:—at a time when, emerging from war, fit occasions offered themselves for reminding Great Britain of what she owed to the bravery of Massachusetts boys, who had planted her flag in the place of the French colors over this Dominion,—in these times the right of fishing in those waters had accrued to the American people from no other origin than a concession by treaty, and no other basis than the *uti possidetis*. When another Commission is appointed by England and France to settle the differences which exist between them in reference to the Newfoundland Fisheries, I doubt much if the political oratory of our American friends could not, with a little change of tableaux and scenery, be turned to some account, —such as the French reminding the English people of the miseries endured by Jacques Cartier during the winter he spent at Sable Island on his way to Newfoundland, Louisburg and Quebec to bring European civilization among the aboriginal tribes.

Although it is hard to vouch for anything in such matters of fancy, I doubt much whether France will recall the heroic deeds of her Cartiers and Champlains to make herself a title to these fisheries. She will not make such light work of her Treaties as our friends have done.

In the line of historical titles adopted by our learned friends, the Scandinavians would wipe out even the claim of Columbus, for three or four centuries before the discoveries of the great Genoese navigator, some of their fishermen had visited profitably the Banks of Newfoundland. My learned friends should be as much alarmed at the consequences of their fiction, as Mr. Seward was when dealing with the headland question in the Senate—page 9 of the British brief—he pointed out that the construction put upon the word bay, by those who confined them to bodies of water six miles wide at their mouth, would surrender all the great bays of the United States.

While listening with pleasure to the narration of the great achievements of the Massachusetts boys, we could not understand why they shed their blood for those poor and unproductive fisheries. We looked a little at history, we searched for a confirmation of the pretensions of our friends, and we found a very different account, in the writings of their great statesmen, both as to the basis of their claim and as to the value of the fisheries.

John Quincy Adams, who represented with others, as has already been mentioned, the United States, at the Treaty of Ghent, in 1814, collected information. He applied to Mr. James Lloyd, and this gentleman, writing from Boston, on the 8th of March, 1815, communicated to him what will be found from page 211 to page 218 of his "Duplicate Letters." A few citations will not be out of place here:—

"The shores, the creeks, the inlets of the Bay of Fundy, the Bay of Chaleurs, and the Gulf of St. Lawrence, the Straits of Bellisle, and the Coast of Labrador, appear to have been designed by the God of Nature as the great ovarium of fish;—the inexhaustible repository of this species of food, not only for the supply of the American, but of the European continent. At the proper season to catch them in endless abundance, little more of effort is needed than to bait the hook and pull the line and occasionally even this is not necessary. In clear weather, near the shores, myriads are visible, and the strand is at times almost literally paved with them."

"The Provincials had become highly alarmed at the expansion of this fishery and trade; jealous of its progress and clamorous at its endurance; they, therefore, of late years, have repeatedly memorialized the government in England, respecting the fisheries carried on by the Americans, while the whole body of Scottish adventurers, whose trade both in imports and exports, and control over the inhabitants, it curtailed, have turned out in full cry and joined the chorus of the colonial governments in a crusade against the encroachments of the infidels, the disbelievers in the divine authority of kings, or the rights of the provinces, and have pursued their objects so assiduously that, at their own expense, as I am informed from a respectable source, in the year 1807 or 8, *they stationed a watchman in some favorable position near the Straits of Canso, to count the number of American vessels which passed those straits on this employment: who returned nine hundred and thirty-eight as the number actually ascertained by* HIM *to have passed, and doubtless many others, during the night or in stormy or thick weather, escaped his observation* and some of these aggressors, have distinctly looked forward with gratification to a state of war, as a desirable occurrence, which would, by its existence, annul existing treaty stipulations, so injurious, as they contend, to their interests and those of the nation."

"The Coast and Labrador Fisheries are prosecuted in vessels of from 40 to 120 tons burthen, carrying a number of men, according to their respective sizes, in about the same proportion as the vessels on the Bank Fishery. They commence their voyages in May, and get on the fishing ground about the 1st of June, before which time bait cannot be obtained. This bait is furnished by a small species of fish called *capling*, which strike inshore at that time, and are followed by *immense shoals of codfish which feed upon them. Each vessel selects her own fishing-ground, along the coast of the Bay of Chaleurs, the Gulf of St. Lawrence, the Straits of Bellisle, the Coast of Labrador, even as far as Cumberland Island*, and the entrance of Hudson's Bay, thus improving a fishing-ground reaching in extent from the 45th to the 68th degree of north latitude.

"In choosing their situation, the fishermen generally seek some sheltered and safe harbor, or cove, where they anchor in about *six or seven fathoms water*, unbend their sails, stow them below, and literally making themselves at home, dismantle and convert their vessels into habitations at least as durable as those of the ancient Scythians. They then cast a net over the stern of the vessel, in which a sufficient number of capling are soon caught to supply them with bait from day to day. Each vessel is furnished with *four or five light boats*, according to their size and number of men, each boat requiring two men. They leave the vessel early in the morning, and seek the best or sufficiently good spot for fishing, which is frequently found within a few rods of their vessels, and very rarely more than *one or two miles distant from them*, where they haul the fish as fast as they can pull their lines, and sometimes it is said the fish have been so abundant as to be gaft or scooped into the boats, without even a hook or line; and the fishermen also say that the codfish have been known to pursue the capling in such quantities, and with such voracity, as to run in large numbers quite out of water, on to the shores. The boats return to the vessels about nine o'clock in the morning, at breakfast, put their fish on board, salt and split them; and after having fished several days, by which time the salt has been sufficiently struck in the fish first caught, they carry them on shore and spread and dry them on the rocks or temporary flakes. This routine is followed every day, with the addition of attending to such as have been spread, and carrying on board and stowing away those that have become sufficiently cured, until the vessel is filled with dried fish, fit for an immediate market, which is generally the case by the *middle* or *last of August*, and with which she then proceeds immediately to Europe, or returns to the United States; and this fish, thus caught and cured, is esteemed the best that is brought to market, and for several years previous to that of 1808, was computed to furnish *three fourth parts* of all the dried fish exported from the United States."

The following statements to be found on page 219 of the work were furnished to Mr. Adams by a person, whom he qualifies as a very respectable Merchant, who dates his letter Boston, May 20th, 1815:

"My calculation is, that there were employed in the Bank, Labrador and Bay fisheries, the years above mentioned, 1232 vessels *yearly*, viz., 584 to the Banks, and 648 to the Bay and Labrador. I think the 584 Bankers may be put down 36,540 tons, navigated by 4,627 men and boys, (each vessel carrying one boy,) they take and cure, annually, 510,700 quintals of fish; they average about three fares a year, consume, annually, 81,170 hhds salt, the average cost of these vessels is about $2,000 each; the average price of these fish at foreign markets is $6 per quintal; these vessels also make from their fish, annually, 17,520 barrels of oil, which commands about $10 per barrel, their equipments cost about $900, annually, exclusive of salt.

"The 648 vessels that fish at the Labrador and Bay. I put down 48,600 tons, navigated by 5,832 men and boys; they take and cure, annually, 648,000 quintals of fish; they go but one fare a year; consume, annually, 97,200 hhds. of salt. The average cost of these vessels is about $1600; the cost of their equipments, provisions, etc., is $1050; those descriptions of vessels are not so valuable as the bankers, more particularly those that go from the district of Maine, Connecticut and Rhode-Island, as they are mostly sloops of no very great value; most of these vessels cure a part of their fish where they catch them, on the beach, rocks, etc., and the rest after they return home; several cargoes of dry fish are shipped yearly from the Labrador direct for Europe. The usual markets for those fish are in the Mediterranean, say Alicant, Leghorn, Naples, Marseilles, etc., as those markets prefer small fish, and the *greatest* part of the fish caught up the bay and Labrador are *very* small. The average price of these fish at the market they are disposed of is $5; these vessels also make from their fish about 20,000 bbls. of oil, which always meets a ready sale and at handsome prices, say from $8 to $12 per barrel, the most of it is consumed in the United States.

1232 vessels employed in the Bank, Bay and Labrador fisheries, measuring.....tons	85,140
Number of men they are navigated by.....	10,459
Number of hhds. salt they consume.....	178,370 hhds.
Quantity of fish they take and cure.....	1 158,700 quintals.
Barrels of oil they make.....	37,520 barrels.

"There are also a description of vessels called jiggers or small schooners of about 30 to 45 tons that fish in the South Channel, on the Shoals and Cape Sables, their number 300, they carry about 4 or 5 hands, say 1200 men and take about 75,000 qtls. of fish, annually; consume 12,000 hhds. of salt, and make about 4,000 barrels of oil; their fish is generally sold for the West Indies and home consumption.

"There are another description of fishing vessels commonly called Chebacco Boats or Pink Sterns; their number 600; they are from 10 to 23 tons, and carry two men and one boy each, say, 1,800 hands; they consume 15,000 hhds. of salt, and take and cure 120,000 quintals of fish, annually. These fish also are wholly used for home and West India market, except the very first they take early in the spring, which are very nice indeed, and are sent to the Bilbao market in Spain, where they always bring a great price; they make 9,000 barrels of oil; these vessels measure about 10,300 tons.

"There are also about 200 schooners employed in the mackerel fishery, measuring 8,000 tons, they carry 1,600 men and boys, they take 50,000 barrels, annually, and consume 6,000 hhds salt.

"The alewive, shad, salmon and herring fishery is also immense, and consumes a great quantity of salt.

"Whole number of fishing vessels of all descriptions.....	2,332
Measuring.....tons.	115,940
Number of men navigated by.....	15,059
Salt they consume.....	265,370 hhds.
Quantity of fish they take and cure.....	1,353,700 quintals.
Number of barrels of oil.....	50,520 barrels.
Number of barrels of mackerel.....	50,000 barrels.

"There are many gentlemen who assert, and *roundly* too, that one year there were at the Labrador and Bay, over 1,700 sail beside the bankers; but I feel very confident they are *much* mistaken, it is impossible it can be correct."

Then Mr. Adams gives the authority of his approbation, at page 233, to the following statements from "Colquhoun's Treatise on the Wealth, Power and Resources of the British Empire," 2nd Edit., 1815,

"The *value* of these fisheries, in table No. 8, page, 36, is estimated at £7,550,000 sterling.

"'New Brunswick and Nova Scotia, from being both watered by the Bay of Fundy, enjoy advantages over Canada, which more than compensate a greater sterility of soil. These are to be traced to the valuable and extensive fisheries, in the Bay of Fundy, which, in point of abundance and variety of the finest fish, exceed all calculation, and may be considered as a mine of gold—a treasure which cannot be estimated too high, since with little labor, comparatively speaking, enough could be obtained to feed all Europe.' pp. 312-313.

"Since the trade with the United Statss has been so greatly obstructed, the produce of the fisheries in the British colonies thus encouraged by the removal of all competition, has been greatly augmented; and nothing but a more extended population is required to carry this valuable branch of trade almost to any given extent.

"It will be seen by a reference to the notes in the table annexed to this chapter, that *the inhabitants of the United States* derive incalculable advantages, and employ a vast number of men and vessels in the fisheries in the river St. Lawrence, and on the coast of Nova Scotia, *which exclusively belong to Great Britain*. The dense population of the Northern States, and their

local situation in the vicinity of the most prolific fishing stations, have enabled them to acquire vast wealth by the indulgence of this country.' p. 313.

"'It ought ever to be kept view, that (with the exception of the small islands of St. Pierre and Miquelon restored to France by the Treaty of Paris, in May, 1814), the whole of the most valuable fisheries of North America *exclusively belong at this present time to the British Crown*, which gives to this country a monopoly in all the markets in Europe and the West Indies, or a right to a certain valuable consideration from all foreign nations, to whom the British Government may concede the privilege of carrying on a fishery in these seas, p. 314.

"'Private fisheries are a source of great profit to the individuals, in this and other countries, who have acquired a right to such fisheries. Why, therefore, should not the united kingdom derive a similar advantage from the fisheries it possesses within the range of its extensive territories in North America, (perhaps the richest and most prolific in the world), by declaring every ship and vessel liable to confiscation which should presume to fish in those seas without previously paying a tonnage duty, and receiving a license limited to a certain period when fish may be caught, with the privilege of curing such fish in the British territories? All nations to have an equal claim to such licenses, limited to certain stations, but to permit none to supply the British West Indies, except his majesty's subjects, whether resident in the colonies or in the parent state.' p. 315.

St. John's or Prince Edward's Island.

"'FISHERIES.—This island is of the highest importance to the United Kingdom. Whether the possession of it be considered in relation to the Americans, or as an acquisition of a great maritime power, it is worthy of the most particular attention of government. Mr. Stewart has justly remarked, in his account of that island. (page 296,) that the fishery carried on, from the American States, in the Gulf of St. Lawrence, for some years past, is very extensive, and is known to be one of the greatest resources of the wealth of the Eastern States, from which about 2000 schooners, of from 70 to 100 tons, are annually sent into the Gulf; of these, about 1400 make their fish in the Straits of Bellisle and on the Labrador shore, from whence what is intended for the European market is shipped off, without being sent to their own ports. About six hundred American schooners make their fares on the north side of the island, and often make two trips in a season, returning with full cargoes to their own ports, where the fish are dried. The number of men employed in this fishery is estimated at between fifteen and twenty thousand, and the profits on it are known to be very great. To see such a source of wealth and naval power on our own coasts, and in our very harbors, abandoned to the Americans, is much to be regretted, and would be distressing, were it not that the means of re-occupying the whole, with such advantages as must soon preclude all competition, is afforded in the cultivation and settlement of Prince Edward's Island.'" pp. 318, 318.

It must be remembered that these statements were for the last 10 years of the last, and the first 10 years of the present century.

We are not informed where the 50,000 barrels of mackerel were then caught, but we have the opinion of Senator Tuck, cited at pages 9 and 10, of British Brief, who says: "Perhaps I should be thought to charge the Commissioners of 1818 with overlooking our interests They did so in the important renunciation which I have quoted, but they are obnoxious to no complaint for so doing. In 1818, we took no mackerel on the coasts of British possessions, and there was no reason to anticipate that we should ever have occasion to do so. Mackerel were then found as abundant on the coast of New England as anywhere in the world, and it was not until years after that this beautiful fish, in a great degree, left our waters. The Mackerel fishery on the provincial coast has principally grown up since 1828, and no vessel was ever licensed for that business in the United States till 1838. The Commissioners in 1818 had no other business but to protect the Codfish, and this they did in a manner generally satisfactory to those most interested."

From the assertions of seemingly well-informed Gloucester officials, accepted as such by the American Counsel, the state of things, described by these Boston gentlemen in 1815, would have undergone a complete change, not progressively and in accordance with the laws of nature; but on the contrary, the species and quantity of fish caught in our waters, and the number of vessels and men engaged in that business, have gradually become more and more insignificant. The magnates of cod and mackerel from Gloucester and other ports, who had draped themselves in lofty statistics for the Centennial, have come here to explain once more that all is not gold that glitters. They took off their Centennial costume, as people do after a fancy ball,—they humbled themselves to the last degree of mortification, contending that the Gulf fisheries had reduced them to beggary, they having lost, some $325, others only $128, on every trip they had made there during scores of years in succession. People who do not know those hardy and courageous fishermen of Gloucester, would hardly believe that some of them have gone through 170 trips consecutively, without ever flinching in their Spartan stoicism, under an average loss of $225 each trip! Who should wonder, if, in their disgust of such an ungrateful acknowledgement, mackerel should have gone to distant zones, where they could be better appreciated!

Cool philosophers thought they were bound to reduce to nine the wonders of the world. They were mistaken. Here is that wonderful town of Gloucester, State of Massachusetts, in the United States of America, which has been built, and has grown up rich and prosperous, by accumulating losses and ruins upon former losses and ruins. The painful history of its disasters should be inscribed as the tenth wonder.

Fishing, no doubt, like all other industries, has its fluctuations of success and partial failure; but as it rests upon an inexhaustible supply to be found somewhere, it never can be said to be an absolute failure. It was only within a few years that experimental science was applied to fish. Science is diffident, as shown by Prof. Baird; in fact, science teaches uncertainty and unbelief, because the more a man learns, the more he finds himself ignorant,—the more he labors to know if what he thought to be one thing, is not another thing. The witnesses from Gloucester are formost in that school of philosophers, who doubt of their own existence. Their town is already a myth; their families would have soon been the same; and alas! themselves, if they had been too long before this Commission, would have to kick each other to know whether they were myths or living beings.

I will have a more fitting occasion for reviewing the evidence brought on behalf of the United States generally. For the moment the contrast was rather tempting,—between what Americans of our days thought of our fisheries, and what their ancestors thought almost a century ago. I proceed now to show that the British claim has been proved.

Mr. DANA:—That was as to the cod-fishery.

Mr. DOUTRE:—I think they have made very little difference.

Mr. DANA:—Cod-fishing is prosperous now.

Mr. DOUTRE:—It must not be forgotten, as one of our learned friends expressed himself in reference to other matters, they have now a point to carry. When Mr. Adams was collecting his information, he had no point to carry, but simply to give a plain statement of facts. Those rich fisheries, which were spoken of in such glowing terms in 1815 have, it is asserted, declined to nothing, because we ask for their value. I never heard the matter more plainly and squarely laid down, than it was yesterday, by my learned friend, Mr. Whiteway, when he said, "Now, that you possess these fisheries, how much would you ask for their surrender?" If we were to turn the tables, in this manner, we would see the Gloucester gentlemen coming here and describing the fisheries in Centennial colors.

Mr. DANA:—Our testimony was all to the effect that the cod-fishery is still profitable in Gloucester.

Mr. DOUTRE:—I think at this hour we must understand the bearing of the testimony, or we will never do so. The fisheries in Maine have been completely destroyed and no longer exist. I will read from the testimony on that point in a few moments.

The number of American vessels frequenting the British-American waters could not be estimated with any degree of precision. Witnesses could only speak of what they had seen, and but very few of them could, within a

short time, go over all the fishing grounds and make an estimate, even if they had gone round with that object in view. They had to trust to what they had heard from other parties, who about the same time had been in other portions of these waters, and by combining the knowledge acquired from others with their own, they were able to give a statement of the number of vessels frequenting those waters.

Capt. Fortin, p. 328 of British evidence, states that in the Province of Quebec only, the extent of the coast on which the fisheries of Canada are conducted is about 1,000 miles ; and Prof. Hind, p, vii. of his valuable paper, estimates the area of coastal waters conceded to the United States by the Treaty, to be about 11,900 square miles. Americans have been in the habit of fishing all around the Bay of Fundy and on the south-east coast of Nova Scotia, without counting the Gulf; but the bulk of the American fleet entered the Gulf, principally by the Gut of Canso, and also by going round Cape Breton, or by the Strait of Belle Isle, coming from Newfoundland. We have a mass of evidence that they were on all points at the same time and in large numbers.

Babson, 20th American Affidavit, estimates the American fleet at 750 sail.
Plumer, 22d " " " " " 700 "
Pierce, 24th " " says from 700 to 800.
Gerring, 26th " " says 700.
Wonson, 30th " " " 700.
Embree, 167th " " says 700 to 800.
Grant, 186th " " says 700.

Bradley, the first American witness examined before the Commission, in answer to the American counsel, p. 2: Q. Give an approximate amount to the best of your judgment? A. 600 or 700 certainly. I have been in the Bay with 900 sail of American vessels, but the number rather diminished along the last years I went there. Everything tended to drive them out of the Bay, cutters, and one thing and another, and finally I went fishing in our own waters and did a good deal better.

Graham, p. 106 of American Evidence, undertakes to contradict Bradley,—but finally he has no better data than Bradley to guide himself, and after all his efforts, he admits the number to have been 600 sail.

This was during the existence of the Reciprocity Treaty, and on this point, as well as on all others, it is to that period that we must refer, to find analogy of circumstances.

The average catch of these vessels presents naturally a great diversity of appreciation, and on this, the causes which divided the witnesses are more numerous than those concerning the number of vessels. First the tonnage of the fishing vessels, varying from 30 tons to 200 tons, must have regulated the catch more or less. When a vessel had a full cargo, she had to go home, even if fish had continued to swarm around her. Then the most favored spots could not admit of the whole fleet at the same time. They had to scatter over the whole fishing area with fluctuations of luck and mishap. We must add to this that many of the crews were composed of raw material, who had to obtain their education and could not bring very large fares. Some Naturalists have expressed the opinion that fish are inexhaustible, and that no amount of fishing can ever affect the quantity in any manner. When it is thought that one single cod carries from 3 to 5 millions of eggs for reproduction, one mackerel half a million, and one herring 30,000, as testified by Prof. Baird, on pages 456 to 461 of the United States evidence ; there was some foundation for that opinion, but several causes have been admitted as diminishing and sometimes ruining altogether some species of fish. Predacious fish, such as shark, horse-mackerel, dogfish, bluefish, and probably many others have had both effects on some species. (See Professor Baird's evidence, at pages 462, 476 and 477.) A more rapid mode of destruction has been universally recognized in the use of seines or purse-seines, by which immense quantities of fish of all kinds and sizes are taken at one time. By that means the mother fish is destroyed while loaded with eggs. Fish too young for consumption or for market are killed and thrown away. It is the universal opinion among fishermen that the inevitable effect of using purse-seines must eventually destroy the most abundant fisheries, and many American witnesses attribute the failure of the mackerel fishery on their own coast, in 1877, to that cause. It is true that this theory is not accepted by Professor Baird, who however has no decided opinion on the subject, and who has given the authority of a publication, which he controls, to the positive assertion that this mode of catching fish is most injurious. P. 476–477.

When a vessel of sufficient tonnage is employed, that is from 40 tons upwards, the catch of mackerel has varied from 300 to 1550 barrels in a season for each vessel.

Here is the evidence on the subject of mackerel :—

Chiverie, British evidence. p. 11, makes the average 450 barrels per vessel in a period of 27 years. Some years, that average reached 700 barrels per vessel.
MacLean, p. 25, says the average has been 500 per vessel during the twenty years, from 1854 to 1874.
Campion, pp. 32, 34, 38, average for 1863, 650 barrels; 1864, from 600 to 700; 1865, over 670; 1877, some caught 300 barrels with seines, in one week. One vessel seined a school estimated at 1000 barrels.
Poirier, p. 62, average catch 500 to 600 per vessel in one season.
Harbour, p, 79, " " 500 " " "
Sinnett, p. 84, " " 500 " " "
Grenier, p. 87, " " 500 to 600 " " "
McLeod, p, 98, " " 500 " " "
Mackenzie, p. 129, average catch of mackerel 700 barrels per vessel.
Grant, p. 182, " " 600 to 700 "
Purcell, p. 197, " 250 per trip.
McGuire, p. 210, average catch of mackerel, 600 per season.

Forty-four other witnesses examined, on behalf of the Crown, and cross-examined before the Commission, have stated the same fact. These statements are confirmed by the following American witnesses :—

Bradley, American evidence, p. 2, 600 barrels.
Stapleton, " p. 10, 600 "
Kemp, " p. 63, 600 to 700.
Freeman, " p. 75, 600 to 750.
Friend, " p. 119, 520.
Orne, " p. 127, 233 per trip = 466 per season.
Leighton, " p. 140, 361 " = 722 "
Riggs, " p. 156, 342 " = 684 "
Rowe, " p. 161, 246 " = 492 "
Ebitt, " p.—175, 375 " = 650 "
Cook, " p.—181, 280 " = 560 "

granted the right to fish over 3,500 miles of sea coasts, where no fishing is done, of any consequence, by the Americans themselves; and where no British subject has ever been seen. (As to area, see Prof. Hind's paper, page VII.) In this instance the Americans cannot contrast the good will of the Imperial Government with the illiberality of the colonists, because the latter were represented in the Joint High Commission, by their first Minister, who assented to the Treaty, and the Dominion Parliament, and the Legislatures of P. E. Island, and of Newfoundland, equally assented, through solemn Parliamentary Acts.

In dealing with the value and extent of the North British-American coast fisheries I think I may, with all safety, say, that in the waters surrounding the three-mile limits, there is no deep-sea fisheries at all. The assertion may appear hazardous to our American friends, but I am sure they will agree with me, when I remind them of the whole bearing of their own evidence. No doubt their witnesses have made use of the words deep-sea fisheries in contradistinction to the shore fisheries proper; but is there one of their witnesses who has ever pretended to have caught fish in any place other than banks, when it was not inshore?

The whole of the witnesses on both sides have testified that when they were not fishing inshore they were fishing around Magdalen Islands, which is another shore, on Orphan, Bradley or Miscou, or other Banks; but as regards a deep sea fishery in contradistinction to banks or shore fishery, there is no such thing in the whole evidence.

Sir ALEXANDER GALT:—Are you now referring to the fisheries generally, or to the mackerel fishery in particular?

Mr. DOUTRE:—To the codfishery also. Codfish is taken on banks.

Mr. DANA:—It is a question of names—what you call a bank fishery.

Mr. DOUTRE:—Is not the result of the whole evidence on both sides, that fish is to be found on the coast, within a few miles, or on banks, and no where else? This is the practical experience of all fishermen. Now, science explains why it is so. That class of evidence is unanimous on this most important particular, namely, as to the temperature necessary to the existence of the cold water fish in commercial abundance, such as the cod and its tribe, the mackerel and the herring, which include all the fish valuable to our commerce. According to the evidence I shall quote, the increasing warmth of the costal waters of the United States as Summer advances, drives the fish off the coast south of New England into the deep sea, and puts a stop to the Summer fishing for these fish on those parts of the coast in the United States,—a condition of things due to the shoreward swing of the Gulf Stream there. On the other hand, it is stated that on the coasts of British America, where the Arctic current prevails, the fish come inshore during the Summer months, and retire to the deep sea in the Winter months.

Professor Baird says, on page 455 of his evidence before the Commission, speaking of the codfish in answer to the question put by Mr. Dana, "What do you say of their migrations?" Answer—"The cod is a fish the migrations of which cannot be followed readily, because it is a deep-sea fish and does not show on the surface, as the mackerel and herring; but so far as we can ascertain, there is a partial migration, at least some of the fish don't seem to remain in the same localities the year round. They change their situation in search of food, or in *consequence* of the *variations* in the *temperature*, the percentage of salt in the water, or some other cause. In the south of New England, south of Cape Cod, the fishing is largely off-shore. That is to say, the fish are off the coast in the cooler water in the Summer, and as the temperature falls approaching Autumn, and the shores are cooled down to a certain degree, they come in and are taken within a few miles of the coast. In the *Northern waters*, as far as I can understand from the writings of Professor Hind, the fish generally go off-shore in the *Winter time*, excepting on the south side of Newfoundland, where, I am informed, they maintain their stay, or else come in in large numbers; but in the Bay of Fundy, on the coast of Maine and still further north they don't remain as close to the shore in Winter as in other seasons."

You will observe that Professor Baird limits his statement that the warm water in Summer drives the fish off the coasts of the United States to the south of New England only. The water appears to be cold enough for them on the coast of Maine in Summer to permit of their coming in shore. But now let us see what he says of the condition of the fisheries there. In his official report for 1872 and '73, the following remarkable statement is to be found:—

"Whatever may be the importance of increasing the supply of salmon, it is trifling compared with the restoration of our *exhausted* Cod-fisheries; and should these be brought back to their original condition, we shall find within a short time, an increase of wealth on our shores, the amount of which it would be difficult to calculate. Not only would the general prosperity of the adjacent States be enhanced, but in the increased number of vessels built, in the larger number of men induced to devote themselves to Maritime pursuits, and in the general stimulus to everything connected with the business of the seafaring profession, we should be recovering in a great measure, from that loss which has been the source of so much lamentation to political economists and well-wishers of the country."—*Page XIV. Report of Commissioner of Fish and Fisheries*, 1872–73.

It thus appears from the testimony of Professor Baird, that the cod are driven off the shores of the United States south of New England by the increase of temperature in the summer months, and on the New England and Maine shores the cod-fisheries are exhausted. The only conclusions that can be drawn from these facts are that the sole dependance of the United States fishermen for cod, which is the most important commercial sea fish, is, with the single exception of George's shoals, altogether in waters off the British American coast line.

Professor Hind says in relation to this subject and in answer to the questions,

"What about the cod? Is it a fish that requires a low temperature? A. With regard to the spawning of cod, it always seeks the coldest water wherever ice is not present. In all the spawning grounds from the Strait of Belle Isle down to Massachussets Bay,—and they are very numerous indeed,—they spawn during almost all seasons of the year, and always in those localities where the water is coldest, verging on the freezing point. That is the freezing point of fresh water, not of salt, because there is a vast difference between the two.

The cause of the spawning of the cod and the mackerel, at certain points on the United States coasts, is thus stated by the same witness:

"Q. Now take the American Coast, show the Commission where the cold water strikes. A. According to Professor Baird's reports there are three notable points where the Arctic current impinges upon the Banks and shoals within the limits of the United States waters and where the cod and mackerel spawning grounds are found. If you will bear in mind the large map we had a short time ago, there were four spots marked on that map as indicating spawning grounds for mackerel. If you will lay down upon the chart those points which Professor Verrill has established as localities where the Arctic current is brought up, you will find that they exactly coincide. One spot is the George's shoals."

So dependant is the cod upon cold waters for its existence that Prof. Baird tells in reply to the question put by Mr. Thomson:—"Could cod from your knowledge live in the waters which are frequented by the mullet?" "No; neither could the mullet live in the waters which are frequented by the cod."—p. 471. Now in another portion of his evidence Prof. Baird says, (page 416) that "the mullet is quite abundant at some seasons on the south side of New England;" and thus we have in a different manner explained the reason why the cod cannot live in Summer on the shores of the United States south of Cape Cod on account of the water being too warm, and the evidence of the witness is confirmed by the following evidence of Prof. Hind:

"Q. Are those three fishing localities on the American coast, Block Island, Georges Bank, and Stellwagen's Bank in Massachu-

Smith,	American evidence,	p.—186.	274	per trip	= 548	per season.
McInnis,	"	p.—191.	457	"	= 914	"
Garder,	"	p.—209.	240	"	= 480	"
Martin,	"	p.—211.	273	"	= 546	"
Turner,	"	p.—226.	270	"	= 540	"
Rowe,	"	p.—235.	259	"	= 518	"
Lakeman,	"	p.—325.	443	"	= 886	"

In order that any one may verify the correctness of this estimate, for every witness, I may state that this is the process through which I arrived at it. I took the number of barrels caught in each trip, by every witness, and divided the total by the number of trips. Some witnesses have made more than that average; others have made less. I abstained from taking the larger and the smaller catches; and, in this respect, I have followed a mode of estimating the matter, which has been incorporated in our legislation. When, in 1854, Seignorial tenure was abolished in Lower Canada, indemnity was to be paid to the seigniors who conceded, for *lods-et-ventes*; that is to say, a kind of penalty upon any sale or mutation of property which took place, consisting of one-twelfth of purchase money. There was no fine imposed on property being transmitted by inheritance, only in case of mutation by sale, or anything equivalent to a sale, such as exchange. Then to estimate the value of that right, which was so variable, because during some years there would be almost no mutations in a seigniory, while during other years there would be many; a rule was adopted by which the income of the Seigniory, from that source, for 14 years, was taken, the two highest and two lowest years struck out, and the 10 other years held to constitute an average, and the amount capitalised at 6 per cent, was to be paid. In that matter they were dealing with facts which could be found in the books of the Seigniories; it was not based upon what my learned friend, Mr. Dana, has so well called the swimming basis; while here the calculation is certainly surrounded with much greater difficulty. Some of the fishermen have made only one trip in a year, but it was their own fault, as they could have made two and three. I have calculated on two trips a year only, although many have made three, and would have justified me in adding a third to the amount per season. I remained within that medium where the Latin proverb says that truth dwells. I have given the calculations for mackerel. Here is that for codfish:

Purcell, p. 198. Has known of 1,000, but does not state whether quintals or barrels.
Bigelow, p. 221. Spring codfisheries on Western and LaHave Banks, summer and autumn fisheries on the Grand Bank. They make from six to twenty trips in a year, with fresh cod. No quantity stated.
Stapleton, p. 226. Caught 600 quintals within 2½ miles of Prince Edward Island.
Baker, p. 269. Has seen 200 American vessels codfishing in one part, between Cape Gaspe and Bay Chaleur, each vessel catching 700 quintals.
Flynn, p. 270. 700 quintals per vessel, caught on Miscou and Orphan Banks, all the bait for which is caught inshore and consist in mackerel and herring.
Lebrun, p. 289,—700 to 800 quintals, from Cape Chatte to Gaspe, per vessel.
Roy, p. 293.—Has seen 250 to 300 American vessels cod-fishing.
John McDonald, p. 374,—600 quintals.
Sinnett, p. 85,—300 draughts or 600 quintals.

The following relates to herring:—
Fox, Customs Officer; Brit. evid., p. 114.—600.000 barrels entered outward since 1854; at least one-half of the vessels have failed to report. This is near Magdalens.
Purcell, p. 198.—50 vessels fishing and catching each 1000 barrels.
McLean, p. 235.—In Bay of Fundy, 100 to 125 American vessels fishing for herring in winter, and catching 7 to 10 million herrings, which went to Eastport.
Lord, p. 245.—From $900,000 to $1,000,000 worth of herring caught annually, by Americans, from Point Lepreaux, including West Isles, Campobello and Grand Manan, Bay of Fundy.
McLaughlin, p. 254-255, estimates at $1,500,000, the annual catch of herring by Americans, around the Island and the mainland of Bay of Fundy.

Halibut, Pollock, Hake, Haddock, were caught by Americans all over Canadian waters,—but in smaller quantity, and their separate mention here would take more time and space than the matter is worth. However, we will see what is said concerning these different kinds in the summary of evidence concerning the inshore fisheries.

In the discharge of my duty to my Government, I have thought proper to go over grounds which laid at the threshold of the question at issue,—first, because the representatives of the United States Government had selected them as a fair field for surrounding that question with artificial clouds of prejudice and fictitious combination of facts and fancy,—and in the second place, because I thought that the main question would be better understood, if the path leading to it was paved with a substantial and truthful narration of the circumstances which had brought this Commission together.

The United States are bound to pay compensation, not for fishing generally in waters surrounded by British territory, but for being allowed to fish within a zone of three miles, to be measured, at low water mark, from the coast or shores of that territory, and from the entrance of any of its bays, creeks or harbors, always remembering that they had the right to fish all around Magdalen Islands and the coast of Labrador, without restriction as to distance. The functions of this Commission consist in determining the value of that inshore fisheries, as compared to a privilege of a similar character, granted by the United States to the subjects of Her Majesty, on some parts of the United States coasts, and then to enquire what appreciable benefit may result to the Canadians, from the admission of the produce of their fisheries in the United States, free of duty, in excess of a similar privilege granted to the United States citizens, in Canada; and if such excess should be ascertained, then to apply it as a set-off against the excess of the grant made to the United States over that made to the subjects of Her Majesty.

As the learned agent and counsel, representing the United States, have often criticised the acts of the colonists, when they constrained the Americans to execute the treaties and to obey the municipal laws, first of the separate Provinces, and then of the Dominion, probably with the object of contrasting the liberality of their government with the illiberality of our own; I would like to ask which of the two governments went more open-handed in the framing of the fishery clauses of the Treaty of Washington? Did we restrict the operations of the Americans to any latitude or geographical point, over any part of our waters? Not at all. We admitted them everywhere; while on their part they marked the 39th parallel of north latitude on one of their coasts, to wit: the eastern sea coast or shores, as the herculean column beyond which we could not be admitted. The immediate and practical consequence was that we granted the liberty to fish over 11,000 miles of sea coasts, where the bulk of the fishing is located; and we were

setts Bay affected every year, and if so, in what way, by the action of the Gulf Stream? A. The whole of the coast of the United States, south of Cape Cod, is affected by the Gulf Stream during the Summer season. At Stonington the temperature is so warm even in June that the cod and haddock cannot remain there. They are all driven off by this warm influx of the Summer flow of the Gulf Stream. The same observation applies to certain portions of the New England coast."—*Rebuttal Evidence p.* 3.

The testimony of these two scientific witnesses then agrees completely with reference to the important question of temperature. We all know of the enormous fleet annually sent by the Americans to the Grand Banks of Newfoundland, the Nova Scotia Banks and the various Banks in the Gulf of St. Lawrence. With the exception of the comparatively small quantity of cod taken on the United States coasts, in Spring and Fall, and on George's Shoals, the greater part of the 4,831,000 dollars worth of the cod tribe, which the tables put in by Prof. Baird show us to be the catch of last year of United States fishermen, must necessarily have been taken in British American waters, or off British American coasts, for there are no other waters in which Americans take this fish.

Turning now to the mackerel, we shall find that the same prevailing influence, namely that of temperature, actually defines the spawning area and limits the feeding grounds of this fish.

Colonel Benjamin F. Cook, Inspector of Customs, Gloucester, tells the commission that this very year, "In the spring, out South, there was a large amount of mackerel, and late this Fall, when we were coming from home recently, the mackerel had appeared in large quantities from Mount Desert down to Block Island; but during the middle of Summer they seem to have sunk or disappeared."—*page* 182.

In the portion of Professor Hind's testimony, just quoted, the cause of the mackerel seeking three or four points only on the United States Coasts to spawn in the Spring is given, which is, that there the Arctic Current impinges on the coast line Cold water is then brought to the surface and as both the eggs of the cod and of the mackerel float, the low condition of temperature required is produced there by this northern current. This question of the floating of the eggs of the cod and of the mackerel is very important, for when the time of spawning is considered, it shows from the testimony of both witnesses that the coldest months in the year are selected by the cod in United States waters; and the mackerel spawn only when the Arctic Current or its offset ensure the requisite degree of cold. The same peculiarity according to Professor Baird, holds good with regard to the herring. This condition of extreme low temperature, necessary for the three commercial fishes, so limits the area of suitable waters off the coast of the United States, that the American fishermen are compelled to come to British American coasts for their supply of these fish, whether for food or for bait.

All the American witnesses concur in the statement that the codfishery is the most profitable, and there is an equal concurrence of statement that the codfishery is erroneously styled an off-shore, or so called deep sea fishery.

I call attention to the codfishery, as pursued by the great Jersey houses, wholly in small open boats, and almost always within three miles from the shore; to the codfishery pursued on the Labrador Coast, wholly inshore; on the whole extent of Newfoundland, except a small portion of the western coast also wholly inshore; to the codfisheries pursued in the deep bays and among the Islands of Nova Scotia, on the north shore of the St. Lawrence, on the northern coast of Cape Breton quite close to the shore.

That leads me, by a natural connection, to banks and shoals, for it has been shown that these bring the cold water of the Arctic current to the surface, by obstructing its passage. The underlying cold current rises over the banks and pushes the warmer water on each side. All our testimony goes to prove that the mackerel are almost altogether taken on shores, banks and shoals, where the water is cold. An off-shore bank is a submarine elevation,—a hill top in the sea,—and the temperature here is cold, because the Arctic current or cold underlying strata of water rises over the banks with the daily flow of the tides, (Professor Hind's paper, p. 97.) This is the fisherman's ground, both for cod at some seasons and for mackerel at all seasons. But what of a shelving or sloping coast two or three miles out to sea, exposed to the full sweep of the tides? Is not that also practically one side of a bank, over which the flood tide brings the cold underlying waters, and mixes them with the warm surface waters, producing in such localities the required temperature? Looking at the chart of Prince Edward Island, the Magdalen Islands and the estuary of the St. Lawrence, there is no part of the Magdalen Islands, where the Americans fish within the three-mile limits, where water is so deep as within the three-mile limit on Prince Edward Island, east of Rustico, and covering fully one-half the mackerel ground there. The depth of water between two and three miles from the coast is shown on the Admiralty chart, to vary there from 9 to 13 fathoms within those limits, or 54 and 78 feet,—enough to float the largest man-of-war and leave 25 to 40 feet beneath her keel. It will be remembered that in one of the extracts I have read the depth of water where fish are taken, is given at from five to eight fathoms. And yet, we have been constantly assured that there is not water enough for inshore mackerel fishing in vessels drawing 13 feet water at the utmost! Besides all this, we have the testimony so frequently advanced from fishermen on the shores of Prince Edward Island, that the American fishermen were a source of alarm and injury to them, on account of their ice-bowing their boats. This proves two important facts,—first, that the American fishermen did and do constantly come within the three-mile limit to fish for mackerel, and they come in with their vessels, because the fish is there.

Having given the reason why these cold water species of fish, according to a law of nature, must be found quite close in shore, I will now proceed to show that the facts put in evidence fully sustain science.

I shall first direct the attention of your Honors to the special facts connected with the fishing operations pursued on the coasts of the estuary of the St. Lawrence and the Gulf of St. Lawrence, from Cape Chatte to Gaspe, and Cape Despair, on the south side, and from Point des Monts, on the north side of the estuary, to Seven Islands, thence to Mingan, thence to Natashquan, an immense stretch of coast line.

The witnesses from the Province of Quebec have more to say about cod, bait, halibut and herring, than about mackerel.

Mr. P. T. Lamontaigne testifies in reply to Mr. Thomson as follows:—

"Q. Take from Cape Chatte to Gaspe, along the south shore, what is the average annual export each year of fish; I refer to codfish and linefish? A. From my place down to Cape Gaspe there will be 25,000 quintals at least of dried fish exported.

"Q. Taking the whole Gaspe shore, what would you say? A. I should think not less than from 180,000 to 200,000 quintals of dried fish.

"Q. What is the value per quintal previous to exportation? A. They should not be worth less than $5 per quintal.

"Q. How are these fish taken, by vessels or by boats? A. By boats.

"Q. Are they taken with hook and line? A. Yes. What we take on our coasts are all taken with boats and with hook and line

"Q. Have you any halibut on your coast? A. Not at present.

"Q. What is the reason? A. We attribute it to the Americans fishing for halibut on our coast.

"Q. What time do they fish? A. About August.

"Q. What years did they come there? A. From 1856 to 1866 and 1870, as near as I can remember.

"Q. In 1866 the Reciprocity Treaty came to an end; did the Americans fish for halibut there in 1870. A. I could not say exactly the year, but I am sure they fished there.

"Q. Did they fish after the abrogation of the Reciprocity Treaty in 1866? A. The Americans did fish there.

"Q. Was halibut taken within two miles of the shore? A. Near the shore.

"Q. The Americans came in after the Reciprocity Treaty was abrogated did they? A. I believe they did.

"Q. And they cleaned out the halibut? A. Fishermen all agree in saying that they took away all the halibut on our coast."

While we are speaking of the halibut, I must remind the members of the Commission of the strenuous efforts made by the American counsel and witnesses to impress them with the notion that halibut was extinct all over the Bay of St. Lawrence, and that the Americans never fished for codfish in the Gulf anywhere. We are not left here to select between conflicting testimony. We have judicial authority to strengthen our assertions. I will extract from a report fyled in the case, four seizures of vessels caught in the act of fishing halibut and cod within the three mile limit.

Lizzie A. Tarr, 63 tons, Messrs. Tarr Bros. owners, Gloucester, Mass., U. S., seized 27th Aug., 1870, by N. Lavoie, schooner La Canadienne, about 350 yards from the shore in St. Margaret's Bay, North shore of Gulf of St. Lawrence, Province of Quebec. Anchored at West Point of St. Margaret's Bay, near Seven Islands, St. Lawrence coast, West of Mount Joly, about 350 yards from the shore. Five fishing boats were alongside the vessel, crew having just returned from tending their lines, which were set between the vessel and the main land. Six halibuts were found on the lines. Master admitted that the owner of vessel had directed him to go and fish there, as the Government cutter was seldom seen in these places, and some of the crew stated that if they had good spy-glass they would not have been caught. Tried in Vice-Admirality Court at Quebec. Vessel condemned. Defended. Sold for $2,801; money paid to credit of Receiver-General, after deducting costs and charges.

Samuel Gilbert, 51 tons, Richard Hanan, master, Gloucester, Mass., U. S., seized 24th July, 1871, by N. Lavoie, schooner La Canadienne, about two miles N.W. by W. from Perroquet Island, near Mingan, on the North Coast of the Gulf of St, Lawrence. At the time of capture, schooner was taking fresh codfish on board from one of her flats alongside. Two of her boats were actively fishing at a distance of 450 yards from shore, and men on board were in the act of hauling in their lines with fish caught on their hooks. When seized, boats were half-full of freshly caught cod fish, and had also on board fishing gear used for cod fishing. Owner admitted having fished, but pleaded as an excuse that he was under the impression that the provisions of the Washington Treaty were in operation. Tried in the Admiralty Court at Quebec. Vessel condemned. Vessel released for costs.

Enola C., 66 tons, Richd. Cunningham, master, Gloucester. Mass., U. S., seized 29th May, 1872, by L. H. Lachance, schooner Stella Maria, less than two miles from the shore in Trinity Bay, North Shore of Gulf of St. Lawrence, Province of Quebec. Actively fishing at time of capture; had been fishing all day with trawl nets set from 50 to 600 yards from shore, and extending 5 or 6 miles along the coast, between Point des Monts and Trinity Bay. When captured, vessel was becalmed inside of two miles of Trinity Bay. had on deck two fresh caught halibuts, and two of her men were at the time engaged raising trawls set close in Trinity Bay. On their coming alongside of vessel, it was ascertained they had two halibuts in their boat. Master admitted having committed the offence, but begged hard to be let off, on account of this being his first offence. Had been warned, before coming to Trinity Bay, not to fish within limits. At time of seizure vessel had on board a cargo of about 2,000 lbs of halibut and salt. Sureties discharged.

James Bliss, 62 tons, Allan McIsaacs, master, Gloucester, Mass., U. S., seized 18th June, 1872, by L. H. Lachance, schooner Stella Maria, within 1½ miles of the East end of Anticosti Island, in the Gulf of St. Lawrence, Province of Quebec. At time of capture was anchored within 1½ miles from the shore, between Point Cormorant and the East end of Anticosti Island. Actually fishing for halibut with five trawl nets set around the vessel, between 50 yards and 1½ miles from the shore, and had been fishing there for three days previous. Master acknowledged the offence, and stated that he had been warned by his owners not to expose their vessel. Sureties discharged.

Dr. Pierre Fortin, M. P. P., testified before the Commission as to the large number of British establishments engaged in the codfisheries on the south shore of the River St. Lawrence, to the head of Baie des Chaleurs, and on the north shore of the River and Gulf of St. Lawrence. Dr. Fortin, examined by myself, testified as follows:—

"Q. All those establishments deal exclusively in cod? A. Yes, their principal business is codfish. Sometimes herring and mackerel are dealt in, but not much. The principal is codfish.

"Q. Do any of those establishments resort to Newfoundland for cod? A. No. Not at all; never.

"Q. Well, where is all their cod caught? A. *On the shore and from boats.*

"Q. Is all the cod they deal in caught in Quebec waters? A. Yes.

"Q. With boats? A. Yes, and they fish from the shore.

"Q. What kind of boats? Open boats? A. Fishing boats manned by two men.

"Q. Name the Banks and their extent, which exists in these waters? A. On the north shore I know of only two Banks of small extent. St. John or Mingan and Natashquan.

"Q. St. John and Mingan are the same thing? A. Yes, the same bank. Six or seven miles from the shore.

"Q. Of what length is it? A. They lie six or seven miles from the shore, but they merge into the shoal fisheries. They are not distinct from the shoal fisheries. They are seven or eight miles in length.

"Q. What is the length of the Natashquan? A. It is about ten miles in length. These are all the banks on the north side.

"Q. Now, on the south side? A. Well, from Matane to Cape Gaspe, in what is called the River St. Lawrence, there are no banks. The fishing is all carried on within three miles, and sometimes within two miles. Then there are two banks opposite the shore of Gaspe and Bay Chaleur. There is a bank called Point St. Peter's Bank, which is very small, ten miles out It is a very small bank, three or four miles in extent. Then there is Bank Miscou, or Orphan, a bank lying off the coast of Miscou: also off the coast of Gaspe or Bay Chaleur, a distance of about twenty miles—fifteen or twenty miles.

"Q. Now, taking into account these banks, could you state how far from the shore, or, rather, could you state what proportion of the whole quantity of cod taken is caught within three miles? A. Taking into account that only our people that are settled in St. John's River, and a place called Long Point, visit this Mingan or St. John Bank, also that but few fishermeu from Natashquan go on the bank, that is of our own fishermen, and taking into account that our fishermen generally go on the bank only in two or three places, I should think that more than three-fourths,—I should say eighty per cent., or up to eighty-five per cent. of the codfish taken by Canadian fishermen are taken inside of British waters."

As to bait for the halibut fishery, Mr. Fortin said —

"Q. What is the bait used for halibut? A. Herring and codfish. Codfish is as good as any. It is firmer than herring, and holds well on the hook. They put a large bait on, so that the small codfish cannot take the bait, because the object of the halibut fishers is to take nothing but halibut. When they take codfish, they have to throw it overboard.

"Q. And as codfish, as well as herring, are taken inshore, they have to come inshore? A. Yes, they come in close to the shore for halibut."

And, with respect to codfish, Dr. Fortin continues:—

"Q. Well, what bait is used for codfish? A. The bait they use are caplin, launce, herring, mackerel, smelt, squid, clam, trout, and chub.

"Q. Where do they generally keep? A. Near the shore. The caplin and launce fish are on the shore, rolling on the beach sometimes, and our fishermen catch many of those with dip-nets, without using seines. Herring are caught also near the shore with nets.

"Q. Well, can the codfishery be carried on advantageously otherwise than with fresh bait? A. No, no. Salt bait is used sometimes, when no other can be had, but it cannot be used profitably.

"Q. Is there any means of keeping bait fresh for some time? A. Well, some of our large establishments which have ice-houses have tried to keep the bait they use in a fresh state as long as they could, but they have not succeeded well. They may from half a day to a day in warm weather, perhaps.

"Q. With ice? A. Yes, because the herring, for instance, may be fit to eat, but not for bait.

"Q. Why? A. Because the bait they use must be fresh enough to stick on the hook. If it is not very fresh it does not stick on, and it will not catch the codfish, because the codfish will take the bait off the hook, and leave the hook.

"Q. You say it can only be kept half a day, or a day? A. It may be kept, perhaps, a day or two. It depends upon the weather.

"Q. Well, would it be possible for the Americans coming there to fish for cod to bring their bait with them in a frese state? A. No, it is impossible.

"Q. They could only bring salt bait, which is not much used? A. That is all."

Mr. John Short, M. P., for Gaspe, examined by Mr. Davies, gave evidence as follows:—

"Q Can you give the Commission an estimate of the quantity of fish taken by our fishermen annually along the coast? A. From Mount Cape Chatte to New Richmond the catch would be about 100,000 quintals.

"Q. Where is New Richmond? A. On Bay Chaleurs. There is Anticosti and the north shore of the St. Lawrence, from Joli north-westward, which will give 100,000 quintals, making together 200,000 quintals.

"Q. The north shore of the St. Lawrence and Anticosti will give 100,000 quintals? A. Yes, with the Magdalen Islands.

"Q. What kind of fish is taken? A. Codfish chiefly; herring is the next catch in quantity and importance.

"Q. You don't fish mackerel to any extent? A. No.

"Q. You don't go into it for the purpose of trade? A. No; we find the codfish more remunerative.

"Q. What is the value of those 200,000 quintals of fish? A. The coast value is about $5 per quintal, which would give a value of $1,000,000. The market value is higher; it ranges from $5 to $8 per quintal.

"Q. How far are those fish taken from shore by the fishermen, take the north shore? A. Principally, and nearly altogether inshore.

"Q. Now take the south shore? A. From Cape Chatte to Cape Gaspe they are all taken inshore, and from Cape Gaspe to New Richmond the greater portion is taken inshore, some are taken on Banks.

"Q. Where do the American cod-fishermen get their bait? A. They get a great quantity from the inshore fishery.

"Q. Have you seen them catch bait? A. I have seen them set nets, but not take them up.

"Q. Have you any doubt that they do catch bait? A. I have not. They often draw seines to shore for caplin and small bait.

"Q. Could the Americans carry on the deep sea cod-fishery without that bait? A. Not with success.

"Q. You are quite sure about that? A. Yes; I have no hesitation in saying it could not be carried on."

Mr. Josef O. Sirois, tells the Commission in his examination by myself:—

"I am a merchant at Grande Riviere, County of Gaspe. I have employed men to fish for me round my neighborhood. I have fished on the south side of the River St. Lawrence, from Paspebiac to Cape Gaspe, a distance of about 90 miles. My fishing was done with small boats, each having two men; I generally have six of such boats employed fishing. I have carried on this kind of business during the last twenty years. It is cod we take on that coast. Cod is slightly more abundant than it was 20 years ago; it may be that each boat takes less, but the number of boats has considerably increased during that period. Part of the cod is taken along the coast, and the remainder on Miscou Bank. Cod is taken from one to two miles from the coast. They take about half their catch on the coast within the distance mentioned, and the remaining half on Miscou Bank. They take cod with bait, consisting of caplin, herring, squid, smelt, and mackerel. The bait is obtained at from a quarter of a mile to two miles from the coast; it is very rare the fishermen would have to go out as far as three miles to take bait. American fishermen could not bring fresh bait from their homes. It cannot be kept with ice to be used advantageously for more than two days. The effect of placing bait on ice is to soften it so that it will not hold on the hooks. I have seen a number of American schooners fishing mackerel on the coast."

Mr. Louis Roy, of Cape Chatte, testified to the Commission, in reply to myself, as follows:—

"Q. What part of the coast of the river St. Lawrence are you acquainted with? A. From Cape Chatte to Cape Gaspe.

"Q. What is the distance between those points? A. About 140 miles.

"Q. That is on the South Coast? A. Yes.

"Q. Do you know anything of the North Coast? A. I have some knowledge of the North Coast, but am not so familiar with it as with the South Coast.

"Q. What extent of coast on the North side do you know? A. About 160.

"Q. That would make a length of three hundred miles of the river coast, that you are acquainted with? A. Yes.

"Q. Is it to your knowledge that the Americans have been fishing on that part of the river St. Lawrence? A. Oh, yes; they have fished near my place very often.

"Q. When did they begin to fish on that part of the river? A. About 1854.

"Q. The time of the Reciprocity Treaty? A. Yes.

"Q. Until then you had never seen much of them? A. Oh, yes. I saw many during the ten years previous to that.

"Q. But they came in large numbere after that date? A. Yes; they came in large numbers for about six or seven years But after that they came in less numbers.

"Q. You mean during the last years? A. Yes.

"Q. At the time they were frequenting that part of the river, how many sail have you any knowledge of as visiting the coast? A. From Cape Gaspe to Cape Chatte?

"Q. Yes, and on the north shore also? A. About 260 or 300 sails.

"Q. Schooners? A. Yes.

"Q. What was the general tonnage? A. About 70 or 80 tons.

"Q. That is the average? A. Yes; there would be some 50 tons and some 120.

"Q. You say that many visited during one season? A. From Spring to Fall. Oh, yes.

"Q. After the Treaty of Reciprocity? A. Not so much.

"Q. You mean not so much after the Treaty was terminated? A. Yes.

"Q. But during its existence? A. Well, about the number I have stated.

"Q. Were they fishing for fish to trade with? A. Yes.

"Q. What kind of fish was it? A. Cod.

"Q. Where was the cod caught? A. Do you mean what distance from the shore?

"Q. Yes? A. Within three miles.

"Q. Well, out of these 300 miles you have spoken of, where could cod be fished for out off the coast? A. Well, for about 15 or 20 miles off the north shore. On the south shore there are none at all outside. You can't catch off beyond three miles on the south shore.

"Q. Where are those 15 or 20 miles? A. From Mingan.

"Q. Have you any knowledge of the catch that one of those schooners would take, neither the largest nor the smallest. Take an average? A. About between 500 or 600 barrels, each vessel.

"Q. For the whole season? A. Yes; because some of them made two trips and some three.

"Q. Well, then they would not take 500 or 600 barrels each trip? A. No, no; I mean for the whole season

"Q. Is the cod as abundant now as it was 30 or 40 years ago? Do you get as much? A. Oh, yes, as much as 30 or 40 years ago. I am sure of it.

* * * * * * * * * * * * * *

"Q. Have you any idea what quantity of fish is taken by the Canadians in that part of the river? A. Oh, yes; I have a memorandum here. I calculate that the catch of codfish from Cape Chatte to Cape Gaspe, along the coast, is about 220,000 quintals of dry fish, valued at $4.50 a quintal.

"Q. Do you know if much of that is exported to the United States? A. Not at all; not any.

"Q. Now, as to the mackerel, is that the fish for which the Americans were fishing on that part of the river? A. Yes.

"Q. Where is the mackerel taken generally? A. It is within three miles, because always the fat mackerel is inside of a mile, — close by.

"Q. Well, from the knowledge you have of the locality, do you think you would see any American schooners if they were prevented from fishing within three miles of the shore? A. No.

"Q. Would it be profitable for them? A. They cannot do it. They would not come because they would not catch enough to pay expenses."

Mr. James Jessop, of Gaspe, examined by Mr. Weatherbe, testifies as follows:—

"Q. As a matter of fact, where do they get most of the bait, on the shores or on the Banks? A. More inshore than on the Banks.

"Q. Do the Americans come inshore constantly for bait? A. They may not come on our shores, but on oth r shores they do. Most of them go to Shippengan, which is a great place for fishing herring. The herring come in from the Banks of Shippegan; the Americans catch them and also follow them insh re

"Q. The Americans come from the Banks on purpose to catch bait? A. Yes, and when they go out of the Bay they get fresh bait when the herring school is passing out.

"Q. How long does fresh bait last? A. It will only keep fresh one day.
"Q. That is when there is no ice on board to preserve it? A. Yes.
"Q. Where there is ice, how long will the bait keep fresh? A. Two or three days.
"Q. From Cape Chatte to Cape Gaspe, how far from the shore did the Americans fish? A. From Cape Chatte to Cape Gaspe the Americans came in along the shore. I never fished there. I have passed up and down and seen American vessels fishing for mackerel right along the shore.
"Q. Did you see or hear of Americans fishing for mackerel outside of three miles from shore? A. No; all within one mile, one mile and a half and two miles of the shore.
"Q. Did you ever hear of any fishing outside three miles? A. Not on that coast.
"Q. On the North side of Bay Chaleurs where are mackerel found? A. The great body of mackerel is along the shore. A few may be caught outside in deep water, but the mackerel make into the shore and come after small bait.
"Q. Where are most of the mackerel caught? A. Handy to the shore, sometimes a mile and a half out. Sometimes not five acres out.
"Q. Do you know from the Americans themselves whether they catch the greater part of the mackerel inshore? A. Yes. The vessel I was on board fished inshore with boats. The vessel was at anchor in Newport harbor.
"Q. How far from the land? A. About 300 yards.
"Q. Did you catch all the fish there? A. There were no fish in the harbor. We caught them in a cove called Carnaval.
"Q. How far from the shore? A. About two cables length. We got 100 barrels one day.
"Q. Did you catch your fish far from the shore? A. The farthest we caught might be half a mile off.
"Q. How many did you catch? A. I could not say exactly, but we pretty nearly loaded her. I left her, and she afterwards left to trans-ship her cargo.
"Q. Do the Americans fish along your shores for cod? A. They do.
"Q. Within three miles from shore? A. Yes.
"Q. To any extent? A. They don't fish codfish to any great extent within three miles from shore.
"Q. Where do they fish for cod? A. On Miscou Bank and Bank Orphan.
"Q. What is the number of the fleet engaged in fishing on Miscou Bank alone? A. I have heard my men say from 40 to 50 sail.
"Q. You would put the average at 40 sail? A. Yes.
"Q. Do you know what is the number of the cod fishing fleet in the Bay on an average each year? A. From 300 to 400 vessels.
"Q. Nearer 400 than 300? A. About 400.
"Q. Where do these cod fishermen get the bait they use? A. A great deal of it inshore, along our coast.
"Q. How do they get it? A. By setting nets inshore, and sometimes by buying it.
"Q. What kind of fish do they catch for bait? A. Herring. I have seen them seining herring. I have heard that they jig squid and bob mackerel.
"Q. They catch caplin? A. Yes.

Mr. Joseph Couteau of Cape Despair, examined by myself, gives the following evidence:—

"I am 42 years of age. I live at Cape Despair, in the County of Gaspe. I am a fisherman, and at present employ men in the fishing business. This fishery is carried on along the coast from one to three miles from the shore, and also on Miscou Bank. The Americans fish there. I have seen as many as 40 sail fishing there at the same time. The Americans procure their bait along and near the coast. The bait consists of herring, caplin and squid. The cod fishery cannot be prosecuted to advantage with salt bait. The Americans cannot bring with them to Miscou Bank a sufficient supply of bait. In 1857 I fished in an American schooner called the 'Maria.' I do not remember her captain's name. The schooner was fitted out at and started from Portland. During the first three months of the voyage, we fished for cod along Cape Breton, the Magdalen Islands and Miscou Bank. At Cape Breton we took the cod at distances of from a mile to a mile and a half from the shore. We fished at about the same distance from the shore at the Magdalen Islands. We took 330 quintals of cod. We caught about three-quarters of our load within three miles of the coast off Cape Breton and the Magdalen Island and the remainder at Miscou Bank. We procured our bait on the Cape Breton shore."

Mr. Abraham Lebrun, of Perce, examined by Mr. Weatherbe, tells the Commission, where the Americans procure their bait:—

"Q. Where do they procure their bait? A. The generality of them procure it on the coast.
"Q. How do they get it? A. In nets. They take herring in nets.
"Q. And what else? A. Squid; they also seine caplin on our coast.
* * * * * * * * * * * *
"Q. Where do they get their nets with which they catch it? A. They bring them with them.
"A. Where did they get the bait after the abrogation of the Reciprocity Treaty? A. They run the risk of capture to obtain it within three mile limit.
"Q. Year after year? A. Yes.
"Q. How do you know that? A. I have seen them do so."

The witness is then asked about halibut:—

"Q. Halibut are caught along the North shore of the River St. Lawrence for the distance of 180 miles, to which you have referred? A. Yes.
"Q. And they are taken on the coast of Anticosti, and along the south coast, and along the other coasts, on the south side of the St. Lawrence, which you have mentioned? A. Yes, sir, from Cape Chatte to Cape Gaspe; this is a celebrated coast for halibut.
"Q. Are halibut caught on the shores of Gaspe and the Bay of Chaleurs? A. They are, or have been, caught there.
"Q. By whom is the halibut fishery carried on? A. Chiefly by the Americans.
"Q. And how are they caught? A. With trawls.
"Q. What effect has their mode of fishing had on the coast as a halibut fishery ground? A. With regard to halibut, it has injured the fishery.
"Q. By what means? A. By overfishing. Halibut is a fish which does not reproduce itself like the cod, and of course the fishing is thus affected and injured.
"Q. By whom has this over-fishing been done? A. By the Americans.
"Q. During how many years? A. It has been the case as long as I can remember,—that is, from 1856 to the time when I left the north shore, in 1873. They have frequented the coast from year to year.
"Q. Is the halibut fishery carried on now on the south shore? A. At present, halibut are very scarce there; but formerly they were very plentiful on this coast."

Mr. John Holliday, who pursues the fishing business on an extensive scale at the mouth of the Moisie River, testified, in his examination by Mr. Thomson, as follows:—

"Q. Well, do you take no halibut or hake? A. We take a few halibut, not of any great moment, this year past.
"Q. Why is that? It used to be plenty? A. They used to be, but since 1868 or 1869 the coast is nearly cleaned of halibut by the American fishermen coming there. Two of them were taken in my neighborhood; that is, two of their vessels were taken by the cruisers.
"Q. What became of them? A. I think they were both condemned.
"Q. Well, were those halibut taken within three miles of the shore? A. Oh, yes, within about a mile and a half of the shore.
"Q. There was no doubt, then, about the fact of the infringement of the law, for which those vessels were taken? A. I have seen several of them leave the coast and leave their lines. When they saw the cruisers come they stood out to sea and came back a day or two afterward and picked up their lines.

"Q. That was within three miles? A. Yes.
"Q. How near? A. About a mile and a half.
"Q. I do not know whether the atmosphere there is of that peculiar character that a vessel within half a mile will think she is three miles out? A. They could not well think that.
"Q. You can generally tell when you are within three miles? A. Yes; at all events within a mile and a half.
"Q. Well, you say that in 1868 and 1869 the American schooners came there and fished out the halibut? A. Yes, they cleaned them out.
"Q. What kind of fishing was it? A. With long lines or trawls.
"Q. There were a great many hooks upon them? A. A great number; there were several miles of them.
"Q. What was the effect of that, either to your own knowledge or from what you have heard? A. The whole of our inshore fishermen fished codfish and halibut. We get none now, or next to none.
"Q. No halibut, you mean? A. No halibut.
"Q. Are they a fish that keep pretty close to the bottom as a rule? A. Yes.
"Q. Therefore they are the more liable to be taken up by the trawl? A. That is the method adopted in this country of catching them altogether.
"Q. Before the Americans came with a trawl, how did your people take them? A. With hand lines.
"Q. Were they reasonably plenty in those days? A. Yes; a boat has got from eight to ten. Now they very seldom get any.
"Q. Well, had the hand-line fishing been continued and those trawls not introduced, is it or is it not your opinion that the halibut would be now there just as it used to be? A. I think it would be as good as previously.
"Q. In your opinion then this trawl fishing is simply destructive? A. To halibut."

SATURDAY, 17th November, 1877.

The Conference met.

Mr. DOUTRE continued his argument in support of the case of Her Majesty's Government, as follows:—

May it please your Excellency and your Honors,—

When we separated yesterday, I demanded and obtained an adjournment until Monday, as I considered I required that time to lay before the Commission the matter in issue, in its different aspects; and I am still of opinion that I would have fulfilled my duty in a more complete manner, if the arrangement of yesterday had been adhered to. However, a very pressing demand was made upon me to meet this afternoon, in order to close my part of the argument, and leave the way free and clear for my successor on Monday. With a strong desire to comply with the demand from gentlemen with whom I have been acting so cordially so far, and with whom I hope to act cordially up to the time of our separation, I made an effort to be able to present myself before the Commission at this hour. However, I shall have to deal, I fear, in a very ineffectual manner, with the matters that remain to be considered. I have taken particular care in arranging the evidence and argument, not entirely for the reason that your Honors required any information from me to form your opinion; I think after this long investigation the minds of your Honors must be pretty well made up, and could not be much altered and influenced by any remarks I could offer. But we must not forget that this Treaty is a temporary arrangement, which will be the object of fresh negotiations within a pretty short period, and I considered that those who will have to deal with the question five, six or eight years hence, will be unable readily to discover, in this mass of evidence, what part has a bearing upon one branch of the case, and what part upon another branch; and I thought it would be useful if not for the present moment, for the future, to make a complete investigation of the evidence, and to place it in such a shape that those who shall succeed your Honors in dealing with this question, may be guided in some way through these fields of testimony. When we adjourned yesterday, I was showing at what distance, from the shore, the codfishery in the estuary of the St. Lawrence is prosecuted. Before proceeding to another part of the evidence, I desire to draw the attention of your Honors to what has fallen from the learned counsel on behalf of the United States, Mr. Foster and Mr. Trescot.

Mr. Trescot admits that the British case can be supported by proof of "*the habit of United States fishermen.*"

"If fifty fishermen of a fishing fleet swore that it was the habit of the fleet to fish inshore and fifty swore that it was the habit never to fish inshore, you might not know which to believe: but supposing, what in this case will not be disputed, that the witnesses were of equal veracity, you would certainly know that you had not proved the habit.

"You will see, therefore, that the burden of proof is on our friends. They must prove their catch equal in value to the award

they claim. If they cannot do that and undertake to prove habit, then they must do,—what they have not done,—prove it by an overwhelming majority of witnesses. With equal testimony their proof fails."

There is an enormous quantity of testimony produced, on the part of Her Majesty's Government, to show that the United States fishing *fleet* constantly, throughout the season, fished within three miles of almost all the shores of the Gulf of St. Lawrence,—on the shores of Nova Scotia, (including all the shores of Cape Breton,) the shores of Prince Edward Island, the west shore of the Gulf, the shores of Bay de Chaleur and Gaspe, both shores of the River St. Lawrence, and the whole north shore to Labrador, the shores of Anticosti, as well as the shores of the Bay of Fundy. The various fleets of United States vessels were very seldom if ever, during the fishing season, out of sight of very large numbers of respectable and intelligent witnesses residing on various parts of the coast, whose sworn evidence has been received by the Commission. Besides, witnesses—too numerous to mention—have given evidence sufficient literally to fill a volume, of having fished in American bottoms; and they testify that the common custom of the various fleets was to fish within three miles of all the shores thrown open by the Treaty of Washington.

In addition to this, a very large number of witnesses have corroborated the views of almost all United States writers and statesmen who have offered the opinion that without the "three mile belt" the Gulf Fishery is useless,—and these latter witnesses, who have been interrogated on the subject, have, without perhaps a single exception, stated that the American skippers and fishermen have invariably admitted that, without the free use and enjoyment of the three mile inshore fisheries, they considered it useless to enter the Bay of St. Lawrence for fishing purposes Can there be stronger proof of habit? Speaking of the British testimony, says the learned counsel, Mr. Trescot:—"With equal testimony, their proof fails." Perhaps so. Has "equal testimony" been produced by the United States? Is there any testimony whatever to contradict this immense mass of evidence of the "habit" of the United States fishing fleet?

Numbers of fishermen were produced by the United States to show that they themselves had fished at Banks Bradley and Orphan, and other banks and shoals, and at the Magdalen Islands, outside of British waters, who, by the way, nearly all suffered loss, but scarcely any of these witnesses undertook to show *where* the fleet fished. On the contrary, they almost invariably qualified their statements by showing that they spoke only of their own individual fishing.

The learned counsel for the United States impliedly admits that unless there has been produced witnesses contradicting the British evidence as to "habit," the British case is made out. There is a singular absence in the vast number of witnesses and affidavits produced on both sides, for twelve weeks,—there is a singular and marked absence of contradiction, and upon the principle involving "habit," enunciated by Mr. Trescot, the evidence can be relied on with confidence as fully and completely establishing the claim.

The learned agent, Mr. Foster, in his very able speech, contends that the British claim is not made out because there are but a trifling quantity of fish caught by United States vessels within the formerly prohibited limits; but it can be clearly shown that he is entirely mistaken as to the weight and character of the evidence. He says:—

"If the three mile limit off the bend of Prince Edward Island, and down by Margaree, where our fishermen sometimes fish a week or two in the autumn (and those are the two points to which almost all the evidence of inshore fishing in this case relates), if the three mile limit had been buoyed out in those places, and our people could have fished where they had a right to, under the law of nations and the terms of the Treaty, nobody would have heard any complaint."

Again:—

"Almost all the evidence in this case of fishing within three miles of the shore relates to the Bend of Prince Edward Island and to the vicinity of Margaree. As to the bend of the Island it appears in the first place that many of our fishermen regard it as a dangerous place, and shun it on that account, not daring to come as near the shore as within three miles, because in case of a gale blowing on shore their vessels would be likely to be wrecked."

He also says:—

"There is something peculiar about this Prince Edward Island fishery, and its relative proportion to the Nova Scotia fishery. As I said before, I am inclined to believe that the greatest proportion of mackerel caught anywhere inshore, are caught off Margaree late in the Autumn. The United States vessels, on their homeward voyage, make harbor at Port Hood, and lie there one or two weeks; while there they do fish within three miles of Margaree Island; not between Margaree Island and the main land, but within three miles of the island shores; and just there is found water deep enough for vessel-fishing. Look at the chart, which fully explains this fact to my mind. Margaree is a part of Nova Scotia, and Prof. Hind says there is an immense boat-catch all along the outer coast of Nova Scotia, and estimates that of the mackerel catch, Quebec furnishes seven per cent, (he does not say where it comes from), Nova Scotia, 80 per cent., New Brunswick 3 per cent., and Prince Edward Island 10 per cent."

This is also from the learned Agent of the United States:—

"When I called Prof. Hind's attention to that, and remarked to him that I had not heard much about the places where mackerel were caught in Nova Scotia, he said it was because there was an immense boat catch on the coast. If there has been any evidence of United States vessels fishing for mackerel within three miles of the shores, or more than three miles from the shore of the outer coast of Nova Scotia, it has escaped my attention. I call my friends' attention to that point. If there is any considerable evidence, I do not know but I might say any appreciable evidence of United States vessels fishing for mackerel off the coast of Nova Scotia, (I am not now speaking of Margaree, but the coast of Nova Scotia), it has escaped my attention. As to Cape Breton, very little evidence has been given, except in reference to the waters in the neighborhood of Port Hood."

Providing Mr. Foster were correct in the view he has put forward of the evidence, he might with some reason urge the Commission to refuse the award claimed on behalf of Her Majesty's Government.

Nothing could be more unjust and unfair to the character of the Canadian Fisheries, than to adopt the statement of the learned Agent as to P. E. Island and Margaree as the correct result of the facts established by absolutely uncontradicted evidence now before the Commission.

It is true that the main efforts of United States Counsel were exerted to impeach the large array of respectable witnesses who testified to the great wealth of the fishery in the Bend of Prince Edward Island, and the constant use of those grounds by United States fleets. But if Mr. Foster should ever again have occasion closely to examine the whole evidence given in this case on both sides, he will find that, beyond the efforts to depreciate that tract of water between the North Cape and the East Point, and that at Grand Manan, there is scarcely a line of testimony offered by him or his learned associatess to shake or contradict the evidence given respecting all the other vast and rich Canadian fishing grounds. The evidence of the value to and use by American fishermen of all the coasts of Nova Scotia from the Bay of Fundy eastward, all around the Island of Cape Breton, the north shores of the coasts and bays of New Brunswick to Gaspe, and the entire coasts of Quebec, within the jurisdiction of the Commission, is almost, if not absolutely, uncontradicted.

This applies as well to the affidavits as to the oral testimony, and it may be stated here of the British affidavits, what cannot be said of those of the United States, that they are strikingly corroborated by the testimony of witnesses both on the direct as well as the cross-examination.

I here produce a number of extracts and references, which are more than sufficient to convince even our learned

friends on the other side, that they have taken only a very partial view of this case. And I call Mr. Foster's especial attention to these witnesses. At the risk of being considered tedious I cite this evidence, because the statement of my learned friend was emphatic, and he threw out a special challenge in asserting that there was but little evidence of fishing by Americans, except at the two places mentioned by him.

The pages refer to the British evidence :—

Page 79.—Mr. George Harbour, a resident of Sandy Beach, Gaspe, was called as a witness. and gave evidence, of the Americans fishing for mackerel in that locality. He says :—"They came in right to the shore, close to the rocks. Upon an average, they take 500 barrels in a season (two trips). He has never seen them fishing for mackerel outside three miles."

Page 83.—Mr. William S. Sinnett, a resident of Griffin's Cove, Gaspe, called as a witness, says :—"That he has seen American skippers fish two miles from the shore, and inside of a mile for mackerel; and that he has never seen them fishing outside of three miles. This witness speaks entirely with reference to his own locality."

Page 87.—Mr. George Grenier, of Newport, Gaspe, gave evidence that he "has seen American vessels fishing for mackerel 25 yards from the Point."

Page —. Hon. Thomas Savage, of Cape Cove, Gaspe, says, in his evidence, that "the fishing grounds extend from Cape Gaspe to Cape Chatte. As soon as the mackerel come in, the American fishermen take that fish, and the Gaspe fishermen cannot get bait."

Page 276.—Mr. James Joseph testifies that he has seen the Americans fishing from Cape Chatte to Gaspe, right along the shore, all within one or two miles from the shore.

Page 280.—Mr. Joseph Couteau, of Cape Despair, Gaspe, called as a witness, says that "The Americans fish along the coast of Gaspe. from one to three miles off shore.

These witnesses are confirmed and supported by—
Wm. McLeod, of Port Daniel, Gaspe.
Philip Vibert, of Perce, Gaspe.
James Baker, Cape Cove, "
Wm. Flynn, Perce, "
Abraham LeBrun, Perce, "
Louis Roy, " "

Page 180.—Mr. James McKay, Deputy Inspector of Fish, Port Mulgrave, after giving evidence of fishing close inshore off Cape Breton, in 1862, says : "In 1872, fished in American schooner *Colonel Cook*, and caught 400 barrels on second trip—three-fourths caught inshore. Caught 800 barrels of mackerel in two trips in 1872. In 1873, caught 360 bbls. in two trips. The greatest portion of the fish were taken about Cape Low, Cape Breton, "close inshore."

Page 226.—Mr. John Stapleton, of Port Hawkesbury, C. B., says in his evidence that he has fished in American vessels "in Bay Chaleur, on the west coast of New Brunswick, to Escuminac and Point Miscou, from Point Miscou to Shippegan, and thence to Paspebiac and Port Daniel, down to Gaspe, round Bonaventure Island as far as Cape Rogers.

Page 243.—Mr. James Lord, of Deer Island, N. B., gives evidence that the Americans "take as much as the British fishermen on the mainland from Point Lepreaux, including West Isles, Campobello and Grand Manan."

Page 347.—Hon. Wm. Ross, Collector of Customs, at Halifax, formerly a resident of Cape Breton, and a member of the Privy Council of Canada, gives evidence as follows :—"The American fishermen fish for mackerel on the *Atlantic Coast* of Cape Breton, from Cape North to Scatterie, in August, September, and October, fishing inshore and offshore, but more inshore than offshore."

Page 374.—Mr. John McDonald, of East Point, P. E. Island, says, in his evidence, that he "has fished in American vessels about Cape Breton, P. E. Island, on West Shore, Bay of Chaleurs, and Gaspe, within three mile limit."

Similar evidence is given by—

Page 558.—John Dillon, Steep Creek, Gut Canso.

Page 361.—Marshall Paquet, Souris, P. E. I.

Page 365.—Barnaby McIsaac, East Point, P. E. I.

Page 384.—John D McDonald, Souris, P. E. I.

Page 388.—Peter S. Richardson, Chester, N. B.

Page 399.—Mr. Holland C. Payson, Fishery Overseer at Westport, N. S., says in his evidence that St. Mary's Bay, the coast around Digby Neck, with Briar Island and Long Island, are valuable fishing grounds. The Two Islands, in 1876, exported about $200,000 worth of fish. This district is frequented by small American schooners, who fish for cod, halibut, pollock and herring.

Mr. Payson's evidence is corroborated by that of Mr. B. H. Ruggles, of Briar Island, Digby, N. S.

Page 407.—Mr. John C. Cunningham, of Cape Sable Island, N. S., says in his evidence that United States fishermen take halibut off Shelburne County, within three miles of the shore, say 1½ to 2 miles. A full fare is about 800 quintals,—take two fares in three months.

These witnesses were examined orally, and nearly all, if not all, ably cross-examined.

The following are from the British affidavits, also to show the extent of coast used by United States fishermen:—

J. E. Marshall, fisherman, a native of Maine, was 10 years master U. S. fishing vessel:—

"1. The fishing by American schooners was very extensive from 1852 to '70. During that period the number of American vessels which have visited the shores of the Gulf of St. Lawrence, for fishing purposes, yearly, amounted from 300 to 500 sails. This I have seen with my own eyes. All these were mackerel fishing. The places where the Americans fished most during that period were on the shores of Cape Breton, Prince Edward Island, New Brunswick, and on the shores of Bay of Chaleur, from Port Daniel to Dalhousie, and east, from Port Daniel to Bonaventure Island, in Gaspe Bay, and on the south shore of Gaspe, from Cape Rozier to Matane, and on the North shore from Moisie to Gadbout River. I have fished myself nearly every year in these places, and I never missed my voyage."

Jas. A. Nickerson, Master Mariner, N. S.:—

"4. My best catches were taken off the north coast of Cape Breton, from Shittegan to Hanley Island, Port Hood, and I never caught any of the fish to speak of beyond three miles from the shore. I am certain, and positively swear that fully nine-tenths, and I believe more than that proportion of my entire catch was taken within three miles of the shore, the nearer to the shore I could get the better it would be for catching fish. One reason of that is that the mackerel keep close inshore to get the fishes they feed on, and these little fishes keep in the eddies of the tide quite close to the shore.

"9. These American fishermen get their catches in the same place we did. They took the fish close into the shore, that is by far the larger proportion of them, and the opinion among the American fishermen was universal, that if they were excluded from fishing within these three miles off the shore, they might as well at once abandon the fishery."

John L. Ingraham, Sydney, Cape Breton, Nova Scotia, fish merchant:—

"I have seen at one time two hundred American fishing Vessels in this harbor. In the summer of eighteen hundred and seventy-six I have seen as many as thirty at one time.

"3. These vessels fish often within one-half mile of the coast, North and East of Cape Breton, and all round.

"21. American fishermen come around the southern and eastern coast of Cape Breton by dozens through the Canal and Bras D'Or Lake, and wherever it suits them."

Daniel McPhee, Fisherman, P. E. I.:—

1. "That I have personally been engaged in the mackerel and cod-fishing in the Gulf of St. Lawrence since the year 1863.

2. That in the year 1863 I commenced mackerel fishing in the American vessel "Messina," and that during that year we fished in the Bay Chaleur, and took home with us six hundred barrels of mackerel during the fishing season of that year, one-third of which quantity, I would say, was caught within three miles of the shore.

10. That about 200 of the American vessels get their bait on the Nova Scotian coast, and, in my opinion, without the bait obtained there they could not carry on the fishing.

11. Then there is also a fleet of 40 American vessels which fish off Grand Manan. They average 350 barrels of herring per vessel, which are all caught close to the shore."

Chas. W. Dunn, Fisherman, P. E. I.:

1. "That I have been engaged in fishing for about twenty-eight years, winter and summer, in both boats and vessels, having fished in the cod-fishing on the Banks for about seven winters. I have also fished mackerel in this Gulf with the Americans, from the summer of 1868 till 1871, and also in the halibut fishery on these coasts.

2. "At Anticosti we could often see the halibut on the bottom when we were trawling. This would be about two or three hundred yards from shore. I have seen ten thousand halibut a day caught at Anticosti, in water where we could see bottom. This halibut fishery is the best paying fishery that I have ever been in. I have made ninety dollars in twelve days as one of the hands at that fishery."

Jas. Houlette, Fisherman, P. E. I.:—

1. "That I have been engaged in fishing for fifteen years, in vessels belonging to the United States. I have fished all about Bay Chaleur, from Port Hood to Seven Islands, at the Magdalens, all along this Island coast, and two years' mackerel fishing on the American shores, and many winters cod-fishing."

John R. McDonald, Farmer and Fisherman, P. E. I.:—

13. "That *almost all the American fishermen*, fish close into the shore *of the different provinces of the Dominion*, and I do not think the Americans would find it worth while to fit out for the Gulf fishing if they could not fish near the shore. The year the cutters were about the Americans did not do very much, although they used to dodge the cutters and fish inshore."

Alphonso Gilman, fisherman, P. E. I.:—

7. "That when the mackerel first come into the Bay, they generally come up towards Bay Chaleur, Gaspe and round there,—passing the Magdalen Islands on their way. It is up there that the American fleet generally goes first to catch fish."

Joseph Campbell, P. E. I., master mariner, 9 years, U. S. vessels:—

2. "That from the year 1858 to 1867 I was constantly and actively engaged in fishing aboard American vessels, and during that time I fished on all the fishing grounds.

3. "We got our first fare generally in the Bay Chaleur. Fully nine-tenths of this fare would be caught close inshore, within the three-mile limit."

Alex. Chiverie, merchant, P. E. I., formerly fisherman; was 20 years in U. S. vessels. "We fished off "the north part of Cape Breton, and caught the whole of our fare within three miles from the shore.

7. "That in the year 1867 I was master of a British fishing schooner. The first trip of that season we fished between the Miramichi and Bay Chaleur. During that trip the fish played chiefly inshore, about a mile from the shore. At times during that trip I would be getting a good catch, when the American vessels, to the number of fifty or sixty, would come along, and by drawing off the fish, spoil my fishing. During that trip, the Americans, I would say, caught fully three-fourths of their fare within the three-mile limit."

Nathaniel Jost, master mariner, Lunenburg, N. S.:—

2. "I have also seen many American mackerel-men engaged in taking mackerel around the coast of Cape Breton, Prince Edward Island, and eastern side of New Brunswick, and many of these fished inshore. I would say that there were at least

four hundred American vessels around the before-mentioned coasts taking mackerel. During the past two years I have seen at one time in sight, five American vessels engaged in taking codfish on the southern coast of Nova Scotia, and a great many in sailing along; and at Sable Island this Spring I have seen from fifteen to twenty in sight at one time, engaged in taking codfish."

Benjamin Wentzler, fisherman, Lower LaHave, N. S.:—

1. "I have been engaged in the fisheries for twenty-seven years, up to eighteen hundred and seventy-five inclusive, and fished every year in the North Bay, around Cape Breton, Prince Edward Island, eastern side of New Brunswick, and around the Magdalens. I have taken all the fish found in the waters on the above-mentioned coast. I am also well acquainted with the inshore fisheries in Lunenburg County. I have seen often more than a hundred American vessels fishing on the above-named coasts in one fleet together, and I have seen these vessels make off from the shore when a steamer appeared to protect the fishery, and when the smoke of the steamer could not be seen they came in again to the shore. Such large numbers of them made it dangerous for Nova Scotian fishermen, and I have lost many a night's sleep by them, in order to protect our vessels. I have seen in Port Hood harbor about three hundred sail of American vessels at one time, and it is seldom, if ever, that a third of them are in any harbor at one time, and I have been run into by an American schooner in Port Hood Harbor. From 1871 to 1875 inclusive, I have seen the Americans in large numbers around Prince Edward Island, eastern side of New Brunswick, and around Cape Breton. I have seen many American vessels on the above-mentioned coast engaged in taking codfish."

Jeffrey Cook, fisherman, Lunenburg, N. S.:—

2. "While in the Bay of Chaleur, the Summer before last, I saw many American vessels there engaged in fishing, and have also seen many of them there fishing since 1871. I have counted, the Summer before last, fifty American vessels within three-fourths of a mile from each other. The most of the American vessels which I saw, fished inshore around the above-mentioned coasts. I saw them take both codfish and mackerel inshore, within three miles of the shore. Mackerel are taken mostly all inshore, and I would not fit out a vessel to take mackerel unless she fished inshore."

James F. White, Merchant, P. E. Island:—

"13. The mackerel, in Spring, come down the Nova Scotian shore, and then strike up the Bay to the Magdalen Islands, from there some shoals move towards the bend of this Island, and others towards Bay Chaleur, Gaspe, and round there. The Americans are well acquainted with this habit of the mackerel and follow them. They have very smart schooners and follow the fish along the shore, taking their cue, to a great extent, from what they see our boats doing."

John Champion, Fishermen, P. E. Island:—

"13. On an average there are eight hundred American vessels engaged in the cod, hake and mackerel fisheries in the Bay, that is including this Island coast, the Magdalen Islands, the New Brunswick and Nova Scotian coasts. There have been as many as fifteen hundred sail in a season, according to their own accounts. I myself have seen three hundred sail of them in a day."

Wm. Champion, Fishermen, P. E. Island:—

"Was one year in an American vessel, down eastward on this Island, and about Port Hood, Antigonish, Cape George and other places in that direction, the boats and also the American schooners fish close inshore. We fished right up in the Bay Chaleur and round the other shores of the Provinces."

James B. Hadley, Port Mulgrave, Notary Public, merchant:—

"The principal places where the Americans fish for mackerel in the summer months are all over the Gulf of St. Lawrence, off Pomquet Island. Port Hood, Prince Edward Island, in the Northumberland Straits, off Point Miscou, as far up as the Magdalen River, across to the Seven Islands, off and around Magdalen Islands, and in the fall from East Point and the Magdalen Islands and Island Brion, thence to Cape St. Lawrence and Port Hood, and around the eastern shore of Cape Breton to Sydney Harbor. The trawling for codfish is done all around our shores from the first of May till the fall."

George McKenzie, Master Mariner, P. E. Island, was 40 years fishing:—

"When the mackerel strike off for this Island the American schooners never wait along the bight of this Island but press up towards the North Cape, and Miscou, and Mira, and generally along the west coast of New Brunswick and up as far as Seven Islands above Anticosti, as their experience has taught them that that is the quarter where the fish are to be found first. Later on in August and September they come back into the bight of this Island. Nearly all the fish caught during these times are caught near the shores of the British possessions, although there are some American vessels which fished entirely in deep water away from the land, but these are comparatively few."

William H. Sweet, of Fall River, in the State of Massachusetts, United States of America, but now of Port Hood, fisherman:—

"1. I have been engaged in the fishing vessels fitted out by the Americans for the past five years, and have been engaged during that time in fishing *in all parts of the Gulf on the coast of Nova Scotia, Cape Breton and P. E. Island*, and on the shores of the Magdalen Island.

"2. A large number of American vessels have been engaged in fishing in these waters for some years past, taking chiefly mackerel and codfish."

Jas. Archibald, fisherman, of Boston:—

"1. I have been engaged in the fishing business for 20 years past, and during seven years past I have been fishing in American vessels, in American and Canadian waters. I have been engaged in various kinds of fishing on the coasts of Nova Scotia, and Cape Breton, in the Gulf and about the Magdalen Islands, and P. E. Island. I came into this port in an American fishing vessel and have been engaged in fishing here during the present season."

This last is corroborated by Richard Thomas, fisherman, of Booth Bay, Me.

Michael Crispo, Merchant, Harbor au Bouche, N. S.:—

"The mackerel are caught all around the shores of the Gulf of St. Lawrence.'

Thomas C. Roberts, Master Mariner, Cape Canso, N. S.:—

"2. During the years that I was employed in fishing, the number of American vessels fishing for mackerel and codfish in the Gulf of St. Lawrence and on the coast of Nova Scotia, would, to the best of my knowledge, range from six hundred to seven hundred each year. The average number of men to each vessel would be about fifteen."

Jacob Groser, Fisherman, Lower LaHave, N. S.:—

"2. Four years ago I was in the Bay of Chaleur, and for many years constantly before that time year after year. Five years ago I have seen in the Bay of Chaleur from two to three hundred American vessels in one fleet. The most of these vessels took mackerel and they took the most of their mackerel inshore, and very seldom caught much mackerel beyond three miles from the shore."

Philip LeMontais, Arichat, Agent of Robin & Co.:—

"The harbor of Cheticamp is much frequented by American fishing vessels, and I have seen at one time along the shore between six hundred and eight hundred fishing vessels, most of which were American. These vessels were fishing for mackerel along the shore of Cape Breton."

John Ingraham, Yarmouth, N. S.:—

"2. About six hundred American vessels, from all ports, are engaged in fishing in Canadian waters, the average number of men is about fourteen; this is within my knowledge the past fifteen years. They fish for mackerel, codfish and halibut, from Bay de Chaleur, to Cape Forchu."

Page 110.—John Morien, of Port Medway, N. S., proves fishing for mackerel by American vessels at Cape Canso, within half-a-mile of the shore.

Page 111.—John Smeltzer, of Lunenburg, testifies that he has seen American vessels fishing for mackerel in the back harbor of Lunenburg.

Page 115.—John Bagnall, of Gabarus, Cape Breton, proves American fishing vessels in Gabarus Bay, North-east side of Cape Breton.

Page 118.—Ryan Murphy, of Port Hood, Cape Breton, swears that he has known as many as 700 American vessels fishing in the Gulf and the shores around *Nova Scotia*, *Cape Breton*, and the Magdalen Islands.

Page 126.—H. Robertson, of Griffin's Cove, Gaspe, proves an extensive mackerel fishery by Americans at Griffin's Cove, and neighboring coves.

Page 126.—Donald West, of Grand Greve, Gaspe, swears to over 100 American schooners in Gaspe Bay, yearly, for mackerel fishing.

Page 127.—Michael McInnis, of Port Daniel, Bonaventure County, Quebec, testifies that the mackerel fishery by Americans has been carried on, on an extensive scale, on that shore.

Pages 134 *and* 136.—John Legresly and John Legros, of Point St. Peter, Gaspe, prove a large number of American mackerelers in Gaspe Bay during and since the Reciprocity Treaty.

Daniel Orange and Joshua Mourant, of Paspebiac, Gaspe, swear that they have annually seen a large fleet of American mackerelers in Bay of Chaleur.

Page 138 to 190.—Forty nine others, all of Gaspe, swear to the continual use by the United States fishermen of the fishing grounds inshore of that region, and to the annual presence of a large fleet of American fishing vessels in the Bay of Chaleur and Gaspe Bay.

The following persons also testify that the Americans fish on all the shores of Nova Scotia, eastern and northern shores of Cape Breton, Antigonish Bay, east coast of New Brunswick, and Bay Chaleur:—

Page of Affidavits.

156. W. Wyse, Chatham, New Brunswick.
181. Gabriel Seaboyer, Lunenburg, Nova Scotia.
182. Patrick Mullins, Sydney, C. B., "
190. John Carter, Port Mouton, "
192. Thomas Condon, Guysboro', "
200. Matthew Monroe, Guysboro', "
200. Isaac W. Rennells, Cape Breton, "
206. Joshua Smith, " "
207. Martin Wentzel, Lunenburg, "
209. Alexander McDonald, Cape Breton, "
216. Amos H. Outhouse, Digby, "
226. Robert S. Eakins, Yarmouth, "
227. John A. McLeod, Kensington, Prince Edward Island.
230. Angus B. McDonald, Souris, "
233. John McIntyre, Fairfield, "
237. Thomas Walsh, Souris, "
239. Daniel McIntyre. "
217. John Merchant, Northumberland, New Brunswick.

From end to end, the British evidence shows that the United States fishermen carry on their operations within the British territorial waters. I beg here to introduce a few instances from the evidence of the United States witnesses who were produced to prove that the mackerel fishery was carried on in what is called by the United States counsel "the open sea."

Timothy A. Danies, of Wellfleet, Mass., fisherman, called on behalf of the Government of the United States, sworn and examined.

By Mr. Foster:—

Q. How old are you? A. 70 years.
Q. Were you engaged in mackerel fishing during a good many years? A. Yes.
Q. How many years did you come to the Gulf to fish mackerel? A. 17 years.
Q. What year did you begin and what year end? A. From 1846 to 1873 I believe, inclusive; one year out.

Q. Were you in the same schooner all the time? A. Yes.
Q. What was the name of the vessel? A. *Pioneer.*
Q. What tonnage? A. 62 tons.
Q. New or old measurement? A. Old measurement.
Q. Were you captain all these years? A. Yes.

* * * * * * *

Q. Where did you do your principal fishing, in those places, more than three miles from shore or less? A. More than three miles.

* * * * * * *

Q. If you were a young man and fisherman once more, and wanted to come to the Gulf to catch mackerel, would you be prevented from doing it by the fact that you were forbidden to fish within three miles of the shore? A. I think so.

By Mr. WEATHERBE:—

Q. If you were forbidden to come within three miles of the shore, would you come at all? A. It would be under certain circumstances. If there were no fish with us and plenty there, perhaps I might. I cannot say as to that.

Q. From your experience, if you had been restricted, during all the years you came to the bay, from coming to within three miles of the shore, you would not have come? A. I think not.

STEPHEN J. MARTIN, master mariner and fishermen, of Gloucester, was called on behalf of the Government of United States. Here are some extracts from pages 212 and 215 of the American evidence.

By Mr. DANA:—

"Q. But you did not fish within the three mile limit? A. No.
"Q. Can you not find out from reports of vessels and from your own observation where the fish are? A. Yes.
"Q. You keep your ears and eyes open all the time you are fishing? A. Yes.
"Q. It is not necessary, actually, to go in and try if you find vessels leaving a place without catching anything, to discover that this is the case? A. No.
"Q. And you have to judge as to the presence of fish, a good deal from the reports of others? A. Yes. A great many men have a choice as to fishing grounds; this is the case everywhere, whether in cod, halibut or mackerel fishing. Some fish one way and some another.

* * * * * * *

"Q. From your experience in the Bay—a pretty long one—do you attach much importance to the right of fishing within three miles of the shore? A. Well, no, I do not think it is of any importance. It never was so to me."

By Mr. WEATHERBE:—

"Q. You never fished so close to the shore as that? A. Sometimes we did. We fished within five miles of Bird Rocks.
"Q. And within four miles of them? A. Well, yes.
"Q. But you did not generally run in so close? A. We might have done so. I could not tell exactly how far off we fished. We used to catch our fish on different days in different places.
"Q. You were asked whether you would not have your ears open and your understanding to know where other people caught their fish, and your answer was that some people had their choice? A. Yes, sir.
"Q. That is to say that some people have their choice to fish in certain places and others in different places? A. Yes.
"Q. And that is the only answer you gave. I suppose that you did hear where others were fishing. Have you given a full answer? A. I have given a full answer.
"Q. You must have heard where others have fished? A. Of course if a man gets a full trip on Orphan Bank he will go there again.
"Q. He does not care where others have fished? A. No.
"Q. Then it is possible that some fish altogether in one place, and some altogether in another place? A. Well, I don't know anything about that—I only know my own experience.
"Q. Then you can give no idea where fish are caught except your own actual experience? A. Well, I know where people have said.
"Q. That is just what Mr. Dana asked you I want to take the same ground that he did that your ears were open and you understood. Your answer was simply that some had their choice? A. If I spoke a vessel and he said there was a good prospect at Bradley I should go there. If he said there was good fishing on the Magdalens I should go there.
"Q. I thought your answer was that some would have their choice, that no matter what they heard they would still go to the same places? A. I would go where I got good catches the year before.
"Q. Then you didn't hear of others fishing in other places? A. I have heard of them fishing at Bradley, and Magdalens and up the Gulf."

Again:—

"Q. Now I don't want to trouble you with reading any opinions, but about what time was it ascertained that the mackerel fishing was inshore? A. I could not tell.
"Q. At the time you mentioned it was not known that it was an inshore fishery at all? A. No, not to my knowledge.
"Q. It was after it was ascertained that it was an inshore fishery that you heard of a difficulty about the limit? A. Yes."

By Mr. DANA:—

"Q. I wish to ask you with reference to the last question when you ascertained that the mackerel fishery was an inshore fishery? A. I stated it was not in the year 1838.
"Q. Mr. Weatherbe asked you when you first ascertained that the mackerel fishery was an inshore fishery, and whether this or that happened before you ascertained that it was an inshore fishery. Now have you ever learned that it was an inshore fishery in distinction from an outshore fishery? A. No.
"Q. Well what do you mean when you speak of "after you understood it was an inshore fishery." Do you mean mainly or largely inshore? A. No. We would hardly ever catch any inshore in the first part of the season. Some parts of the year they did take them inshore and offshore too.
"Q. Taking them all through, where did you catch them? A. Most of them are caught offshore.

"By Mr. WEATHERBE:—

"Q, I asked when it was that the difficulty first arose about the limit, and whether it was after it was considered an inshore fishery, that is '39? A. I referred to the year '38. It was an inshore fishery when they fished there. When vessels didn't fish there, you could not call it an inshore fishery.

The attempt of many witnesses to show that the fishing was all carried on outside of three miles, was amusing, to say the least.

ISAAC BURGESS, of Belfast, Maine, fisherman, called on behalf of the Government of the United States, sworn and examined:

By MR. FOSTER:—

This witness fished in the Gulf of St. Lawrence in the years 1868, 1869, 1872 and 1874, and excepting on one day, all his fishing was outside of three miles.

By MR. WEATHERBE:—

"Q. You caught your mackerel four miles off? A. Yes.
"Q. What proportion? A. Half of them,—I could not tell.
"Q. I suppose that would be the distance you would select as being good fishing? A. Yes sir.

" Q. That would be the best fishing you have? A. Yes sir.
" Q. I suppose most of the fishermen fished that distance? A. Yes they generally fished off there near four or five miles.
" Q. It is considered about the best fishing, four or five miles? A. Yes, it is.
" Q. I suppose in some places the fish would go in three and a half miles? A. Yes, some fish do.
" Q. You would not mind coming in three and a half miles if you were four miles out, I suppose sometimes they would manage to get in three miles? A. No vessel that I have ever been in.
" Q. I am not speaking of the vessels, but the fish—is there anything to stop them at four miles? A. No.
" Q. There is no obstruction of any kind. Just as good water? A. Yes, only a little shallower.
" Q. Just as good feed? A. Yes.
" Q. Perhaps better feed? A. Well most generally the gales drive them off but they come back again.
" Q. I suppose when the wind is a little offshore the best feed would be inside, close in? A. Yes.
" Q. Closer inside than four miles. A. I should say so.
" Q. They would then go in pretty close? A. Yes.
" Q. You would then go in there and drift off? A. Yes.
" Q. And the fleet would do that. We have evidence of that. The fleet would run in as close as they could get and then drift off? A. Yes that was the way they fished.
" Q. As close as they could get in? A. Not within four miles.
" Q I was referring to a little closer. I wanted to come in a little closer if I could. I was throwing a little bait. A. Well, probably there might have been some fellows got in handier.
" Q. Some would go in handier? A, Yes, some of the captains went in.
" Q. Let us make a compromise and say three miles and a half. You don't object to that do you?" (No answer.)

George Friend, of Gloucester, whose evidence is to be found on page 119 of the United States, was produced and examined by Mr. Foster. He had many years experience of fishing in the Gulf of St. Lawrence—having fished there every year from 1855 to 1860, and owned several fishing schooners, two of which were seized, but afterwards released. He gave evidence, that the great body of his mackerel were caught more than three miles from the shore. He was cross-examined, and at page 123 the following record appears:—

" By Mr. WEATHERBE:—
" Q. Between 1868 and 1876 you had five vessels fishing? A. Yes.
" Q. And you made three mackerel trips? A. Yes
" Q. And you lost money by them? A. Yes.
" Q. Where did the vessels fish—outside of the three mile limit? A. I could not tell you.
" Q. You have no idea where they fished? A No
" Q. You had three vessels fishing in the Bay—you sent them there? A. Yes.
" Q. They come home, and you lost money by the trips? A Yes.
" Q. And you undertake to say that you do not know, and never made any enquiry whether the vessels fished inshore or outside? A. Yes.
" Q. You never made any enquiry about it? No."

This witness also stated that he was not aware whether any of these vessels had fishing licenses from the Canadian Government.

" Q. Is the privilege of using the inshore fishery of any use to you as fishermen? A. No. Personally, I say no.
" Q. Do you know that practically youself? A. That is my opinion.
" Q. You never fished inshore? A. No.
" Q. Therefore you are not able to say so from your own knowledge? A. I fished offshore for the very reason that I thought I would do better there. I had a perfect right to come inshore.
" Q. You lost money, you say? A. Yes.
" Q. Did you ever try inshore fishing? A. No.
" Q. But you say the privilege of inshore is of no value? A. That is my opinion.
" Q. For what reason? A. I gave you my reasons. It would keep the vessels out of the harbors, and they would get more mackerel.
" Q. What else? A. Then we would not have so many drafts. They lay in the harbors too long, and go into harbors when it comes night.
" Q. Is it not the practice for the fishermen to run in to the shore and drift off, and then run in again? A. It is not always you can drift off shore.
" Q. Is the privilege of going inshore an advantage to you? A. If the mackerel were inshore, it would certainly be an advantage; if they were not inshore, it would not be an advantage.
" Q. You never tried whether the inshore was not better than the outshore fishing; why did you not try it? A Because I thought I could do better outside.
" Q. Year after year you lost money. As a business man, why did you not try fishing inshore like other fishermen who have made money? A. I don't know where they are; they are very much scattered.
" Q. Why did you not try? A. Because I thought I could do better offshore.
" Q. Do you know of any vessel which fished within three miles of the shore? A. Not personally.
" Q. Why do you say not personally? A. Because I do not know any one. I never saw them in there fishing.
" Q. Did you hear of any vessel which fished inshore? A. I could not tell what I have heard
" Q. Have you heard of vessels fishing inshore? A. I could not answer that.
" Q. Did you ever make any inquiries? A. No. I was not interested.
" Q. You fished offshore, lost money, and never tried to fish inshore, and never made any enquiries as to whether there was good fishing there or not? A. Yes."

This is from the record of the evidence of CHARLES H. BRIER, of Belfast, Maine, called on behalf of the Government of the United States.

By Mr. DOUTRE:—
" Q. Can you find out easily whether you are three miles or four miles or five miles off? A. I don't know how we can.
" Q. Suppose you were about five or four miles, would you call it off shore or inshore? A. I would call it inshore
" Q. Then what leads you to say you caught about half of your trip inshore and half out? A Because we did I suppose. We had a license to fish inshore and we did
" Q. You were not afraid of going in there? So long as you found fish you fished there? A. Yes.
" Q. Well, you had no reason whatever, had you, to take a note of the quantity taken inshore or outshore—what reminds you now of the fact? A. I don't know anything to remind me, only that we fished about half the time offshore and caught about as many fish off shore as in."

Permit me to refer to one locality to show how completely our learned brethren on the other side have ignored our evidence. I select this instance because the absence of contradiction is perhaps unusually striking. Grand Manan on the west side of the Bay of Fundy, I have intimated, has received the especial attention of United States Counsel, and many witnesses were called to contradict the very strong case made out by Mr. Thomson there.

Let me call your attention to the other side of that Bay, and to the attention bestowed to that part of the Province of Nova Scotia by my learned friend, Mr. Weatherbe. If you look at the map you will find St. Mary's Bay on the South Westernmost corner of Nova Scotia, on the Eastern shore of the mouth of the Bay of Fundy. From Cape Split near the Head of the Bay of Fundy follow down the Eastern shore of that Bay to Brier Island at the very extremity of Digby Neck a strip of rocky soil averaging one or two miles in width which forms the barrier between the Bay of Fundy and St. Mary's Bay, a bay six miles in width at Petite Passage. From Brier Island go to the head of St. Mary's Bay 30 miles and follow the sinuosities of the opposite coast to its mouth and proceed southwardly along the shores of the old French settlement of Clare towards Barrington—that ancient town which was founded by fishermen from Cape Cod, who settled there with their families in 1763. Here is a coast line on the Western part of Nova Scotia, 250 or 300 miles including the whole length of Digby and Annapolis Counties, with the finest zones and currents and temperature on the globe for a great fishing ground—swarming within three miles of the shore as you will find by turning to the 413th page of the British evidence with *codfish*, *haddock*, *pollock*, *halibut*, *herring* and *mackerel*. In 24 hours, with the *Speedwell*, Professor Baird would extend the list of edible fish very much. It is true we did not call witnesses from every part of this coast. It would have occupied too much time. We did, however, produce sufficient evidence. Take Brier and Long Islands,—about 14 miles in their entire coast line. These Islands are within about five or six hours sail of the United States, and will in a few months be almost connected by rail—after you cross St. Mary's Bay—with Halifax. The Inspector of Fisheries at Brier Island, Holland C. Payson, who was cross-examined by Mr. Dana, has carefully collected information. The people of these two islands alone catch $200,000 worth of fish annually. It would be fair to put the catch of that entire coast at three millions and a half. Ezra Turner from Maine, whose testimony is to be found on page 235 of the American evidence, and who has fished in the British waters for 30 or 40 years, swore that Maine is bankrupt in the fisheries from end to end. This is corroborated by a number of American witnesses, and by the official records of the nation.

In the American answer, it is claimed that the poor people of our fishing villages are saved from destitution by the American fishermen. Mr. Payson and Mr. Ruggles—the latter a descendant of the celebrated General Ruggles—say their people do not pay a cent of poor tax. The almost destitute fishermen from the bleak coasts of Maine, and from New England, *since the Treaty of Washington*, during the last four years throng these friendly neighboring coasts of ours, and from these two Islands alone they carry away annually from one-third to one-fourth as many fish as are caught by the inhabitants—say $50,000 worth. They come with small vessels, which they haul up or anchor, and they establish themselves on the shore, and carry on these fisheries side by side with their Canadian brethren. This exercise of the right is gradually growing annually.

These American fishermen admit their distressed condition at home, and the great advantages they enjoy by access to our coasts. These fisheries of ours, with those on the New Brunswick shore, including the Grand Manan, are a great blessing to our neighbors. This is no fancy picture. Here is a list of the Affidavits, filed to establish the facts. Here are the facts from fourteen men, whose statements could have been fully sifted:—

The statements of Holland C. Payson and Mr. Ruggles as to the value and extent of the fisheries in the Bay of Fundy, and the southern coast of Nova Scotia, are corroborated by the affidavits of—

155.—Joseph D. Payson, Westport, Digby County.

207.—Livingston Collins, " "

218.—Wallace Trask, Little River, "

218.—Geo. E. Mosely, Tiverton, "

220.—Gilbert Merrit, Sandy Cove, "

221.—Joseph E. Denton, Little River, "

221.—John McKay, Tiverton, "

222.—Whitfield Outhouse, Tiverton, "

222.—John W. Snow, Digby, "

223.—James Patterson Foster, Port Williams, Annapolis.

223.—Byron P. Ladd, Yarmouth, Yarmouth.

225.—Samuel M. Ryerson, " "

240.—Thomas Milner, Parker's Cove, Annapolis.

240.—James W. Cousins, Digby Town, Digby.

More than seven weeks before the United States agent closed his case, we produced two of the most intelligent and respectable men in the district. While Mr. Dana was cross-examining them, his countrymen were on the shores of Digby fishing with their vessels. A messenger in a few hours could have detected any exaggeration in their statements. From that hour to the end of their case not one word of all that evidence has been contradicted or shaken. These New England fishermen continue, under the Treaty of Washington, to pursue their ancient calling, and their number is increasing on the western and southern shores of Nova Scotia and at Grand Manan, and all around the Bay of Fundy

Mr. Dana calls this practical pursuit of the fisheries in British waters, a franchise, an incorporeal faculty. Call it what you will, is it not a great advantage to his countrymen? Is it not the salvation of the State of Maine? Is it not affording an increasing number of Americans safe and steady employment? These fisheries do not fail. I invite the careful attention of the Commission to pages 399 and 412 of the British evidence. Are these fisheries not supplying cheap and wholesome food to citizens of the United States? Is it not making hardy sailors of her stalwart sons? Mr. Dana can appreciate that. Mr. Foster says he fails to find any evidence, except as to the Bend of P. E. Island and Margaree. Can you, "pencil in hand," measure by arithmetic the benefit of the right of fishing to the people of a whole coast, who have been trained to no other pursuit, and whose families are dependent on the return of the boats from Brier Island and the other coast of Nova Scotia?

What goes on here at one extremity of these wonderfully varied and prolific Canadian fisheries, is going on at the other extreme,—at Gaspe and the mouth of the St. Lawrence, and at all other points varied by the circumstances of place.

I wish to call your attention to an error—shall I say a geographical error—of our learned friends. The learned agent for the United States says he can figure this question up pencil in hand. He admits with all the assistance of Mr. Babson and his figures (which are not evidence at all) he admits, one link in the chain of his argument is wanting—the Port Mulgrave returns of 1875. Does the learned agent know that the Port Mulgrave returns are entirely incomplete. Mr. Foster seems to be laboring under the delusion that every American fisherman reports himself as he passes through the Strait of Canso. This is not really the case. Look at the map and read the evidence and then see if it is possible to say, how many fishermen never sail in the direction of the Strait. All round the Eastern and Northern side of the Island of Cape Breton there are the finest mackerel grounds in the Gulf of St. Lawrence or the world. No United States witnesses could be produced to call this a dangerous coast. There are a number of fine harbors—the ancient port of Louisburg among the number—open all winter. This latter port is now connected by forty miles of railroad with the magnificent harbor of Sydney.

James McKay, of Port Mulgrave, Inspector of Fish, was called and examined as a witness before the Commission. He says, "No one man stationed in the Gut of Canso can get an accurate list of the vessels that go through there. To do so is a moral impossibility."

James Purcell, Revenue Officer at Port Mulgrave, says:—"The number of light dues collected would not be a fair return as showing the actual number of vessels that pass through the Gut of Canso."

B. M. Smalley, Fisherman, of Bedford, Maine, was called on behalf of the United States, and examined. I invite the Commissioners to read his evidence:—

"Q. Now don't you think the same fish go out and in? Is it your idea that certain schools keep in one place, and certain schools in another? A. Yes, it is my opinion the mackerel go out and in, and we know they do. But it is my positive idea that the best fish that go into the Bay Chaleurs go through the Strait and by Sydney.
"Q. Do you mean the Strait of Canso? A. No The Strait of Bellisle, and come down to Sydney.
"Q. What time? A. Well, they are passing up and down there after the month of August, until they all go out.
"Q. You think these are not the same as you catch off the North of the Island? No, I don't.
"Q. Do you think your opinion is general? A. Yes, sir."

Here are a few extracts from the evidence on file:—

Archibald B. Skinner, inspector of fish at Port Hastings, Cape Breton, has been 32 years engaged in the fishing business, and has been a practical fisherman:—

"During the Reciprocity Treaty a large fleet of American fishing vessels came to this coast during the Summer season to carry on a fishing business. The number increased during the treaty, until at the termination a fleet numbering hundreds of vessels were engaged in fishing around the coast of Nova Scotia, Cape Breton, P. E. Island and the Magdalen Islands. These principally took mackerel and codfish, but they took other fish as well.
"A large portion of the American fishing fleet is now going every year up the eastern side of Cape Breton, and fishing in the vicinity of Scaterie, Cape North, and the sections around there. I understand that these grounds are very rich in fish."

To reach these localities they are under no necessity whatever of passing through the Gut of Canso. They may, directly after they come from the Bay of Fundy, either pass along the coast of Nova Scotia and reach the Gulf by way of the northern part of Cape Breton, or pass north in the vicinity of Newfoundland.

George C. Lawrence, merchant, Port Hastings:—

"Not nearly all the American fishing vessels passing through the Straits of Canso are noted or reported. A great number pass through every year that have never been noted or reported at all.
"The Newfoundland herring fleet from American ports go thither along the eastern side of Cape Breton instead of passing through the Straits, and toward the latter part of the season large quantities of the most valuable mackerel are taken by Americans on the eastern shore of Cape Breton, between Cape North and Louisburg, and thereabouts."

Alex. McKay, merchant, North Sydney, C. B.:—

"None of the codfish vessels, to my knowledge, go through the Strait of Canso. They come around the southern and eastern coast of Cape Breton, and many mackerelmen do the same. Mackerelmen fish around by Scaterie, and it is therefore shorter for them to come round by the southern and eastern sides of the Island of Cape Breton."

James McLeod, master mariner, Cape Breton:—

"Last Summer I fished from Cape North to Scaterie, during the cod season, and saw at that season great numbers of American fishermen there, engaged in fishing. Within the last two years I have seen many American fishermen, from Cape North to Scaterie, engaged in mackerel fishing, and have seen at one time between twenty and thirty American fishermen so engaged, within sight, and think that there would be in that vicinity, at one time, about one hundred."

William Nearing, fisherman, Main-a-Dieu, Cape Breton:—

"All the codfish and halibut fishermen come around the southern and eastern coasts of Cape Breton, and do not run through the Strait of Canso. During the past five or six years I have seen, on an average, upwards of one hundred American fishing vessels each year around in this vicinity."

Wm. Edward Gardiner, merchant, Louisburg:—

"The American vessels which come here do not pass through the Strait of Canso."

Thomas Lahey, fisherman, Main-a-Dieu, C. B.:—

"I have seen in one day from fifty to sixty of these American vessels. These American vessels came round the southern coast of Cape Breton and did not run through the Strait of Canso. During the past five or six years I have seen on an aver-

age during the fishing season over a hundred American fishing vessels in and near the waters where I fished, and I have often found it difficult to keep out of their way. Those American vessels take all kinds of fish—mackerel, codfish and halibut. On board these vessels there are from sixteen down to ten men on each."

Isaac Archibald, merchant, Cow Bay, C. B.:—

"The Americans in this Bay have often practiced throwing bait overboard, and thus enticing the mackerel off-shore.'

John Peach, fisherman, Cow Bay, C. B., fished from Cape North to Scaterie, and in Cow Bay:—

"The Americans fish from three miles off-shore close up to the land for mackerel, and come in among us inshore fishermen and take the fish away from us."

James Fraser, Master Mariner, Sydney:—

"During the past ten years I have seen one hundred and sixty American vessels fish in Sydney harbor for mackerel in one day, and large fleets of American fishing vessels visit our harbor daily for the purpose of catching mackerel during the mackerel season year after year."

John Ferguson, Cow Bay, C. B.:—

"I have seen from forty to fifty American vessels pass through the "Kittle" between Scaterie and Main-a-Dieu in one day."

John Murphy, Fisherman, Lingan, C. B.:—

"During the past five or six years I have caught mackerel inshore around Lingan Harbour, and last year I have seen from ten to fifteen sail of American vessels engaged in taking mackerel."

"The American mackerelmen who fish around here come around the southern and eastern coasts of Cape Breton. and all the codfish and halibut fishermen come around the same way."

Angus Matheson, Fisherman, Sydney, C. B.:—

"I have caught them in Sydney Harbour, until the bottom of the boat touched the ground. The Americans always come inshore for the mackerel and when they did not fish them inshore they baited them off to beyond the three miles."

At a time when the imaginative faculties of the learned American Agent and Counsel had not been appealed to by their government,—at a time when it had not yet been discovered that the Americans derived their title to our fisheries from the achievements of a Massachusetts Army and Navy, our American friends had another basis to rest their claim, also not to be found in the Treaties. Until quite recently, American fishermen were under the firm impression that the mackerel was an American born fish—from the neighborhood of Newport, Rock Island, Cape Henlopen, Cape May, and other places on the American coasts, which were and are spawning grounds. Under that notion, whatever mackerel was to be found in Canadian waters, were nothing but the migrating product of the fertile American coasts. That theory was touchingly impressed upon the minds of the Joint High Commissioners during the Winter and in the early Spring, which preceded the Washington Treaty. The mackerel of the Canadian waters were represented as a species of strayed chicken or domestc duck and pigeon, which the owner had the right to follow on his neighbor's farm. At that time, they had no interest at all in depreciating our fish, for Canadian mackerel were then quoted at the highest rates on the markets of Gloucester and Boston; this was avowedly the case. They had even prepared statistics for the Centennial, in which these fish were at the highest price quoted on these markets, because it was only the prodigal son which was thus offered. These fish were considered then their property, and why should they endeavour to depreciate the value of their property! Some of the British Joint High Commissioners, under this strong assertion of right, felt a deep commiseration for the proprietor of the poultry in being restricted to certain grounds in the execution of a search warrant for the recovery of his property; and in order to repair the cruelties of the Convention of 1818, they were—like a facetious American writer—prepared to sacrifice all their wives' relatives to do something at our expense for the United States, as an atonement for that long injustice.

While these notions were prevalent, our American friends had no interest in depreciating a property which constructively was their own. In a long article on the fisheries, published in the New York *World* of the 15th April, 1871, not quite a month before the signing of the Washington Treaty, evidently written by a well-informed person, we read the following:—

"About the middle of April, or the 1st of May, the mackerel fleet makes the first trip of the season to off Newport, Rock Island, Cape Henlopen, and Cape May; and if they have good luck, may get as much as 200 barrels to each vessel. Those are all, however, poor fish, only ranking as No. 2, and sometimes not even that. A little later in the season, say in June, and far northward, "No. 2" fish are caught, but it is not until the middle and latter part of August, that up in the Bay of Chaleur, off Prince Edwards Island, and off the Magdalen Islands, in Canadian waters, the finest and fattest fish, both Nos. 1 and 2, are caught. From the time they are first struck in the Bay of Chaleur, the mackerel move steadily southward, until they leave Canadian waters, and are off Maine and Massachusetts, the fishermen, both American and Canadian, following them."

As already said, this idea of a migrating mackerel prevailed until Professor Baird, of the Smithsonian Institute, Washington, and other specialists, destroyed it by asserting that the mackerel was a steady and non-migrating squatter,—that what was found on the American coasts was born there, and remained there, in a pretty limited circle of motion induced by necessity of finding food; that what was caught in Canadian waters, was also born, and had there its habitat in similar conditions of circumnavigation for food, or to escape from predacious fish. From the moment our friends discovered that the fish which were caught in the Bay were Canadian fish, these lost with them all prestige. From that moment, Canadian markets lost all consideration and credit in the minds of many. American witnesses, heard in the case, called our mackerel trash, others invented a contemptuous word to describe its rank inferiority, and called it eel-grass mackerel, something hardly good for manure, almost unfit for quotation on the market of the United States.

We do not claim such marked superiority for Canadian mackerel as was attributed to them when supposed to be of American growth; but the evidence fairly weighed shows that, while both shores have good, indifferent and inferior mackerel at times; as a whole, the Gulf mackerel have commanded a higher price on the American market than American caught mackerel,—and in a run of years the quantity caught in the Gulf was, as well as quality, superior to American shore mackerel.

In order to see whether there is any difference between Canadian and American mackerel, I appeal to the

statement produced here by Mr. Low, unknowingly, I think, because he put his hand in the wrong pocket at the time and drew out a statement prepared for the Centennial, showing that our mackerel, which had been described as being of such inferior quality, netted 50 per cent more than the American mackerel in the market.

The valuation which this Commission is called upon to make of the respective advantages resulting from the Treaty, can hardly be based on an arithmetical appreciation of the quantity of fish caught by Americans in the three mile limit, although the evidence given on this point cannot but assist the Commissioners in forming their opinion. No tribunal of arbitration probably ever had to deal with such variable and uncertain elements; and if the Commission were left without anything to guide them towards a port of refuge, they would be left on a sea of vagueness as to amount. Fortunately they will find in the case an anchor, something of a definite character to guide them. During the Conferences of the Joint High Commission, the Representatives of the United States, offered to add to fish and fish oil, as additional compensation, the admission, free of duty, of coal, salt and lumber. The annual value of the duty on these articles in the United States, taking an average of the period from 1864 to 1875, would be:—

	Value.	Duty.
Coal	$773,645	$190,886
Salt	91,774	46,182
Timber and Lumber	7,345,394	1,083,609
		$1,330,677

Which gives for the twelve years of the Treaty the sum of $15,848,125. The annual value of the duties in Canada on these articles, taking an average of the same period, would be:—

	Value.	Duty.
Coal	$1,196.469	$8,491
Salt	92,332	248
Timber and Lumber	500,085	6,874
		$15,613

American Duties	$15,848,124
Canadian do.	187,356
The balance in favor of Canada would therefore be:	$15,660,768

If the matter had been settled on that basis, it does not mean that Canada would have received $15,660,768 as a direct compensation paid into her Treasury, but according to the theory adopted by American statesmen it would have to cost that sum to have acquired those fishing privileges.

In the estimation of the evidence adduced on both sides, I admit that there is apparently a conflict of views and facts; but when weighed in the scales of an expert, by a judge or lawyer accustomed to winnow the chaff from the grain, the discrepancies would turn out more fictitious than real. We have builtby a mass of witnesses and documents unassailable, the foundations of our claim- In many instances, we have obtained, from American writers, reports and witnesses, the confirmation of that substantial part of our case which consists in the value of our fisheries, both to our people and for the American nation. The *ex parte* portion of our evidence, consisting in the affidavits, has been fully sustained by the oral evidence. Generally our witnesses have been selected among citizens, whose station in life and well-established character, gave moral authority to their statements; and we could challenge our friends on the American side to point out the deposition of one witness who had to correct his examination in chief, when cross-examined. Can we say the same thing of a large number of American witnesses, without imputing to any of them the desire of stating an untruth? They have, as a rule, shown themselves so completely blinded by their national prejudices, that they have, unwittingly to themselves, been induced to give to most of their statements a color which would have been, in an ordinary court of justice, easily construed as a determined misrepresentation of facts. As an example of the reckless manner in which some of the American witnesses have spoken of the relative value of the fishing privileges granted by the Treaty of Washington, we refer to the 21st American Affidavit, subscribed to by Frank W. Friend and Sydney Friend, of the firm of Sydney Friend & Bro., Gloucester, and sworn to before one of the most important witnesses before this Commission, David W. Low, Notary Public and Postmaster of Gloucester, who could not ignore, and perhaps wrote himself this Affidavit. In answer to the 34th Question (p. 53): "The amount of remission of duties on Canadian fish, and the free market of the United States for their mackerel and other fish, saving the expense of Cutters; and the benefits of a large trade from the American vessels; the admission to our coasts for menhaden and mackerel,—will aggregate an advantage of nearly two million dollars a year in gross amount."—I may here mention the fact that two other witnesses wrote at full length the amount "two hundred millions." (Affid. 18 and 19.)—"For this we obtain the privilege of pursuing a fishery, which, after deducting expenses, will not net to the American fishermen ten thousand dollars a year."

The United States agent and counsel, who have made a successful effort to exclude from the consideration of this Commission the commercial advantages resulting from the purchase of bait and supplies, and of transshipping cargoes on our coast, have thought proper to collect a mass of evidence to prove the commercial advantages resulting to British subjects from the Washington and Reciprocity Treaties. For instance, Messrs. R. V. Knowlton and Edward A. Horton, of Gloucester, value at $200,000 per year the bait sold by Canadians to Americans; and at half a million dollars per year the goods sold to Americans for refitting.

The principal witnesses brought from Gloucester came here with such prejudiced minds, not to say worse, that their examination in chief seemed like an attempt to blind this Commission with one-sided statements, from which, at first sight, evolved a mystery which took us some time to penetrate. Taking their figures as they first gave them, it seemed a piece of folly for any American fisherman to have attempted, more than once or twice, to have fished in British waters, as the result of each trip constituted a net loss,—the quantity of fish taken being almost insignificant, and in quality unfit for the American market. Their statistics were arranged to create that impression, The statistics with the names of several firms who had pursued such an unprofitable business for a period of twenty-five and thirty years consecutively were furnished. We could not find in our experience of things and men, an obstinacy of that magnitude in mercantile affairs. The cross-examination of these witnesses, extracted piecemeal, presented these transactions under a different aspect, and it turned out,

after all, that the Gloucester vessel owners and fishermen had had all along more sense than the witnesses wanted us to suppose,—it turned out that the fish caught in our waters were highly remunerative in quality, and was in quality branded in the Boston and Gloucester markets far above the American shore mackerel.

I have now done with this portion of my subject, and I have said all I have to say with reference to the evidence brought in support and in contradiction of the British Case; and I now desire to deal briefly with what has been pleaded as an offset to our claim.

When we come to deal with the privileges granted by the Americans to the subjects of Her Majesty in British North America, we find them to be of two kinds:

1st.—Right to fish on the South-Eastern coast of the United States to the 39th parallel of North Latitude.

2nd.—The admission, free of duty, of fish and fish oil, the produce of British North American fishsries into the United States market.

As to the privilege of fishing in American waters, this Commission will have very little difficulty in disposing of it. In the first instance it has been proved that the most of the fish to be found in these waters are caught 30 and 90 miles offshore, almost exclusively on Georges Bank, and the British fishermen would not derive their right of fishing there from Treaties; but from international law. In the second place no British subject has ever resorted to American waters, and the province of the Commissioners being limited to twelve years, to be computed from the 1st July, 1873, there is no possibility to suppose that they will ever resort to these waters, at least during the Treaty. There remains then but one item to be considered, as constituting a possible offsett, that is the admission, free of duty, of Canadian fish and fish oil. This raises several questions of political economy, which will be better dealt with by my colleague who is to follow me, and I will limit myself to say that if the question, now under consideration, were pending between the fishermen of the two countries, individually, this would suggest views which cannot be entertained as between the two Governments.

The controverted doctrines between Free traders and Protectionists, as to who pays the duty under a protective tariff, whether it is the producer or consumer, seems to be solved by this universal feature, that, in no country in the world, has the consumer ever started and supported an agitation for a protective tariff; on the contrary we find everywhere directing and nursing the movements of public opinion on this matter, none but the producers and manufacturers. This cannot be explained otherwise than that the manufacturer receives in addition to a remunerative value for his goods the amount of duty as a bonus, which constitutes an artificial value levied on the consumer. It is in most instances the consumer that pays the whole amount of the duty. In a few cases there may be a proportion borne by the producer, and there is no process of reasoning or calculation to determine that proportion. When duties are imposed on articles of food which cannot be classed among luxuries, there seems to be no possibility of a doubt that the whole duty is paid by the consumer. Salt cod or mackerel will never be called luxuries of food. A duty imposed upon such articles has had the effect of raising their cost far above the amount of duty, and had thereby the effect of increasing the profit of the producer, at the expense of the consumer. For instance, a barrel of mackerel which would have brought $10.00 when admitted free, will bring $14.00 under a tariff of $2.00 per barrel; and statistics will be laid before the Commissioners to prove that fact, which I will not undertake to explain. This being so, however, would it be equitable to subject the Canadian Government to the payment of an indemnity to the United States for providing American citizens with a cheap and wholesome article of food, when it is evident that the Canadian fishermen have as a rule been benefitted by the existence of an American duty on the product of their fisheries. The Government of the Dominion any more than its inhabitants have not suffered in an appreciable manner from the imposition of duties on fish, and the remission of that duty has been profitable only to the consumers of the United States or to the merchant who re-exports Canadian fish to foreign countries. We may therefore conclude that in a fiscal or pecuniary point of view, the remission of duty almost exclusively profits the citizens of the United States. The admission of the United States fishermen to British waters at this period is pregnant with advantages unknown under the Reciprocity Treaty. Of late numerous new lines of railway have been built in all the British Provinces bordering, or in the immediate neighborhood of the United States, especially in the Provinces of Quebec, New Brunswick, P. E. Island, and Nova Scotia. A new industry consisting in the carrying of fresh fish all over the Continent, as far as California, has sprung up of late. With the confessed exhaustion of most of the American sea-fisheries this industry must find the largest part of its supplies in British waters.

To these varied advantages must be added the political boon conferred upon the United States, of allowing them to raise and educate, in the only possible school, that class of seamen which constitutes the outer fortification of every country, and of protecting her against the advance of her enemies on the seas. Would it not be a monstrous anomaly, if, by means of an indirect compensation, under the name of offset, the Canadian Government should be taxed for creating a United States navy, from which alone Canadians might entertain apprehensiens in the future? I am sure any tribunal would pause before committing such a flagrant act of injustice. Your Honors will remember, I am certain, that, although the Treaty of Washington is apparently made for a period of twelve years, it might become the starting-point of a perpetual Treaty of Peace, if not stained by the verdict of this Commission, as an iniquitous instrument. It is, on the contrary, to be hoped that future diplomatists will find both in our proceedings and in the award, the elements upon which to base an everlasting adjustment, which will forever settle the question of the British North American fisheries. On presenting such a result to the three Governments interested in this matter, we would collectively and individually feel proud of having been associated with this international trial.

I cannot close these remarks without acknowledging the valuable aid I have received from Professor Hind's book, filed in this case. As a specialist, in the several branches of science, connected with this case, he elucidated several grave questions, and gave the key to a great part of the evidence. My learned friend and esteemed colleague, Mr. Weatherbe, with whom I more particularly consulted, and who was so well acquainted with every spot in Nova Scotia, directed my attention to those parts of the evidence which brought in relief the advanced post occupied by this Province in the Fisheries. To both, I here tender my most cordial thanks. The inexhaustible patience and endurance of your Honors during these proceedings, extending over a period of five months, were only equalled by the exquisite urbanity and kindness with which we have all been treated. To my other British and American confreres before the Commission, I wish to express a feeling of fellowship which I will forever cherish. The American and British Agents and the Secretary will also be associated in my remembrance with one of the most pleasant incidents of my life,—enlivened by their sincerity of purpose, and the uniform good will they have brought to bear in the discharge of their onerous duties

FINAL ARGUMENTS ON BEHALF OF HER BRITANNIC MAJESTY.

No. IX.

MR. THOMSON.

MONDAY, NOV. 19.

The Conference met.

May it please your Excellency and your Honors:—

It has now become my duty, after this long and tedious enquiry has been concluded, as far as the evidence is concerned, to present the final argument on behalf of Her Majesty's Government. I could wish, in view of the great importance of the issue, that the matter had been placed in abler hands. I shall not go very much into the historical question which has been involved in this enquiry, because my learned friends who preceded me have gone fully into that; and, although I dissent from some of the views presented by the learned counsel for the United States, and may, incidentally, in the course of my remarks, have occasion to state some particulars of that dissent, I do not think there is anything that calls upon me to consider the subject at length.

There was one matter which, if I may use the expression of my learned friend, the Agent of the United States, at one time appeared likely to loom up with very great importance. I refer to the headland question. I feel that I can congratulate this Commission that, for the purpose of their decision upon the subject submitted to them, that question does not assume any importance whatever in this inquiry. But I wish to guard myself distinctly from assenting to the view presented by Mr. Foster, when alluding to that subject. He rather appeared to assume that, for practical purposes, this headland question had been abandonded by Her Majesty's Government, and that the mode of conducting this enquiry, on the part of the counsel for Her Majesty's Government, showed such an abandonment. I beg to set my learned friends on the other side right upon that matter. There has been no abandonment whatever. It only comes to this: that in this particular enquiry the evidence has so shaped itself, on either side, that your Excellency and your Honors are not called upon to pronounce any opinion on the subject. There can be no doubt that, under the terms of the Treaty, your Excellency and Honors are not empowered to pronounce any authoritative decision, or effect any final settlement of that much vexed question. Incidentally, no doubt, it might have fallen within your province to determine whether the contention of the British or of the American Government, in reference to that question were the correct one; because, had it been shewn that large catches had been made by the American fishermen within the bodies of great bays, such as Miramichi and Chaleurs, it would have become at once necessary to come to a decision as to whether we were entitled to be credited with those catches. But, in fact, no such evidence has been given. And that course was taken somewhat with the view of sparing you the trouble of investigating that question, when the Treaty did not empower you to effect a final decision of it. The learned Counsel, associated with me on behalf of Her Majesty's Government, and myself, shaped our evidence as much as possible with reference to the inshore fisheries. We concluded that if the American Government, who had put this matter prominently forward in their Brief, intended to challenge a decision from this Commission, they ought to have given evidence of large catches made by their vessels in those bays. They have not done so. The evidence on our side has shewn that, to a very great extent, the value of the fisheries is inshore; that, undoubtedly, very large catches could be made in the bodies of those bays, and that the fish frequent the body of the bays as well as the portion within three miles from the contour of the coast all around those bays; but we tendered evidence chiefly with relation to the fisheries within three miles of the shore, by no means intending to have it understood,—in fact, we expressly disclaimed the intention of having it understood—that there were not in the bodies of those bays valuable fisheries. I can only say, however, that before this Commission there is no evidence of that, and you may dismiss it, therefore, from your minds. When this headland question shall hereafter arise, if it should unfortunately arise, then I beg to say that the position laid down when the Convention of 1818 was made, has since been in no way departed from. My learned friends on the other side point to the Bay of Fundy. They say, there is a bay which Great Britain contended came within the Convention of 1818, and yet she was obliged, in consequence of the decision given by Mr. Bates, in the case of the Washington in 1854 to recede from that position in reference to that bay. I beg to say that Great Britain did not recede. It was stated on the other side that it was *res adjudicata*. I say it is not. It is wholly improbable that the Bay of Fundy will ever again become a matter of contest between the two nations, but the fact in regard to that case is, that Great Britain gave the United States the right to do in that Bay that which answered their purpose quite as well as if she had abandoned her claim. She relaxed any claim that she had by the convention of 1818, and that relaxation has never been departed from, and in all human probability never will be departed from for all time to come. *But it is relaxation, and nothing else* My learned friend rather assumed, than distinctly stated, that the decision in regard to the Bay of Fundy would have considerable weight in reference to other bays. I deny that. Great Britain expressly guarded herself against any such construction. And, moreover, she guarded herself against another construction placed upon the negotiations between the two Governments, viz., that the Gut of Canso was common to the two nations. The British Government, so far as I am informed—I have no special knowledge on the subject, except that afforded by the correspondence and negotiations between the two Governments,—emphatically deny that doctrine. The Gut of Canso is a *mare clausum*, belonging to Great Britain,—to the Dominion of Canada. It is a strait on either side of which is the territory of the Dominion. There is no foreign shore to that strait. It is not necessary for me to argue, nor shall I argue, what would be the effect on the international question, assuming the Gulf of St. Lawrence to be an open sea, whose waters

could be traversed by the keels of other nations, and to which the Gut of Canso was the only entrance. How far the position I assume might be modified, if that were the case, I shall not consider; but such is not in fact the case. There is another entrance north of the Island of Cape Breton, and also one by the Straits of Belle Isle.

In connection with this subject, permit me to call your attention to the instructions issued by the British Government to the Admiralty, immediately after the Reciprocity Treaty had been abrogated by the United States. These instructions are dated April 12th, 1866, and were issued by Mr. Cardwell, then Secretary of State for the colonies, to guide the fleet about to protect the British North American fisheries:—

"It is, therefore, at present the wish of Her Majesty's Government neither to concede, nor, for the present, to enforce, any rights in this respect which are in their nature open to any serious question. Even before the conclusion of the Reciprocity Treaty, Her Majesty's Government had consented to forego the exercise of its strict right to exclude American fishermen from the Bay of Fundy; and they are of opinion that during the present season that right should not be exercised in the body of the Bay of Fundy, and that American fishermen should not be interfered with, either by notice or otherwise, unless they are found within three miles of the shore, or within three miles of a line drawn across the mouth of a bay or creek which is less than ten geographical miles in width, in conformity with the arrangement made with France in 1839."

"American vessels found within these limits should be warned that by engaging, or preparing to engage in fishing, they will be liable to forfeiture, and should receive the notice to depart which is contemplated by the laws of Nova Scotia, New Brunswick and Prince Edward Island, if within the waters of one of these Colonies under circumstances of suspicion. But they should not be carried into port except after wilful and persevering neglect of the warnings which they may have received, and in case it should become necessary to proceed to forfeiture, cases should, if possible, be selected for that extreme step in which the offence of fishing has been committed within three miles of land.

"Her Majesty's Government do not desire that the prohibition to enter British bays should be generally insisted on, except when there is reason to apprehend some substantial invasion of British rights. And in particular, they do not desire American vessels to be prevented from navigating the Gut of Canso (from which Her Majesty's Government are advised they may be lawfully excluded), unless it shall appear that this permission is used to the injury of Colonial fishermen, or for other improper objects.

"I have it in command to make this communication to your Lordships as conveying the decision of Her Majesty's Governmenton this subject. I have, &c.,

(Signed) EDWARD CARDWELL."

I quote these instructions, and make these observations, in order that hereafter it may not be said that the views expressed by the American Counsel in regard to the Bay of Fundy and the Gut of Canso were acceded to by being passed *sub silentio* by the Counsel for Great Britain.

With these preliminary observations, I shall return to the main question, and here I may say that some weeks back, when Your Excellency and Honors arrived at the conclusion that this enquiry should be closed by oral, instead of written, arguments, I foresaw that great difficulties must occur, if Counsel were expected to do what Counsel ordinarily do whilst closing cases in courts of justice. If the immense mass of testimony, covering many hundreds of pages, together with the voluminous appendices and addenda to the evidence, were to be gone over, and the relative value of the testimony on either side to be weighed, it seemed certain that the several speeches closing this case, on either side, must necessarily extend over weeks. I had some curiosity, when my learned friend, Mr. Foster, commenced his address,—and a very able one it was,—to see in which way he would treat this matter, and whether or not he would attempt to go over all this evidence. He quite reassured me, when he said:—

"A great mass of testimony has been adducad on both sides, and it might seem to be in irreconcilable conflict. But let us not be dismayed at this appearance. They are certain land-marks which cannot be changed, by a careful attention to which I think we may expect to arrive at a tolerably certain conclusion."

I thought he had made an epitome of the evidence, and had attempted to sift it, but I was "dismayed" afterwards, when I discovered that, so far from considering himself bound by the testimony, he conveniently ignored nearly the whole of the British evidence, and that the small portions to which he did refer, he was pleased to treat in a way that did much more credit to his ingenuity as an advocate, than to his spirit of fair dealing with the witnesses. I therefore did not feel at all relieved by his course. Throughout his speech, as I shall show, there have been a series of assumptions, without the slightest evidence on which to base them. It was a most admirable speech in every respect, but one. It had little or no foundation in the facts proved. It was an admirable and ingenious speech, I admit, and the same may be said of the speeches of his learned colleagues. It was an admirable speech in a bad cause. Fortunately, I feel that I am not here for the purpose of measuring my strength as an advocate against that of Judge Foster. Were it so, I am very much afraid I should go to the wall. But I have just this advantage over him, as I think I shall satisfy you before I have done, that my cause could not be injured even by a bad advocate; and I think I shall show you that his cause has been made the very best of by a wonderfully good advocate.

Now, I think that probably the proper course for me to take, is to go through those speeches, and after having done so, to turn your attention somewhat to the evidence. I take the very pleasant and humorous speech of my learned friend, Mr. Trescot, which certainly gave me a great deal of amusement, and, I humbly conceive, put me very much in the position of the man who was beaten by his wife, and who, being remonstrated with by his friends for permitting it, said that it pleased her and didn't hurt him. The speech of my learned friend pleased him, and didn't hurt us a bit. I will show why. In the course of his argument, he referred to a minute of the Privy Council of Canada, made in answer to Earl Kimberly shortly after the treaty of 1871 was negotiated between the two countries. Mr. Trescot laid great stress upon the fact that this was not a treaty between the United States and Canada, but that it was a treaty between the United States and England. No person disputes that proposition. It is not doubted. But I suppose that no person will dispute the fact that, although England is nominally the party to the treaty, the Dominion of Canada is vitally interested in the result of this Commission. There is just this difference between this treaty and an ordinary treaty between the United States and England; that by its very terms, it was wholly inoperative as regards the British North American possessions, unless it were sanctioned by the Dominion Parliament and the Legislature of Prince Edward Island, which at that time was not a part of the Dominion. In this respect, it differed from an ordinary treaty, inasmuch as by the very terms of the treaty, the Dominion of Canada had a voice in the matter. But I am willing to treat the matter, as Mr. Trescot has been pleased to put it, as one between England and the United States alone, as the high contracting parties. You will recollect that, in the "Answer" to the British case, it was put prominently forward that this treaty was not only a boon to the Dominion, but that it was so great a boon, that the Premier of this Dominion, in his place in Parliament, made a speech to that effect, which is quoted at length in the Answer. Now, it may be right enough to quote the statements of public men in each of the countries. They are representative persons, and may be supposed to speak the language of their constituencies. Therefore I do not complain of their words being quoted. But

I was surprised when, in the course of this enquiry, it was argued,—I do not know whether it was by Mr. Foster or by one of the learned gentlemen associated with him,—that these speeches were calm expressions of opinion by gentlemen not heated in any way by debate. It struck me that that was a curious way in which to characterize a debate in the House of Commons, upon a question vital to the existence of the Ministry for the time being. I thought that was just a case where we had a right to expect that the speeches delivered on either side would probably partake of a partizan character, and not only so, but that it was inevitable that the Government speakers would use the strongest arguments they could in defence of the action of their leader, even though their arguments weakened the case of their country in an international point of view. Had my learned friends been content to put forward these speeches in their answer, and quote them for the purpose of argument, there would have been nothing to say beyond this, that when Sir John A. Macdonald and others talked about the fisheries, they were speaking of what they knew nothing about. They had no practical knowledge whatever. What practical knowledge of the matter had any of us around this table, before hearing the evidence? None whatever. And yet, can it be that Sir John A. Macdonald, Dr. Tupper, Mr. Stewart Campbell, or anybody else who made speeches, and whose remarks have been quoted, had a tithe of the information that we now possess. Therefore, I think that we may dismiss the whole of those speeches by saying, without meaning anything discourteous, that they were talking about matters of which they knew nothing, and therefore that their speeches ought to have no weight with this Commission. But Mr. Trescot has relieved me from using even that argument, for he has referred to this Minute of council, which I hold in my hand, passed in the very year in which the Washington Treaty was negotiated, and before the legislature of Canada had adopted it. And I wish to call, the attention of the Commission to the fact that the whole Privy Council were present, including Mr. Peter Mitchell, the then Minister of Marine and Fisheries, and especially to the fact that Sir John A. Macdonald was present. The minute is as follows:—

"PRIVY COUNCIL CHAMBER, Ottawa, Friday, July 28, 1871.

"Present:—The Hon. Dr. Tupper, in the chair; the Hon. Sir John A. Macdonald, the Hon. Sir George Et. Cartier, the Hon. Mr. Tilley, the Hon. Mr. Mitchell, the Hon Mr. Campbell, the Hon. Mr. Chapais, the Hon. Mr. Langevin, the Hon. Mr. Howe, the Hon. Sir Francis Hincks, the Hon. Mr. Dunkin, the Hon. Mr. Aikins.

"To His Excellency the Right Honorable John, Baron LISGAR, G.C.B., G.C.M.G., P.C.,
"Governor-General of Canada, &c., &c., &c.

"MAY IT PLEASE YOUR EXCELLENCY,—

"The Committee of the Privy Council have had under their consideration the Earl of Kimberley's Despatch to your Excellency, dated the 17th June ult., transmitting copies of the Treaty signed at Washington on the 8th May last, by the Joint High Commissioners, and which has since been ratified by Her Majesty and by the United States of America; of the instructions to Her Majesy's High Commissioners, and of the Protocols of the Conference held by the Commission; and likewise the Earl of Kimberley's Despatch of the 20th of June ult., explaining the failure of Her Majesty's Government to obtain the consideration, by the United States' Commissioners, of the claims of Canada for the losses sustained owing to the Fenian raids of 1866 and 1870.

"The Committee of the Privy Council have not failed to give their anxious consideration to the important subjects discussed in the Earl of Kimberley's Despatches, and they feel assured that they will consult the best interests of the Empire by stating frankly, for the information of Her Majesty's Government the result of their deliberations, which they believe to be in accordance with public opinion in all parts of the Dominion.

"The Committee of the Privy Council readily admit that Canada is deeply interested in the maintenance of cordial relations between the Republic of the United States and the British Empire, and they would therefore have been prepared without hesitation to recommend the Canadian Parliament to co-operate in procuring an amicable settlement of all differences likely to endanger the good understanding between the two countries. For such an object they would not have hesitated to recommend the concession of some valuable rights, which they have always claimed to enjoy under the Treaty of 1818, and for which, as the Earl of Kimberley observes, Her Majesty's Government have always contended, both governments having acted on the interpretation given to the Treaty in question by high legal authorities. The general dissatisfaction which the publication of the Treaty of Washington has produced in Canada, and which has been expressed with as much force in the agricultural districts in the West, as in the Maritime Provinces, arises chiefly from two causes.

"1st. That the principal cause of difference between Canada and the United States has not been removed by the Treaty, but remains a subject for anxiety.

"2ndly. That a cession of territorial rights of great value has been made to the United States, not only without the previous assent of Canada, but contrary to the expressed wishes of the Canadian Government.

"The Committee of the Privy Council will submit their views on both those points for the information of Her Majesty's Government, in the hope that by means of discussion a more satisfactory understanding between the two Governments may be arrived at. The Earl of Kimberley has referred to the rules laid down in Article 6 of the Treaty of Washington, as to the international duties of neutral governments, as being of special importance to the Dominion; but the Committee of the Privy Council, judging from past experience are much more apprehensive of misunderstanding, owing to the apparent difference of opinion between Canada and the United States as to the relative duties of friendly States in a time of peace. It is unnecessary to enter into any lengthened discussion of the conduct of the United States during the last six or seven years, with reference to the organization of considerable numbers of the citizens of those States under the designation of Fenians. The views of the Canadian Government on this subject are in possession of Her Majesty's Government; and it appears from the Protocol of Conference between the High Commissioners that the British Commissioners presented the claims of the people of Canada, and were instructed to state that they were regarded by Her Majesty's Government as coming within the class of subjects indicated by Sir Edward Thornton in his letter of 26th January last, as subjects for the consideration of the Joint High Commissioners. The Earl of Kimberley states that it was with much regret that Her Majesty's Government acquiesced in the omission of these claims from the general settlement of outstanding questions between Great Britain and the United States; and the Committee of the Privy Council, while fully participating in that regret, must add that the fact that this Fenian organization is still in full vigor, and that there seems no reason to hope that the United States' Government will perform its duty as a friendly neighbor any better in the future than in the past, leads them to entertain a just apprehension that the outstanding subject of difference with the United States is the one of all others which is of special importance to the Dominion. They must add, that they are not aware that during the existence of this Fenian organization, which for nearly seven years has been a cause of irritation and expense to the people of Canada, Her Majesty's Government have made any vigorous effort to induce the Government of the United States to perform its duty to a neighboring people, who earnestly desire to live with them on terms of amity, and who during the civil war loyally performed all the duties of neutrals to the expressed satisfaction of the Government of the United States. On the contrary, while in the opinion of the Government and the entire people of Canada, the Government of the United States neglected, until much too late, to take the necessary measures to prevent the Fenian invasion of 1870, Her Majesty's Government hastened to acknowledge, by cable telegram, the prompt action of the President, and to thank him for it. The Committee of the Privy Council will only add, on this painful subject, that it is one on which the greatest unanimity exists among all classes of the people throughout the Dominion, and the failure of the High Commissioners to deal with it has been one cause of the prevailing dissatisfaction with the Treaty of Washington.

"The Committee of the Privy Council will proceed to the consideration of the other subject of dissatisfaction in Canada, viz., the cession to citizens of the United States of the right to the use of the inshore fisheries in common with the people of Canada. The Earl of Kimberley, after observing that the Canadian Government took the initiative in suggesting that a joint British and American Commission should be appointed, with a view to settle the disputes which had arisen as to the interpretation of the Treaty of 1818, proceeds to state that 'the causes of the difficulty lay deeper than any question of interpretation,' that 'the discussion of such points as the correct definition of bays could not lead to a friendly agreement with the United States,' and that 'it was necessary therefore to endeavor to find an equivalent which the United States might be willing to give in return for the fishery privileges.'

"In the foregoing opinion of the Earl of Kimberley, the Committee of the Privy Council are unable to concur, and they cannot but regret that no opportunity was afforded them of communicating to Her Majesty's Government their views on a subject of so much importance to Canada, prior to the meeting of the Joint High Commission.

"When the Canadian Government took the initiative of suggesting the appointment of a Joint British and American Commission they never contemplated the surrender of their territorial rights, and they had no reason to suppose that Her Majesty's Government entertained the sentiments expressed by the Earl of Kimberley in his recent despatch. Had such sentiments been expressed to the

delegate appointed by the Canadian Government to confer with his Lordship a few months before the appointment of the Commission, it would at least have been in their power to have remonstrated against the session of the inshore fisheries; and it would moreover have prevented any member of the Canadian Government from acting as a member of the Joint High Commission unless on the clear understanding that no such cession should be embodied in the Treaty without their consent. The expediency of the cession of a common right to the inshore fisheries has been defended, on the ground that such a sacrifice on the part of Canada should be made in the interests of peace. The Committee of the Privy Council, as they have already observed, would have been prepared to recommend any necessary concession for so desirable an object, but they must remind the Earl of Kimberley that the original proposition of Sir Edward Thornton, as appears by his letter of 26th January, was that 'a friendly and complete understanding should be come to between the two governments as to the extent of the rights which belong to the citizens of the United States and Her Majesty's subjects respectively, with reference to the fisheries on the coasts of Her Majesty's possessions in North America.'

"In his reply, dated 30th January last, Mr. Secretary Fish informs Sir Edward Thornton that the President instructs him to say that 'he shares with Her Majesty's Government the appreciation of the importance of a friendly and complete understanding between the two Governments with reference to the subjects specially suggested for the consideration of the proposed Joint High Commission.'

"In accordance with the explicit understanding thus arrived at between the two Governments, Earl Granville issued instructions to Her Majesty's High Commission, which, in the opinion of the Committee of the Privy Council, covered the whole ground of controversy.

"The United States had never pretended to claim a right on the part of their citizens to fish within three marine miles of the coasts and bays, according to their limited definition of the latter term; and although the right to enjoy the use of the inshore fisheries might fairly have been made the subject of negotiation, with the view of ascertaining whether any proper equivalents could be found for such a concession, the United States was precluded by the original correspondence for insisting on it as a condition of the treaty. The abandonment of the exclusive right to the inshore fisheries, without adequate compensation, was not therefore necessary in order to come to a satisfactory understanding on the points really at issue.

"The Committee of the Privy Council forbear from entering into a controversial discussion as to the expediency of trying to influence the United States to adopt a more liberal commercial policy. They must, however, disclaim most emphatically the imputation of desiring to imperil the peace of the whole Empire in order to force the American Government to change its commercial policy. They have for a considerable time back ceased to urge the United States to alter their commercial policy, but they are of opinion that when Canada is asked to surrender her inshore fisheries to foreigners, she is fairly entitled to name the proper equivalent. The Committee of the Privy Council may observe that the opposition of the Government of the United States to reciprocal free trade in the products of the two countries was just as strong for some years prior to 1854 as it has been since the termination of the Reciprocity Treaty, and that the Treaty of 1854 was obtained chiefly by the vigorous protection of the fisheries which preceded it; and that but for the conciliatory policy on the subject of the fisheries, which Her Majesty's Government induced Canada to adopt after the abrogation of the Treaty of 1854 by the United States, it is not improbable that there would have been no difficulty in obtaining its renewal. The Committee of the Privy Council have adverted to the policy of Her Majesty's Government, because the Earl of Kimberley has stated that there is no difference in principle between a money payment and "the system of licenses calculated at so many dollars a ton, which was adopted by the Colonial Government for several years after the termination of the Reciprocity Treaty." Reference to the correspondence will prove that the license system was reluctantly adopted by the Canadian Government as a substitute for the still more objectionable policy pressed upon it by Her Majesty's Government, it having been clearly understood that the arrangement was of a temporary character. In his Despatch of the 3rd March 1866, Mr. Secretary Cardwell observed: "Her Majesty's Government do not feel disinclined to allow the United States for the season of 1866 the freedom of fishing granted to them in 1854, on the distinct understanding that unless some satisfactory arrangements between the two countries be made during the course of the year this privilege will cease, and all concessions made in the Treaty of 1854 will be liable to be withdrawn." The principle of a money payment for the concession of territorial rights has ever been most repugnant to the feelings of the Canadian people, and has only been entertained in deference to the wishes of the Imperial Government. What the Canadians were willing under the circumstances to accept as an equivalent was the concession of certain commercial advantages, and it has therefore been most unsatisfactory to them that Her Majesty's Government should have consented to cede the use of the inshore fisheries to foreigners for considerations which are deemed wholly inadequate. The Committee of the Privy Council need not enlarge further on the objectionable features of the Treaty as it bears on Canadian interests. These are admitted by many who think that Canada should make sacrifices for the general interests of the Empire. The people of Canada, on the other hand, seem to be unable to comprehend that there is any existing necessity for the cession of the right to use their inshore fisheries without adequate compensation. They have failed to discover that in the settlement of the so-called "Alabama" claims, which was the most important question in dispute between the two nations, England gained such advantages as to be required to make further concessions at the expense of Canada, nor is there anything in the Earl of Kimberly's Despatch to support such a view of the question. The other parts of the Treaty are equally, if not more, advantageous to the United States than to Canada, and the fishery question must, consequently, be considered on its own merits; and if so considered, no reason has yet been advanced to induce Canada to cede her inshore fisheries for what Her Majesty's Government have admitted to be an inadequate consideration. Having thus stated their views on the two chief objections to the late Treaty of Washington, the Committee of the Privy Council will proceed to the consideration of the correspondence between Sir Edward Thornton and Mr. Fish, transmitted in the Earl of Kimberley's Despatch of the 17th of June, and of his Lordship's remarks thereon. This subject has already been under the consideration of the Committee of the Privy Council, and a Report, dated the 7th June, embodying their views on the subject, was transmitted to the Earl of Kimberley by your Excellency. In his Despatch of 26th June, acknowledging the receipt of that Report, the Earl of Kimberly refers to his Despatch of the 17th of that month, and "trusts that the Canadian Government will, on mature consideration, accede to the proposal of the United States' Government on this subject." The Committee of the Privy Council in expressing their adherence to their Report of the 7th June, must add, that the inapplicability of the precedent of of 1854, under which the action of the Canadian Parliament was anticipated by the Government, to the circumstances now existing appears to them manifest. The Treaty of 1854 was negotiated with the concurrence of the Provincial Governments represented at Washington, and met with the general approbation of the people; whereas the fishery clauses of the late Treaty were adopted against the advice of the Canadian Government, and have been generally disapproved of in all parts of the Dominion.

"There can hardly be a doubt that any action on the part of the Canadian Government in anticipation of the decision of Parliament would increase the discontent which now exists. The Committee of the Privy Council request that your Excellency will communicate to the Earl of Kimberley the views which they entertain on the subject of the Treaty of Washington in so far as it affects the interests of the Dominion.

(Signed) WM. H. LEE,
Clerk, Privy Council, Canada."

Now, here is a statement made by the Privy Councillors, on oath as Privy Councillors to give the best advice to the Governor-General; and they state that the opinion they are about to give is in accordance with public opinion in all parts of the Dominion There was no new election after that opinion was given, and before the debate in which the speeches were made that have been quoted. There was no change in public opinion, as evidenced by a new election, and the return of other persons to the House of Commons to represent that change. It was the same House. The same members were present, and the same Privy Councillors heard and participated in that debate. That is, those of them that were members of the House of Commons. Now, here is the authoritative declaration of the opinion of the members of the Privy Council, and that opinion is expressed, not simply as the private individual opinion of these Councillors, but as a reflection of the public opinion of the whole Dominion, that this Treaty did gross injustice to British North American interests. And, in that opinion, Sir John A. McDonald, whose speeches are quoted here against us, agreed Mr. Trescot, in citing that minute of council, to my mind cited the best evidence that could be adduced in favor of the British claim.

I admit you have nothing to do with the question whether or not this treaty satisfies the countries interested in it, whether it satisfies the Dominion, or whether it is unsatisfactory to the United States. That is not the question. That is all over and past, and you are here for the purpose of determining the difference in value between the advantages conceded to the United States and those conceded to the Dominion of Canada by the Fishery Articles of the Treaty of Washington I only make these observations for the purpose of saying that it is wholly impossible for the United States to show, as they have attempted to do in their Answer, by the speeches of Canadian statesmen, that all the advantages of the Treaty are in favor of the Dominion. I will therefore pass to another branch of the subject, but before doing so I wish to revert for a moment to the question as to the Bay of Fundy,

to which I referred a few moments ago. I desire to cite a letter addressed on the 6th of July, 1853, by the then Secretary of State of the United States, Mr. Marcy, to the Hon. Richard Rush, one of the negotiators of the Convention of 1818. It is as follows:—

DEPARTMENT OF STATE,
WASHINGTON, July 6, 1853.

SIR,—You are probably aware that within a few years past, a question has arisen between the United States and Great Britain, as to the construction to be given to the 1st Article of the Convention of 1818, relative to the fisheries on the coast of the British North American Provinces. For more than twenty years after the conclusion of that Convention, there was no serious attempt to exclude our fishermen from the large bays on that coast; but about ten years ago, at the instance of the Provincial authorities, the home government gave a construction to the 1st Article, which closes all bays, whatever be their extent, against our citizens for fishing purposes. It is true they have been permitted to fish in the Bay of Fundy. This permission is conceded to them by the British Government, as a matter of favor, but denied as a right. That government excludes them from all the other large bays.

Our construction of the Convention is that American fishermen have a right to resort to any bay, and take fish in it; provided they are not within a marine league of the shore. As you negotiated the Convention referred to, I should be much pleased to be favored with your views on the subject.

I have the honor to be, etc., etc., etc.,

(Signed) W. L. MARCY.

To the Honorable RICHARD RUSH,
Sydenham, near Philadelphia.

This clearly proves that the American Government understood the matter thoroughly. Official correspondence is the best authority on the subject.

Mr. FOSTER—That correspondence was before the decision in the case of the Washington.

Mr. THOMSON:—Lord Aberdeen wrote the despatch containing the relaxation on March 10th, 1845. The schooner had been seized in 1843, and the decision of Mr. Bates, as umpire, was given in 1854, in December. The reason why I cited the letter to Rush was to show that in 1853, in July, the United States had full knowledge of the construction which had been placed upon that relaxation. It is true, says Mr. Rush, they have been permitted to fish in the Bay of Fundy, but that is conceded as a matter of favor and not of right, and that was in 1845.

Mr. DANA:—But you recollect that after we had that decision, we did not accept the concession as a favor.

Mr. THOMSON:—Great Britain has expressly adhered to her opinion from the beginning to the end as I said before. It is no use to quarrel about the terms of relaxation. Whether the terms mean a relaxation or not is behind the question. It is a practical abandonment since Great Britain has said that as regards the Bay of Fundy she has relaxed her claim and does not purpose to enforce it again. No such claim has been made since that time, and we have given no evidence of any fishing in the Bay of Fundy, except the fishing within territorial limits, around Grand Manan, Campobello, Deer Island, and the coasts of the County of Charlotte and the Province of Nova Scotia.

Mr. TRESCOT:—No one objects to the view that Great Britain adheres to the construction you insist upon, so long as you admit that the United States adheres to its construction under which the waters of the Bay of Fundy are not British territorial waters.

Mr. THOMSON:—I only wish to say that the United States themselves understood the position of the British Government, and that they must take the concessions in the terms and with the meaning that the British Government attached to it. A man who accepts a gift cannot quarrel with the terms of it.

Mr. DANA:—Mr. Everett declined to accept it as a courtesy.

Mr. THOMSON:—As a matter of fact the United States have not declined to accept it. They have acted upon it ever since. If they had kept all their vessels out of the Bay of Fundy for fear of that construction being placed upon their use of these waters, we would have understood it. But they have entered and used it ever since.

Mr. DANA:—The United States had fished there under a claim of right. England agreed not to disturb them, but still contended that we had not a right. Therefore our going in was not an acceptance of any favor from Great Britain. This subject was referred to a Commission and the Commission decided, not on general grounds, but on the ground that one headland was on the American territory. Therefore it was a special decision, and that decision settled the question as to the Bay of Fundy, so that we have not accepted anything from Great Britain which precludes us from taking the position always, that we had claimed from the first, namely, that we had a right to fish in the Bay of Fundy.

Mr. THOMSON:—The two Commissioners, Mr. Hornby and Mr. Upham, were authorized to decide whether the owners of the *Washington* should or should not be paid for the seizure of their vessel. That was the only authority they had. They had no more authority to determine the headland question than you have, and it is conceded that you have no such power. Neither had they. *A fortiori* neither had Mr. Bates, the umpire.

Mr. DANA:—That was the very thing they had to determine.

Mr. THOMSON:—They had to determine the legality of a seizure. Incidentally the question of the headlands might come up, just as it would have here, had evidence been given.

Mr. FOSTER:—Will you not read the paragraphs from the umpire's decision.

Mr. THOMSON:—I haven't it here.

Mr. FOSTER:—He puts it on two grounds. It was impossible to decide the question whether the United States could be paid without deciding whether the *Washington* was rightly or wrongly seized. That depended upon whether she was seized in British territorial waters. Mr. Bates, the Umpire, decided she was not, and put it on two grounds, one of which Mr. Dana has stated, viz.: that one of the headlands of the Bay of Fundy was on American waters, and the other that the headland doctrine was new and had received its proper limitation in the Convention of 1839, between France and Great Britain, that it was limited to bays not exceeding ten miles in width.

Mr. THOMSON:—While I do not dispute what Mr. Foster says,—I go back to what I was saying when I was interrupted, that these two gentlemen, Mr. Hornby and Mr. Upham, had no authority to decide the headland question. They had undoubted power to decide whether the vessel was improperly seized, and if so, to assess the damages, and because Mr Bates in giving his decision against the British Government was pleased to base it upon the ground that one headland was in the United States and the other in British territory, according to his views of the contour of the Bay, is behind the question. He had no more power to determine that important international question than, as it is conceded, have your Excellency and Honors in this Commission.

Mr. TRESCOT:—Does not the question of damages for trespass settle the right of possession?

Mr. THOMSON:—I am quite willing that when the learned counsel for the United States think I am making misstatements of law or facts I should be interrupted, but I cannot expect them to concur in my arguments, and it is difficult to get on in the midst of interruptions. If I understand the arguments against the British case, able arguments I admit they are, and if I understand the argument which I shall have the honor to submit, I shall show that they have not one single leg to stand upon, that they have no foundation for the extraordinary defence that has been set up

to the righteous claim of the British Government for compensation. If I fail to show this, it will not be because it cannot be shown by Counsel of the requisite ability, but simply because I have not the ability to present the subject as it should be presented to your Excellency and Honors.

My learned friend, Mr. Trescot, after taking the ground that the treaty was not made between the United States and Canada, but was made between the United States and Great Britain, went on to use an argument which certainly caused me a great deal of astonishment at the time, but which I think, upon reflection, will not inure to the benefit of the United States. "Why," said he, referring to a Minute of Council which he read. "the Canadian Government said in that Minute that if Great Britain would guarantee a loan of (I think it was £4,000,000) they would be willing that this treaty should be passed." Now, that had reference, we well know, to the Fenian claims particularly. Whether it was creditable to Canada or not to give up the right to compensation for the outrageous violation of neutral territory by marauders from the United States, it is not my province to argue. She had a right to give it up if she saw fit to do so in consideration of a guarantee by Great Britain of the proposed loan. Mr. Trescot says: "Because you were dissatisfied with this treaty, -because you were dissatisfied with losing your territorial rights,—you obliged Great Britain to guarantee a loan of £4,000,000 in reference to an intercolonial railway." Great Britain did guarantee a loan, and Canada got the money. "With what face," he says, "does Canada come here now and claim compensation since she has been paid for that?"

Well, it struck me that if his argument was correct it proved a little too much. What does it show? This question, by his own contention, is one between Great Britain and the United States. Great Britain claims a compensation here, which, under the terms of the treaty, she is entitled to get. If, therefore, as Mr. Trescot argues, the claim has been paid, I would ask, who has paid it? If Canada has been paid for yielding certain important territorial rights to the United States for the term of twelve years from 1873, if Canada has ceded those rights to the United States, as undoubtedly she has by the Treaty of Washington, and if Canada has been paid for that cession by Great Britain, then I apprehend Great Britain has paid the debt which the United States ought to have paid, and she can properly and justly look to the United States to be refunded. Now, that guarantee was exactly £4,000,000 Stg. We are modest in our claim, and ask for only $15,000,000 altogether. That being so, I think Mr. Trescot has pretty well settled this case. I think it was he, but I am not quite sure, who said in the course of his speech, although I did not find it reported afterwards,—perhaps it was Mr. Dana,—that when he came down here first he thought the case of the British Government was a great deal better than it turned out in evidence.

Mr. TRESCOT—I didn't say that.

Mr. THOMSON—It was said by one of the counsel for the United States. It may be repudiated now.

Mr. DANA—I haven't committed my speech to memory.

Mr. THOMSON—Unfortunately I do not find it committed to paper. At all events that is the fact. If you take Mr. Trescot's argument, the result is that we must get four million pounds sterling. Great Britain paid that; and it is just the case of a man who, with the consent of another, pays that other's debt. It is money paid to his use, as all lawyers know, and is a valid claim against the party for whom it was paid.

Now, I will follow him a little further, and will examine some other propositions that he laid down. He says this, on page 58 of his speech:—

"It is precisely, as far as you are concerned, as if, instead of the exchange of fishing privileges, that Treaty had proposed an exchange of territory. For instance, if that Treaty had proposed the exchange of Maine and Manitoba, and the United States had maintained that the value of Maine was much larger than Manitoba, and referred it to you to equalise the exchange. It is very manifest that to New England, for instance, it might not only be disadvantageous, but very dangerous; but the only question for you to consider would be the relative value of the two pieces of territory."

Well, I will take his view of that matter, and let us see what follows. He in effect says, just put one territory against another and take their value—how many acres are there in the State of Maine and how many in the Province of Nova Scotia? Now we have evidence of what the concession is under this treaty to the fishermen of the Dominion. They get the right to fish as far north as they please over a line drawn from the 39th parallel of north latitude upon the American coast, a distance, I think, of somewhere about 1,050 miles. As against that, the United States fishermen get upon the British American coast the right to fish over an extent of some 3,700 odd miles. There is a clear balance entirely against them. Or if you choose to take the area in square miles you have nearly 3,500 square miles of fishing territory given to us by the United States, while 11,900 square miles of British territorial waters are given to them. I am quite willing to meet them upon their own ground, to oppose them with their own weapons. In that view there is just the difference in our favor, between 3,500 square miles and 11,900.

Now, I will pass on to another branch of our claim for compensation. Great Britain says and we have proved that, along the line of Canadian coast upon which the American fishermen ply their calling by virtue of this treaty, there have been very costly harbors made, and there have been numerous large and expensive lighthouses erected. Great Britain says that by means of these harbors and lighthouses the fishermen of the United States have been enabled more successfully to prosecute their calling in territorial waters. That would strike you, I think, as being obviously the case. These improvements render the privilege conceded by us much more valuable than it otherwise would have been. Suppose the coast to have been entirely unlighted, and the harbors to have been unsafe and difficult of access, it might then well have been said that the privilege was merely a nominal one; that no fisherman could ply his vocation in Canadian territorial waters without danger to life and property. The evidence as to the cost of these works is before you, and I do not intend to go into it. I am only alluding to it because I am following the course of Mr. Trescot's address. Does it not strike you as reasonable that the effect of these expenditures upon the American fishing business should be taken into consideration? Not only is there greater safety and more certainty of successful catches, but money is thereby actually put into the pockets of their merchants in the shape of premiums of insurance saved. If it be true that they pay one per cent. a month for a fishing vessel in the Bay,—and some of the witnesses say that is the rate,—what would they pay if there were no such lighthouses to guide their vessels to a place of safety,—no such harbors to shelter them from storms. When Mr. Trescot made his flourish on the subject, he asked if we had no trade that required these lighthouses. I am afraid to trust my memory to quote the very words he used, for his language startled me a little. I read his remarks as follows:—

"And now, with regard to this question of consequences, there is but one other illustration to which I will refer, and I will be done I find at the close of the British testimony, an elaborate exhibit of 166 Lights, Fog-whistles, and Humane Establishments, used by United States fishermen on the coast of the Dominion, estimated to have cost in erection, from the Sambro Light House, built in 1758, to the present day, $232,138, and for annual maintenance, $268,197. I scarcely know whether to consider this serious; but there it is, and there it has been placed, either as the foundation for a claim, or to produce an effect. Now, if this Dominion has no commerce; if no ships bear precious freight upon the dangerous waters of the Gulf, or hazard valuable cargoes in the Straits which connect it with the ocean; if no traffic traverses the imperial river which connects the Atlantic with the great Lakes; if this fabulous fishery, of which we have heard so much, is carried on only in boats so small that they dare not venture out of sight of land, and the fishermen need no other guide and protecting light than the light streaming from their own cabin windows on shore; if, in short, this Dominion, as it is proudly called, owes nothing to the protection of its commerce and the safety of its seamen; if these humane establishments are not the free institutions of a wise and provident government, but charitable institutions to be supported by the sub-

scriptions of those who use them,—then the government of the Dominion can collect its $200,000 by levying light dues upon every vessel which seeks shelter in its harbors, or brings wealth into its ports. But if, in the present age of civilization, when a common humanity is binding the nations of the world together every day by mutual interests, mutual cares, and privileges equally shared, the Dominion repeals her light dues in obedience to the common feeling of the whole world, with what justice can that government ask you, by a forced construction of this Treaty, to re-impose this duty, in its most exorbitant proportions and its most odious form, upon us and upon us alone?"

Now, a more extraordinary argument than that I have never heard used. Your Excellency and your Honors are here to value the difference between the concessions made by the United States to Great Britain on the one hand, and those made by Great Britain to the United States on the other We contend that the fisheries of the United States are useless, not because there are no lighthouses on their shores, and no harbors in which our fishing vessels could find shelter in time of need. But we say their fishing grounds are of no service to us, because the fish are not there, because our fishermen have never used them, preferring to fish upon our own coasts; there being, in fact, no occasion for them to leave their own shores and go hundreds of miles away from home to fish on the American coast. But if the fish had been abundant in American coastal waters, and lighthouses had been there to guide our fishermen, and harbors to preserve them from shipwreck, or reduce their perils, do you think these things should not be taken into consideration in fixing the compensation for the use of those fisheries? Do you think they would not have been the basis of a claim against us? Certainly they would. I shall show from the written statements of United States officials what estimate was placed upon lighthouses immediately after the great storm, which is called the "American Storm," by reason of the vast number of American vessels that were destroyed in the Gulf of St. Lawrence, and the vast number of American seamen that found a watery grave beneath its waves. I will show you what was thought about this subject of lighthouses at that time. And if you can then agree with the view presented by Mr. Trescot, I have nothing more to say; but I do not think it is possible that you can. In the official correspondence, which is in evidence, we have this letter addressed by the then United States Consul, I think, at Pictou, to Sir Alexander Bannerman, at that time the Governor of Prince Edward Island. It is No. 28, in the official correspondence, (Appendix H.,) put in as part of the evidence in support of Her Majesty's case, at the outset of these proceedings. I may mention here that a number of the witnesses spoke of the storm as having taken place in 1851. This letter bears date in 1852, but as it refers to a great storm, and I have heard of only one such storm happening between 1850 and 1860, I should judge either that this is a misprint for October 1851, or that the storm actually took place in 1852, for no two storms succeeded one another in 1851 and 1852. The letter is as follows:—

"Consulate of the United States,
Province of Nova Scotia, October 28, 1852.

"Sir,—Since my return from Charlotte Town, where I had the honour of an interview with your Excellency, my time has been so constantly employed in the discharge of official duties connected with the results of the late disastrous gale, so severely felt on the north side of Prince Edward Island, that I have not found time to make my acknowledgments to your Excellency for the kind and courteous reception extended to me at the Government House, nor to furnish you with my views relative to some improvements which might be made by your Excellency's Government, thereby preventing a similar catastrophe to the one which has so lately befallen many of my countrymen; and at the same time on behalf of the Government of the United States, which I have the honour to represent, to thank you most feelingly for the promptness and energy displayed by your Excellency in issuing Proclamations, whereby the property of the poor ship-wrecked mariner should be protected from pillage.

"These various duties devolving upon me, I now have the pleasure of discharging, but only in a brief and hurried manner.

"The effect of the recent visitation of Providence, although most disastrous in its consequences, will yet result in much good.

"In the first place, it has afforded the means of knowing the extent and value of fisheries on your coast, the number of vessels and men employed, and the immense benefit which would result to the people within your jurisdiction, as well as those of the United States, if the fishermen were allowed unrestrained liberty to fish in any portion of your waters, and permitted to land for the purpose of curing and packing.

"From remarks made by your Excellency, I am satisfied it is a subject which has secured your most mature reflection and consideration, and that it would be a source of pride and pleasure to your Excellency to carry into successful operation a measure fraught with so much interest to both countries.

"2nd. It has been satisfactorily proved, by the testimony of many of those who escaped from a watery grave in the late gales, that had there been beacon-lights upon the two extreme points of the coast, extending a distance of 150 miles, scarcely any lives would have been lost, and but a small amount of property been sacrificed. And I am satisfied, from the opinion expressed by your Excellency, that the attention of your Government will be early called to the subject, and that but a brief period will elapse before the blessing of the hardy fishermen of New England, and your own industrious sons, will be gratefully returned for this most philanthropic effort to preserve life and property, and for which benefit every vessel should contribute its share of light-duty.

"3rd. Its has been the means of developing the capacity of many of your harbors, and exposing the dangers attending their entrance and the necessity of immediate steps being taken to place buoys in such prominent positions that the mariner would in perfect safety flee to them in case of necessity, with a knowledge that these guides would enable him to be sure of shelter and protection.

"From the desire manifested by your Excellency previous to my leaving Charlottetown, that I would freely express my views relative to the recent most melancholy disaster, and make such suggestions as might in my opinion have a tendency to prevent similar results, there is no occasion for my offering an apology for addressing you at this time.

"I have, &c,

(Signed) "B. H. Norton.
"U. S. Consul for Pictou Dependency.

"His Excellency Sir A. Bannerman, &c., &c.

Bear in mind that an official letter, written in the year 1864, by Mr. Sherman, the then American Counsel at Charlottetown, was put in evidence by the United States Agent; and Mr. Foster contended with much force that the statements in that letter should be treated as thoroughly trustworthy, because the writer could have had no object in misleading his own government. I accede to that view. No doubt Mr. Sherman believed in the truth of all he wrote. It is for you to say on the evidence whether or not he was correct in point of fact. Apply Mr. Foster's reasoning to Consul Norton's letter, and are not the value of the Prince Edward Island inshore fisheries, and the value to American fishermen of the lighthouses and harbors, since built and constructed around her shores, proved by the best of all evidence? As regards the inshore fisheries the Consul had no object in over-estimating their value in any way to the Governor of the Island that owned them, or to the Government that alone, of all the Governments of the world, sought entrance into them, as against the rightful owners. Now, what does he say:—

"It has been satisfactorily proved, by the testimony of many of those who escaped from a watery grave in the late gales, that had there been beacon lights upon the two extreme points of the coast extending, a distance of 150 miles, scarcely any lives would have been lost, and but a small amount of property been sacrificed. And I am satisfied from the opinion expressed by your Excellency, that the attention of your Government will be early called to the subject, and that but a brief period will elapse before the blessing of the hardy fishermen of New England and your own industrious sons, will be gratefully returned for this most philanthropic effort to preserve life and property, and for which benefit every vessel should contribute its share of light-duty."

This is a very different opinion from that of Mr. Trescot—very different, indeed. All these light-houses, and many more than ever Mr. Norton dreamed of, have since been built. Before they were built, Mr. Norton says that such erection would prove of the greatest value to future American fishermen, and that, not only their blessings would be poured on the heads of those who should erect them, but he even pledged them to go a step further, and part with

that which they are less disposed to bestow than blessings—a little money. The light dues have long since been abandoned.

Mr. FOSTER:—When?

Mr. THOMSON:—They were abandoned in 1867. It has been so stated in evidence, and it is in the Minutes. From that time to the present, there have been no light dues collected at all.

He goes on to say:—

"It has been the means of developing the capacity of many of your harbors, and exposing the dangers attending their entrance and the necessity of immediate steps being taken to place buoys in such prominent positions that the mariner would in perfect safety flee to them in case of necessity, with a knowledge that these guides would enable him to be sure of shelter and protection."

There is the opinion of a disinterested man at that time, or rather of a man who was directly interested in getting these light-houses erected, for which we now ask them to pay us a fair share during the twelve years they are to be kept up for their fishermen. We could not ask it before, although the fishermen were in the body of the Gulf, and had the advantage of them. But when they come on equal terms with our own subjects, into our territorial waters, why should they not bear a portion of the territorial burdens? Is it not monstrous to argue against it?

Mr. FOSTER:—Does it not appear in your evidence that you charged the American fishing vessels light dues from the time they came into your harbors, or passed through the Strait of Canso, until such time as you saw fit to abolish them, having collected enough to pay for them?

Mr. THOMSON:—They have been abolished since 1867, as regards the Gut of Canso, if my memory does not deceive me very much, we have in the evidence of that very amusing gentleman, Mr. Patillo, a description of the way they were evaded. To this evidence I shall refer hereafter.

I think that I have now shown conclusively that this part of the British case is entitled to serious and favorable consideration at the hands of your Honors,—I mean this question of the lights.

I come to another part of Mr. Trescot's argument, which I think will be found on page 59:—

"I have but one other consideration to suggest before I come to the history of this question, and it is this: If you will examine the Treaties, you will find that everywhere it is the 'United States fishermen,' the 'inhabitants of the United States,'—the citizens of the United States who are prohibited from taking part in the fishery within the three-mile limit. Now, I say,—remember, I am not talking about local legislation on the other side at all, I am talking about treaties. I say, there is nothing in any treaty which would forbid a Nova Scotian or a Prince Edward Island citizen from going to Gloucester, hiring an American vessel with an American register, and coming within the three-mile limit and fishing,—nothing at all. If such a vessel be manned by a crew half citizens of the United States and half Nova Scotians, who are fishing on shares, recollect, and who take the profits of their own catches, where is the difference? The United States citizens may violate the law, but are the citizens of Nova Scotia doing so? They are not the 'inhabitants' or 'fishermen of the United States' excluded from fishing within the three-mile limit."

I do not like to say I was startled at that, because Mr. Trescot says I am startled continually. Nevertheless I was. I defy the parallel of that proposition to be found, uttered by any statesman or lawyer that ever existed. Mr. Trescot stands alone in that view, both as having the extraordinary faculty to conceive such an idea, and the yet more extraordinary boldness to utter it in a civilized community, and before a tribunal such as this. What? Because the American ship-owners of Gloucester, Welfleet, or anywhere along the coast of New England, choose to take into their service Prince Edward Islanders, who are starved out in consequence of their fish being stolen under their noses, he has the audacity, (I do not use the word offensively, but in a Pickwickian sense,) to say that a vessel so manned is not an American vessel within this Treaty; but that a British crew makes an American vessel a British vessel.

Mr. TRESCOT:—That is not the statement of the extract you read.

Mr. DANA:—There is nothing about vessels in the Treaty.

Mr. THOMSON:—I will read it again:—

"Now, I say, &c."

Now, if he means that there is nothing in the Treaty of Washington to prevent American vessels entering our waters to fish, I agree with him, but if he means that there is nothing under the Treaty of 1818, I take issue.

It is the boldest proposition I ever heard, that an American vessel, an American bottom, manned by British inhabitants from Nova Scotia, Prince Edward Island, or any other part of the Dominion, owned by American owners, but simply manned by British subjects, could come into our waters in the face of the Convention of 1818, I say I never heard such a proposition before, and do not ever expect to hear it again. Such a proposition never emanated from any northern brain. It requires the heat of the South to generate such an idea.

At page 60 Mr. Trescot says:—

"That in valuing the exchange of privilege, the *extent* to which the privilege is offered, is a fair subject of calculation, and that a privilege opened to 'all British subjects' is a larger and more valuable privilege than one restricted to only the British subjects resident in the Dominion."

I have already dealt with that proposition. I have shown that if that is the case, the United States have given us the right to fish where there are no fish at all, over an area of 3,500 square miles, and that they get under the treaty the right to fish over 11,900 square miles on our coasts, where there are fish in abundance. So his first proposition is necessarily against him. Then take the second:—

"That in valuing the exchange of privilege, only the direct value can be estimated, and the *consequences* to either party cannot be taken into account."

It is difficult to see what is meant by that. Does he mean to say, if this privilege which is given to the Americans to enter our territorial waters and fish there, should have the effect of preventing the whole Gloucester and American fishing fleet from being absolutely destroyed for want of business to make it pay, and if we should show conclusively on behalf of the British Government, that such is really the case, that nevertheless the United States Government should not pay one dollar because it is a consequence of the privilege, and not the direct value? Does he seriously contend for such an extraordinary doctrine? I think I shall be able to show you by the evidence on record in this enquiry, that unless the Americans had the right to come on the shores of Nova Scotia and New Brunswick, to enter our territorial waters along the shores of Prince Edward Island, along the Gaspe shore, the southern shore of Labrador, and along the estuary of the St. Lawrence,—that unless they had those rights, the United States fishing fleet could not subsist; and I do not intend to rely upon British proofs on that point; but I intend to turn up the American evidence, and I shall make that as clear as daylight. I will prove it by evidence from the lips of their own witnesses, man after man, witness after witness,—not by evidence given by us. And is it to be said that the United States ought to pay nothing to us for rights obtained under the treaty, if I can show that without those rights the Gloucester fishing fleet, and all the American fishing fleet, the whole North American fishery, as prosecuted by Americans, would be a failure? Are they not to pay for that privilege? If we hold fishing grounds over which alone fishing can be

successfully prosecuted, is that fact not to be taken into account? Underlying the whole arguments of Mr. Foster, Mr. Dana, and Mr. Trescot, is the extraordinary fallacy that this is a simple question for you to determine as between Great Britain and the fishermen of Gloucester. They apparently think that if they can show that under the *status quo* before the treaty, their fishermen could make more money than since the treaty went into operation; that is an end of the British case. That is not so. The treaty was not made between Great Britain and the fishermen of Gloucester; it was not made in respect to the Gloucester fishermen, but in respect to the whole body of the people of the United States. It is not a question whether the fishermen get more or less money. In fact however, how is the whole trade of Gloucester and other American fishing ports kept up? Is it not by the fishing business? The people of Gloucester do not, however, live merely on fish. They have to buy meat, pork, flour, etc., which are raised elsewhere than in Gloucester, I apprehend. They come from the far West; the Gloucester people are consumers of the produce of the far West. How are they able to pay for that produce? From the fisheries; and so the far West is interested as much as the seabord itself. So again take the consumers of the United States. If a much larger quantity of fish goes into the country under the treaty than otherwise would, the price falls and the consumers get the fish for far less money. Is that not a benefit? I care not whether it is an injury to Gloucester fishermen or not; I care nothing about them, as a class, although it can and will be shown that the fishermen of Gloucester, as such, have not lost one dollar by this treaty, but have made money. Now, let us pass on and see what is the next proposition. Mr. Trescot says:—

"That so far as British subjects participate in the inshore fishery in United States vessels upon shares, their fishery is in no sense the fishing or fishermen of inhabitants of the United States."

I have dealt with this subject before. It requires a man possessing great flexibility of argument and great boldness of utterance, to enunciate such a proposition in this or any other court. We have heard it for the first time, and we will never hear it again after this Commission closes. What difference does it make in valueing the privilege given under the Treaty, whether the vessels sent out by the city of Gloucester, the towns of Wellfleet or Marblehead, or other towns on the New England coast, are manned by British subjects or foreigners. We have it in evidence that some of the fishermen are Portuguese, some Spaniards,—Portuguese certainly,—and I am not sure but that some were Danes, and men belonging to the more northern nations. Why not have prepared a schedule, showing how many of those who fished in American vessels, and made money in them, were Portuguese or Spaniards, and asked us to make deduction because they were not American citizens. The whole money and profits of the voyages, excepting the men's shares, went into the pockets of the merchants? Never was such an argument heard as that the United States should not pay one dollar, because fish might have been caught by Portuguese, Spaniards or Frenchmen on board of United States vessels. The United States must be reduced to very great straits in supporting its failing case, before they would use such an argument. I could not help thinking, after the evidence got fairly launched, that the American Counsel were much abroad as to what their own case really was. I do not for one instant charge upon Mr. Foster, that in preparing his case, he put in a single statement that he did not believe to be absolutely true; he necessarily had to receive the information from somebody else. Yet you see throughout the United States "Answer" statements that are and must be admitted to be, wholly without foundation.

Look at this statement as put forward in the United States Answer, which will remain on record as a statement of the views of the government and of the facts which the government of the United States pledged itself to prove:—

"The United States inshore fisheries for mackerel, in quality, quantity, and value, are unsurpassed by any in the world."

So far from this being the fact, we had from the lips of witness after witness, called on behalf of the United States, that their inshore fisheries have entirely failed, that last year there was, as far as mackerel was concerned, an exceptionally good catch upon their own coast, but that the body of that catch was not taken within United States territorial waters at all, but extended over areas of the sea from ten to fifty miles distant from the shores. Yet this extraordinary statement is put upon record. I say again I do not assume for an instant that Mr. Foster wrote this on behalf of the United States, not believing it to be true I believe that some parties or other, I do not know who, have given him false and incorrect information, and he has committed the United States to a statement that is utterly and wholly at variance with the facts. The Answer says:—

"The United States inshore fisheries for mackerel in quality, quantity and value are unsurpassed by any in the world They are within four hours sail of the American market, and many of the mackerel are sold fresh at a larger price than when salted and packed. The vessels fitted with mackerel seines can use the same means and facilities for taking menhaden, so that both fisheries can be pursued together. And they combine advantages compared with which the Dominion fisheries are uncertain, poor in quality, and vastly less in quantity."

In Heaven's name if these Dominion fisheries are "uncertain, poor in quality and vastly less in quantity," how happens it that such an excitement has been aroused, and such an incendiary address been made before this Commission, as was delivered by Mr. Dana, and to which I shall have to call the attention of your Excellency and your Honors. If the fisheries are so "uncertain, poor in quality, and vastly less in quantity," and miles and miles away from their own coast, what did they mean by fighting for entrance into these waters, and by challenging us with making inhospitable laws to keep them out? If the lips of their witnesses told the truth, the laws are hospitable laws; they are laws passed by us for the purpose apparently of keeping them out of the fishery, but their effect was to keep American fishermen from ruining themselves. They make voyage after voyage into the Bay, each one resulting, they say, in a loss of $500 or $1,000.

I will show your Excellency and your Honors by-and-bye, the figures put in for the purpose of showing the losses made by these men who sent their vessels to the Bay for the fish "poor in quality, and vastly less in quantity," while there were thousands and thousands of fish off their own coasts, just waiting to be caught, and deal with those figures as they deserve to be dealt with. Did you ever hear anything like it in the world?

The United States Answer further states:—

"The Canadian fisheries are a long voyage from any of the markets whatever, and involve far more exposure to loss of vessels and life. These fisheries along the shores of the United States are now open to the competition of the cheap built vessels, cheap fed crew, and poorly paid labor of the Dominion fishermen who pay trifling taxes, and live both on board their vessels and at home, at less than half the expense of American fishermen."

I have not heard any evidence of that yet. It is a pretty bold assertion to put forward, and not support with proof. But if it were true, what does it mean? We have had the evidence of American fishermen to show that they live like little princes, and we had one witness who absolutely told us that the cook was the chief man on board. The men must make a fortune in the Bay to enable them to live like princes, at a rate at which they would only be justified in living if they had from $10,000 to $12,000 a year. If they choose to indulge in expensive

dress and food, and return at the end of the year and say they have lost money —are we to lose the compensation to which we are entitled for our fisheries? I never heard such an argument used before, and I hope never to hear it again. If men choose to eat, drink and wear all their profits, they cannot both have their cake and eat it.

Let ut see what else the "Answer" says:—

"It is only from lack of enterprise, capital and ability, that the Dominion fishermen have failed to use them; but recently hundreds of Dominion fishermen have learned their business at Gloucester, and other American fishing towns, and by shipping in American vessels. They (the Dominion fishermen) have in the United States waters, to-day, over 30 vessels equipped for seining, which, in company with the American fleet, are sweeping the shores of New England."

When we first read that extraordinary statement, we were beyond measure astonished. We made enquiries, but no one had ever heard of these vessels; and, after cross-examining American witnesses and examining our own witnesses, we found at last trace of a phantom ship, one vessel alone that was ever heard of on the United States coast, since the Treaty was made. The truth must have been known to the man who gave the information to Mr. Foster, for he must have been a practical man or he would not have been called upon to give information, and the information is precise "*over thirty vessels.*" The man who gave that information to Mr. Foster, who induced him to commit his Government to such an extraordinary and baseless statement, deliberately and wilfully, in my judgment, deceived the Agent of the United States.

I call your Honors' attention to these facts, in order to show that the Agent and Counsel of the United States hardly knew what sort of a case they had when they came into court. They must have been entirely misled as to the facts by fishermen or fish dealers, or those interested in the fisheries on the New England coast.

I will pass on. Mr. Trescot says in his argument:

"With regard to the history of these Treaties, there are two subjects in that connection which I do not propose to discuss at all. One is the headland question. I consider that the statement made by my distinguished colleague, who preceded me, has really taken that question out of this discussion. I do not understand that there is any claim made here that any portion of this award is to be assessed for the privilege of coming within the headlands. As to the exceedingly interesting and very able Brief, submitted for the other side, I am not disposed to quarrel with it. At any rate, I shall not undertake to go into any argument upon it. It refers entirely to the question of territorial right, and the question of extent of jurisdiction,—questions with which the United States has nothing to do. They have never been raised by our government, and probably never will be, because our claim to fish within the three mile limit is no more an interference with territorial and jurisdictional rights of Great Britain, than a right of way through a park would be an interference with the ownership of the property, or a right to cut timber in a forest would be an interference with the fee-simple in the soil."

Well, I should like to ask your Excellency and your Honors whether a gentleman who owned a farm would not find that its value materially diminished by some one else having a right of way over it. Could he sell it for the same price? He obviously could not. And why? Because the enjoyment of the privilege is destroyed to the extent that the easement gives the enjoyment of it to the person holding the right of way. The assertion that it makes no difference to a person possessing land that somebody else has the right to cut trees on it I submit is perfectly absurd. It is just what the Americans have the right to do under the Treaty. They have not the right to come to our lands and cut trees; but they have the right to come into our territorial waters and take from them fish, which are just as valuable to the waters as trees are to the land. They have the right to take the fish, and for that, I apprehend, they must pay. If a man has the right to enter on my land to cut trees I presume he must pay compensation for it; I presume he cannot get the right unless compensation is agreed upon. That is what we say. Taking fish from our waters is precisely the same as taking trees off our land.

Further on in his argument, Mr. Trescot puts forward the extraordinary doctrine that the Treaty of 1818 was rescinded by the Treaty of 1854.

At page 60 he uses these words:—

"Then with regard to the character of the Convention of 1818. I wish to put on record here my profound conviction that by every rule of diplomatic interpretation, and by every established precedent, the Convention of 1818 was abrogated by the Treaty of 1854, and that when that Treaty was ended in 1866, the United States and Great Britain were relegated to the Treaty of 1783, as the regulator of their rights."

Well, the proposition that the Convention of 1818 was abrogated by the Treaty of 1854 is sufficiently novel. I will, however, show your Honors that by the Reciprocity Treaty, so far from there being any intention shown to abrogate the Treaty of 1818, the exact opposite was the case; and that the Convention of 1818 is cited in the Reciprocity Treaty as a Treaty then subsisting, and which should continue to subsist. Before I read from the Reciprocity Treaty I desire your Excellency and your Honors to understand that in refuting these arguments, I do not do so because they can have had any substantial effect upon this Commission. They cannot possibly have any. Your Excellency and your Honors know too much of international law to believe any such proposition. But I am afraid that, if such propositions are allowed to run broadcast through their speeches, without being controverted, it may be imagined that we are unable to meet them, and therefore allow them to pass *sub silentio*. If the matter was being argued before a tribunal which had then and there to decide on it, and the court were composed of lawyers, I would not ask to be heard, and would not insult the court by arguments against so untenable a proposition. The observations I am now making are for the purpose of refuting opinions, not in the minds of your Excellency or your Honors, but in the minds of the public who have not the same intelligence or means of information as your Honors. The Reciprocity Act recites:—

"Her Majesty the Queen of Great Britain, being specially desirous, with the Government of the United States, to avoid further misunderstanding between their respective subjects and citizens, in regard to the extent of the right of fishing on the coasts of British North America, secured to each by Article I of a convention between the United States and Great Britain, signed at London on the 20th day of October, 1818, and being also desirous to regulate the commerce and navigation between their respective territories and people, and more especially between Her Majesty's possessions in North America, and the United States, in such manner as to render the same reciprocally beneficial and satisfactory, have respectively," &c.

Your Honors will see that the Act commences by stating that both governments are desirous of avoiding further misunderstandings between their respective subjects and citizens, with respect to the extent of the right of fishing given by that article; and after reciting the convention of 1818 and the particular article in question, goes on to say that it was important that the right under the convention should be settled. So far from showing any intention to repeal the Convention of 1818, the exact opposite was the fact. That is the preamble. Here is the enacting part:—

"It is agreed by the high contracting parties, that, *in addition to the liberty*," etc.

Does it say in this Treaty that it swept away the Treaty of 1818 and enacted a new treaty in lieu thereof? So far from that being the case, it says:—

"* * * In addition to the liberty secured to the United States fishermen by the above-mentioned Convention of October

20th, 1818, of taking, curing, and drying fish on certain coasts of the British North American Colonies therein defined, the inhabitants of the United States shall have," etc.

And yet it is seriously urged by one of the learned Counsel on behalf the United States that the Treaty of 1854 abrogated the Convention of 1818. I think I have satisfactorily refuted Mr. Trescot's argument on this point, although that argument was not material to any question arising under the Washington Treaty. I now turn your attention to Twiss on "The Law of Nations." I am reading from the edition of 1859. At page 376 Sir Travers Twiss says:—

"Treaties properly so called, the engagements of which imply a state of amity between the contracting parties, cease to operate if war supervenes, unless there are express stipulations to the contrary. It is usual on the signature of a Treaty of Peace for nations to renew expressly their previous treaties if they intend that any of them should become once more operative. Great Britain, in practice admits of no exception to the rule that all treaties, as such, are put an end to by a subsequent war between the contracting parties. It was accordingly the practice of the European powers before the French Revolution of 1789 on the conclusion of every war which supervened upon the Treaty of Utrecht to renew and confirm that Treaty under which the distribution of territory amongst the principal European States had been settled with a view of securing an European equilibrium."

This has a double bearing. Part of the argument which has been used by Mr. Trescot is, that we are remitted to the rights acquired by the Treaty of 1783. He conveniently passes over, for the purpose of his argument, the fact that a war occurred between the United States and Great Britain in 1812, which was followed by a Treaty of peace signed in Dec. 24, 1814, the Treaty of Ghent. There is no doubt, says Mr. Trescot, that in consequence of the repeal of the Convention of 1818 by the Reciprocity Treaty of 1854, the two nations are remitted back to the right each possessed under the Treaty of Paris of 1783; and that the Treaty of Ghent has nothing to do with this matter. I answer to that argument, that such is not the law of nations. By the law of nations, when war was declared in 1812 by the United States against Great Britain, every right she possessed under the Treaty of 1783 was abrogated, and, except so far as it was agreed by the parties that the *status quo ante bellum* should exist, it ceased to exist. The status, which is commonly called by writers *uti possidetis*, the position in which the Treaty found them, alone existed after the Treaty of 1814 was concluded, I have cited the express authority of Sir Travers Twiss upon the subject.

But we do not stop with British law. I will take American law on the subject, and we will see where my learned friends find themselves placed by American writers. I now cite from "Introduction to the Study of International Law, designed as an aid in teaching, and in historical studies, by Theodore D. Woolsey, President of Yale College." At page 83, President Woolsey uses this language:—

"At and after the Treaty of Ghent, which contained no provisions respecting the fisheries, it was contended by American negotiators but without good reason that the Article of peace of 1783, relating to the fisheries was in its nature perpetual, and thus not annulled by the war of 1812. By a convention of 1818 the privilege was again, and in perpetuity, opened to citizens of the United States. They might now fish as well as cure and dry fish, on the greater part of the coast of Newfoundland and Labrador, and on the Magdalen Islands, so long as the same should continue unsettled; while the United States on their part renounced for ever any liberty "to take or cure fish, on, or within three marine miles of any of the coasts, bays, creeks, or harbors of his Britannic Majesty's Dominions in America, not included within the above mentioned limits."

It is there positively declared by one of their own writers on international law in so many words;—and he not only lays down the law generally, but takes up the specific case with which we are now dealing,—that the American contention is entirely incorrect. He says:—

"At and after the Treaty of Ghent, which contained no provisions respecting the fisheries, it was contended by American negotiators, *but without good reason*, that the article of the peace of 1783, relating to the fisheries, was in its nature perpetual, and thus not annulled by the war of 1812."

I think that statement is pretty conclusive. Now, here is the general law which President Woolsey lays down. At page 259 he says:—

"The effect of a Treaty on all grounds of complaint for which a war was undertaken, is to abandon them. Or, in other words, all peace implies amnesty or oblivion of past subjects of dispute, whether the same is expressly mentioned in the terms of the Treaty, or not. They cannot, in good faith, be revived again, although *repetition* of the same acts may be a righteous ground of a new war. An abstract or general right, however, if passed over in a treaty, is not thereby waived.

"If nothing is said in the Treaty to alter the state in which the war actually leaves the parties, the rule of *uti possidetis* is tacitly accepted. Thus, if a part of the national territory has passed into the hands of an enemy during the war, and lies under his control, at the peace or cessation of hostilities, it remains his, unless expressly ceded."

That is quite clear. If, at the end of this war, Washington had been in the possession of the British, and if nothing had been said about it in the Treaty, it would have become British territory; but with the exception of some unimportant islands in the Bay of Fundy, no territory fell into the hands of the British; and those islands, I believe, were subsequently given up. If, however, the cities of Boston or New York had at that time been actually in possession of the British, unless there had been a clause introduced into the Treaty by which the territory was to return to the *status quo ante bellum*, it would have been governed by the *uti possiditis* rule, and would have remained British territory. I also refer your Honors to 3 Phillimore, pp. 457, 458 and 459, to the same effect. Now, I am not aware there is anything else in Mr. Trescot's speech which I need specially take up, because some of the other points occur in the arguments of Mr. Dana and Mr. Foster.

Mr. TRESCOT:—Perhaps you will allow me to say that you are replying to an opinion and not to an argument.

Mr. THOMSON:—Where an opinion is put forward by Counsel, he must either be Counsel of such eminence that his opinion did not require to be supported by authorities, or else authorities should be advanced at the time. I admit that Mr. Trescot possesses great ability, but I have undertaken to meet him by British and American authorities, and, as I have shown, he is completely refuted by both. I think it was Mr. Trescot's duty, when he put forward such an extraordinary doctrine, to have stated his authorities. If he did not choose to do so, I cannot help it; but if he now wishes to retract it as not being anything else than an opinion, well, of course, it makes the matter different.

Mr. TRESCOT—No; but I did not argue it.

Mr. THOMSON—It is put forward not as an opinion, but as a proposition on behalf of the United States—there is no opinion about it—and when the United States speak through the mouth of Counsel, I am bound to treat the matter seriously. If this were a common case between man and man, I would not treat it seriously, but when such a proposition is put forward on the part of a great nation, through Counsel, it cannot be treated lightly, but is entitled to be treated with respect; and if there is nothing in it, I am bound to show that such is the case.

I pass from Mr. Trescot to Mr. Dana. I propose to take this course for this reason: while I admit the great ability of Mr. Trescot and Mr. Dana, still I think your Honors will agree with me that whatever the case of the United States has in it, is to be found in the speech of Mr. Foster. No doubt, it is also to be found in the other

speeches, but I am taking Mr. Trescot's speech, and Mr. Dana's speech out of their order, because I only want to touch on those subjects contained in them which Mr. Foster did not put forward. Anything submitted by Mr. Foster, although it is put forward by Mr. Dana and Mr. Trescot, I will treat, as it appears in Mr. Foster's speech, in order to avoid going over the ground twice. Besides Mr. Foster, as Agent, put forward his case with great ability, and as he on this occasion is officially the Representative of the United States, I shall treat his argument as the most serious one of the three.

Mr. Dana stated that all these fisheries belonged to the United States as a right,—it is very curious language,—because, said he, they were won. He gave a very good description, only a little fanciful, of the whole of the contests for the last century, in respect to the fisheries. It was a very pretty essay, and I had much pleasure in listening to it. It was delivered, as one would suppose any thing emanating from him would be delivered, very well indeed,—the English was admirable, and the style not to be found fault with. But there was very considerable play of imagination, and in this respect the learned counsel on the other side have a great advantage over me, for I am obliged to stick to hard facts. They have followed the practice of the free-swimming fish, and taken a little trip through history in a most graceful but free-and-easy manner. Mr. Dana sets out by stating that the fisheries belonged to the United States, and particularly to the State of Massachusetts, because, says he, they were won by the "bow and spear" of Masaschusetts men. I never had the pleasure of visiting any of the museums of Boston or other cities of New England, where those bows and spears are, presumably, hung up, but if those bows of that olden time were anything like so long as the bow which American orators, statesmen, and lawyers sometimes now-a-days draw in defence of real or imaginary American rights, then I must confess that they must have been most formidable weapons. It is a very extraordinary view, certainly, to present that because those people fought in some former time, with some persons on the coast,—Mr. Dana does not say whether they were French, or barbarians, or Indians,—they at that time being British subjects, they have the right to our fisheries.

But Mr. Foster went a step further. He stated—I suppose it was this which set off his colleagues—that we are indebted to the people of Massachusetts for now being in possession of Nova Scotia, and that it was entirely owing to their efforts that the British flag waves to-day on the Citadel, instead of that of France. Well, it was rather a bold assertion to make, certainly. I believe some of these Massachusetts men were fighting characters in those days. They fought with the people of England, and came out because they could not live in peace and quietude under British rule; they came out and found liberty of conscience for themselves, and terrified other people by burning witches, and stripping Quakers, showing that after all, the old British intolerance was pretty well uppermost. But they were fighting people always, and they came over, and no doubt fought with the French to some extent; and for the first time, I knew they went down to LePre, and committed the abominable outrage of turning out all the Acadians; I suppose they were commanded by General Winslow. Mr. Dana should have told Mr. Longfellow the story before he wrote *Evangeline*, because probably, the British might not have suffered so much in public opinion if it had been generally known that they were Massachusetts people who committed the outrage. I am glad to this extent that the people of Nova Scotia are relieved from the odium. A friend placed in my hands, after the statement had been made, a well-known history of England containing a statement which shows the spirit in which the descent was made by the Massachusetts people upon the coast and upon the French. I find that about that time, after they had come here and fought, and—if I may accept Mr. Foster's view of history as true—delivered us out of the hands of the French, they sent a claim to England for their services. That claim was laid before the British Parliament, which at the instance of George II, voted them the large sum in those days of £115,000 for their services. So besides being fighting men they were cute enough to get paid for their trouble. Now by the rule *qui facit per alium facit per se* it was Great Britain herself that was fighting, and these were her hired troops. If the people of Massachusetts are going to set up a claim to the Province of Nova Scotia and all the fisheries on the score of their fighting, the money so paid to them should be given back, and £115,000 with 125 years' interest will be a sum which we will condescend to receive for our fisheries and go and live somewhere else as we must do when our fisheries are gone.

That is really the history of that transaction on which the counsel of the United States so vaunt themselves. I do not say that the Massachusetts men did not fight well; no doubt they did. Mr. Foster says they were people who knew their rights and knowing, dared maintain them. The people of this Dominion also knew their rights, and will maintain them too. When I know that the present learned and able Chief Justice of Nova Scotia is sitting in this chamber, within sound of my voice, as I now speak,—when I see the portraits of his eminent predecessors, and of Sir Fenwick Williams of Kars, and Sir John Inglis of Lucknow, (both sons of Nova Scotia), looking down upon me from the walls, I know that our rights have been, and are thoroughly understood, and can, if necessary, be bravely upheld and defended in the future as they have been in the past. But I presume the day will never again come when Great Britain will be forced to measure strength with the United States. It is perfectly idle to make use of such language in an enquiry such as this, and in making these remarks, I do not wish to be understood as saying anything that can be considered at all offensive to my friends of the United States; I make them simply in answer to observations made, as I submit, most unnecessarily by them.

Mr. Dana's other propositions I will pass over as rapidly as I can consistently. He said we had no territorial waters,—that no nation has. He stakes his reputation on that point.

Mr. DANA:—No; you misunderstood me.

Mr. THOMSON:—On page 67, Mr. Dana says:—

"Now, these fishermen should not be excluded except from necessity, some kind of necessity, and I am willing to put at stake whatever little reputation I may have as a person acquainted with the jurisprudence of nations (and the less reputation, the more important to me) to maintain this proposition, that the deep-sea fishermen, pursuing the free-swimming fish of the ocean with his net, or his leaded line, not touching shores or troubling the bottom of the sea, is no trespasser, though he approach within three miles of a coast, by any established, recognized law of all nations."

Now, I say that the meaning of that proposition is this, that there are no such things as territorial waters. I say it means that and nothing else. That is a distinct affirmation, that by international law, any fisherman can approach within not merely three miles of the coast, but within any distance from the coast, if he keeps his leaded line from touching the bottom, and the keel of his vessel from touching the land, and that no international law excludes him. Upon that extraordinary proposition I take direct and unqualified issue.

MR. DANA:—What was the proposition to which you refer?

MR. THOMSON:—The proposition was that there are no such things as territorial waters.

MR. DANA:—I made no such proposition. The question was this—was there among territorial rights the right to exclude fishermen from fishing.

MR. THOMSON:—I did say this, that Mr. Dana had put forward the proposition that no nation possessed territorial waters. But no doubt that was too broad because there may be territorial waters so enclosed by land that I presume no question could arise in regard to them, therefore, I stated his proposition too broadly. But Mr. Dana does not confine his statement to the one that no nation has absolute territorial rights over waters. He says that any

foreign fisherman can come within any distance of the shores and if he does not allow his leaded line or the keel of his vessel to touch the bottom, he has an undoubted right to fish.

MR. DANA :—There is no established recognized law of all nations against it.

MR. THOMSON :—Mr. Dana says, " by any established, recognised law of all nations." I do not wish to have any fencing about words ; I use words in their ordinary meaning. I presume Mr. Dana means civilized nations. I do not suppose he will contend that, if the civilized nations of Europe and America had recognised a doctrine totally different from that enunciated by him, but the King of Ashantee or Siam or some other potentate away off in the interior of the vast continents of Asia and Africa had not acceded to that doctrine, it was not therefore the law of nations. I presume he refers to the civilized nations. I will now show the Commission that the proposition submitted by Mr. Dana has no foundation in international law. I say again, that I understand the expression to mean all *civilized* nations.

I undertake to prove the contrary of that proposition to be true, not only by international law writers in England, but also by the writers in the United States. Taking up the English writers, I call your attention to I. Phillimore page 180, edition of 1854, at which he says :—

" Beside the rights of property and jurisdiction within the limit of cannon shot from the shore, there are certain portions of the sea which, though they exceed this verge, may, under special circumstances, be prescribed for."

The writer there assumed that in regard to the three mile line there was no doubt about it. Sir Robert Phillimore further wrote :—

" Maritime territorial rights extend, as a general rule, over arms of the sea, bays, gulfs, estuaries, which are enclosed, but not entirely surrounded by land, belonging to one and the same state."

Not only does Sir Robert Phillimore lay down the law that round the coast of any maritime nation, to the extent of three miles, its territorial waters flow, but he goes further, and says that in the case of estuaries and bays, enclosed within headlands, such estuaries and bays belong to the state. That would have been an authority, had the headland question, *per se*, come up for argument. I state it, however, for another purpose. That is an authority which at all events shows the views of one of the greatest English writers on International law upon the subject under discussion.

Mr. DANA:—Is there anything said about fisheries.

Mr. THOMSON :—I have read the passage, and will hand you the book, if you desire it.

Mr. DANA :—The question is, whether among the rights is there one to exclude fishermen.

Mr. THOMSON :—With great respect for Mr. Dana, I am meeting the proposition as I find it in his argument, not as he chooses to cut it down. It is thus stated :—

" That the deep sea fishermen, pursuing the free swimming fish of the ocean with his net or his leaded line, not touching shores or trawling the bottom of the sea, is no trespasser, though he approach within three miles of a coast, by any established, recognised law of all nations."

I think the *onus probandi* lies on Mr. Dana, and those who support such a proposition, of showing that there is a special exception to be made in favor of fishermen of all nations by which they can enter, without permission, the territorial waters of another nation—a foreign nation—and be no trespassers. I have shown that the waters are territorial ; that is all I have to do. The moment I show that the waters are territorial, then for all purposes they are as much part of the State as are the lands owned by the State, with the exception that vessels prosecuting innocent voyages may sail over them without committing any trespass ; they may pass to and fro to their respective ports, but foreigners can pursue no business within those waters any more than they can pursue business on land.

Mr. DANA :—Can nations enclose them?

Mr. THOMSON :—In answer to that question, I say that nations cannot enclose them. Other nations have the right of way over them, and the right in case of tempest to enter the ports. Humanity dictates that. But no business can be pursued by the citizens of one nation within the territorial waters of another, whether that business be carried on by fishermen or by any other class of persons. That proposition is sustained by the authority I have read from Phillimore. I will show, however, that Sir Robert Phillimore does not stand alone, and that it is not the law of England only, but the law of the United States as well. I call your attention to Wheaton on International Law, page 320. This language is used :—

" The maritime territory of every state extends to the ports, harbors, bays, mouths of rivers, and adjacent parts of the sea inclosed by headlands, belonging to the same state. The general usage of nations superadds to this extent of territorial jurisdiction a distance of a marine league, or as far as a cannon shot will reach from the shore along all the coasts of the state. Within these limits its rights of property and territorial jurisdiction are absolute, and exclude those of every other nation."

Mark the emphatic language of this great writer on international law :—

" *Within these limits its rights of property and territorial jurisdiction are absolute.*"

He declares that no right to interfere with these limits in any way is possessed by other people or by other classes of people. If fishermen had the right to approach within these limits of territorial jurisdiction which extend to the distance of three marine miles from the coast, no English-speaking writer on international law would use the term here employed, and say that every nation whose coasts are surrounded by these territorial waters has such an absolute right. Under such circumstances, the author would have used the term, " qualified right ;" and supposing that fishermen were the only class to be allowed within these waters, he would say at once that " these nations have this right against all the world, *except fishermen*, who undoubtedly have the right to fish within those waters if they do not touch the land with the lead of their fishing lines or with the keels of their vessels ;" but no one has so written, and this very accurate author, who is quoted with approbation by English and Continental writers on international law, states that—

" Within these limits its rights of property and territorial jurisdiction are absolute and exclude those of every other nation."

This language, I repeat, is emphatic, and I am glad that it is the language of an American writer, because I presume that it will in consequence have greater weight with Mr. Dana.

Mr. DANA—I would like to ask my learned friend whether he would himself be willing to adopt that language and say that these rights of property are absolute.

Mr. THOMSON :—Yes, I have seen no decision which in any way qualifies that, unless it can be said that the case of the *Queen v. Keyn* (which is quoted against us in the American Brief, and reviewed at some length in the British Brief in reply,) qualifies it. To that case, it will become my duty to refer by-and-bye.

Mr. Wheaton further states that " the general usage of nations superadds to this extent of territorial jurisdiction

"a distance of a marine league, or as far as a cannon shot will reach from the shore along all the coasts of the state."

Now, I say that the propositions of international law thus laid down by this very eminent American writer are entirely at variance with the doctrine laid down by Mr. Dana.

Mr. Dana has put to me a question which I am quite willing to answer. It is this:—whether or no, I would myself if writing on the subject, use such language as that and say that, a nation has exclusive right of property within its territorial waters.

Mr. DANA:—Absolute right.

Mr. THOMSON:—Yes, absolute right of property; with the single exception,—which is, of course, understood by all writers on the subject—that the ships of other nations have a right to pass through and by those waters for innocent purposes, and in cases of storm to enter harbors, or anchor in them for the purpose of shelter. I say that nations have such absolute right; and that there is no law of nations,—no international law, or any other law anywhere, by which fishermen or any other class have the privilege of coming within those waters and fishing without the permission of the nation to whom those territorial waters belong, and whose coasts they wash.

Let me now turn the attention of your Excellency and Honors to the case of the *Queen v. Keyn*, upon the authority of which Mr. Dana very much relies. In that case the prisoner was indicted for the crime of manslaughter, alleged to have been committed by him on board a foreign ship, of which he was the captain, in the English channel, and within three miles of the British shore. He was tried in the Central Criminal Court of London, and convicted. A novel point of law was raised by the prisoner's counsel and reserved by the Judge. In order to understand the bearing of that point, I think it right to explain to the Commission that, in order to clothe English Courts of Assize, with the common-law jurisdiction to try offenders, the offense must have been committed within the body of a county. Unless so committed, no grand jury could indict, and no petit jury try or convict a prisoner. Those large bodies of sea water within English headlands, called "King's Chambers," were considered to lie within the bodies of counties, as the case of the *Queen v. Cunningham*, cited in the "British Brief," shows. No formal decision had ever, so far as I am aware, determined that the territorial waters lying around the external coasts of England were within bodies of counties. Over offenses committed upon the seas, and not within bodies of counties, the jurisdiction of the Lord High Admiral attached, and he or his deputies, sitting in Admiralty Court, tried and punished the offenders.

By a statute passed in the reign of William IV, the criminal jurisdiction of the Admiral was transferred to Judges of Assize, and to the Central Criminal Court. The substance of the objection raised by Captain Keyn's counsel was this: The realm of England over which the common-law jurisdiction extends, does not reach beyond the line of low water, and therefore the court has no common-law right to try the prisoner. In regard to the Admiralty jurisdiction conferred upon it by the statute of William, that cannot affect the question, because the Admiral never had jurisdiction over *foreign vessels*, or over crimes committed on board of them. The Court of Appeal quashed the conviction, holding, by seven judges against six, that the realm of England did not, at common-law, extend, on her external coasts, beyond the line of low water. *But the judges who quashed the conviction all held that the Parliament of Great Britain had the undoubted right to confer upon the courts of the kingdom full authority to deal with all questions arising within her territorial waters around the external coasts.* Owing to the absence of such legislation, Captain Keyn escaped punishment.

The Court of Appeal in this case was composed of thirteen judges, and it is well to bear in mind that the authority of the judgment is greatly weakened by the fact that six were one way and seven the other.

Mr. DANA:—One of them died.

Mr. THOMSON:—Judge Archibald died, I think; and after his death, the decision of the Court letting the man go free and holding that the Central Criminal Court had no jurisdiction in the matter, was given by the casting vote of the Lord Chief Justice of England, Sir Alexander Cockburn.

I was surprised at Mr. Dana, who whilst commenting on this case,—I presume that he had not read it very recently,—stated that the Common Law lawyers were greatly puzzled and that the Civil Law lawyers alone—

Mr. DANA:—I said other lawyers,—other than those who were strictly trained in the Common Law.

Mr. THOMSON:—I think that I can give your exact language.

Mr. DANA:—You will find it on page 71 of our argument.

Mr. THOMSON:—Mr. Dana said:

"The *Franconia* case, which attracted so much attention a short time ago, did not raise this question, but it is of some importance for us to remember. There, there was no question of headlands. It was a straight line coast, and the vessel was within three miles of the shore. But what was the ship doing? She was bearing her way down the English Channel against the sea and wind, and she made her stretches toward the English shore, coming as near as safety permitted, and then to the French shore. She was in innocent use of both shores. She was not a trespasser because she tacked within three miles of the British shore"—"all this I conceded."—It was a necessity, so long as that Channel was open to commerce. The question which arose was this. A crime having been committed on board of that ship while she was within three miles of the British coast, was it committed within the body of the county? Was it committed within the realm, so that an English sheriff could arrest the man, an English grand jury indict him, an English jury convict him, under English law, he being a foreigner on board a foreign vessel, bound from one foreign port to another, while perhaps the law of his own country was entirely different? Well, it was extraordinary to see how the common-law lawyers were put to their wit's end to make anything out of that statement. The thorough-bred common-law lawyers were the men who did not understand it; it was others, who sat upon the Bench, who understood it better."

Now, I mean to say,—that when my learned friend delivered himself after this manner, I think that he forgot who composed the Bench on this occasion. That Bench was wholly composed of common-law lawyers, with the solitary exception of Sir Robert Phillimore. The only civil-law judge, who then sat on the Bench, out of the whole thirteen, or whatever was the number, was Sir Robert Phillimore; and the judgment of the majority of the Court was determined by a casting judgment, which was delivered by the Lord Chief Justice, against the jurisdiction of the Crown; and of course this is a decision of which I understand that Mr. Dana approves. So far, however, from the common-law lawyers having had nothing to do with this finding, the fact is, that if it had not been for the common-law lawyers, no such decision would have been given at all.

MR. DANA:—I do not include the equity and chancery lawyers among the others.

MR. THOMSON:—No equity or chancery lawyers sat on the Bench—not one; all the judges who sat on that Bench were common-law judges, except Sir Robert Phillimore, who was a Judge of the High Court of Admiralty; and, as I have stated, the casting decision was given by Lord Chief Justice Cockburn, himself a great common-law lawyer.

How was the Parliament of England to exercise or give jurisdiction over these waters, unless they were within the territorial jurisdiction of the nation, for neither the Parliament of England nor the Parliament of any other country can possibly make laws for the government of the high seas? The moment you get within the three mile line line of coastal sea, you are within the jurisdiction of the country whose coast is washed by those waters. The Lord Chief Justice decided on a technical ground against the authority of the Crown, but further stated his conviction—and so also expressly held all the other Judges who agreed with him—that it was within the province and the power of the British Parliament to pass an Act by which its own jurisdiction and the jurisdiction of the courts (over these territorial waters which washed the coast) could be established and maintained;—therefore, so far from this judgment being against the doctrine that

there are such territorial waters, it is the very best authority which could possibly be given for saying that such jurisdiction does exist. If it were not for the law of nations, the very moment that you got beyond the realm—that is to say on the coast just below low water mark, the nation would have no jurisdiction over you, and Parliament could not touch you at all, as you would then be on the high seas; but by the law of nations, all civilized countries have this jurisdiction within the three mile line, and hence, the Parliament or other legislative body existing within the country, can pass laws, governing this territory; and it was only the absence of these laws that induced the Lord Chief Justice and the other Judges to arrive at the decision to which they came. I therefore think, may it please your Excellency and your Honors, that I have refuted this proposition of Mr. Dana's, and refuted it by the authorities of his own country, as well as by British authorities.

Mr. DANA:—Which proposition do you mean—the one that I put, or the one which you put?

Mr. THOMSON:—I refer to the one which you put, viz: that there is no exclusive jurisdiction enjoyed by any nation over its territorial waters.

There is now another thing to be mentioned. What is the practice of the United States herself. Why, the United States has never permitted any vessel of any foreign country to approach her coasts within the three mile limit to fish there. They have uniformly excluded such vessels; and not only have they uniformly excluded them from within the three mile limit, but further, they have also rigidly excluded them from the large bays, such as the Chesapeake and Delaware Bays, and bays of a similar description—not bays which are merely six miles in width at the mouth, but many miles beyond. The whole practice of the United States is entirely against Mr. Dana's theory; and what is the practice as recognized by this very Treaty, under which your Excellency and your Honors are now sitting,—this Treaty of 1871? What do you find is here given by Great Britain to, and accepted by, the United States?—it is the right to enter our territorial waters; and the United States gives to Great Britain, and Great Britain accepts from the United States the right to enter her territorial waters; and she absolutely not only gives that right, which England accepts—and England admits her right, or otherwise she would not accept the grant,—but the United States also go a step further, and say, that "although we give you the right to come on our coasts and fish in our waters within this privileged and territorial distance; yet we warn you that we only give you that right for the portion of our coasts lying to the northward of the 39th parallel of North latitude." "Can anything be clearer than that. It is in the face of that declaration of the United States herself, that one of her Counsel, in arguing this case, advances this most extraordinary doctrine. If Mr. Dana be right about that matter, then the 39th. parallel of North latitude is no barrier at all to our fishermen; and we have the right to go down and fish where we please along the whole length of the coast of the United States. But do you think that this would be tolerated for a moment? What would be said to us if we attempted it? Would it not be this?" "You have admitted our rights and we have admitted your rights; then how dare you come to the southward of that line?" What could be said to that? Why, clearly nothing, save that we were infringing our agreement.

And then, although I do not know that this, in itself, would have very much strength as an argument—it might be mentioned that, in 1818, the Americans agreed, not on any account whatever to come within three miles of our coasts; but we never made any agreement not to come within three miles of their coasts. At all events, we are not hampered by any such agreement; and if this novel law be correct, as Mr. Dana lays it down, then, beyond a doubt, we have a right to fish on their coast anywhere we please. There can be no doubt about that at all. It belongs to the law of nations, says Mr. Dana, that, as long as our leaded line does not touch bottom, and our vessel's keel touches no sand beneath the water, we have the undoubted right to go there and fish; but I am very much afraid that the Americans would treat us to some of their torpedoes, if we were so to go down there, and explode us out of those waters in a very short time; and I think that we would, under such circumstances, have very scant sympathy from the civilized world. What does Mr. Dana, or the other counsel in this case, mean by raising this question? A number of the observations made by Mr. Dana, in the course of his speech, I could understand would well become the hustings. I could well understand that, in a speech before a legislative assembly, having a jurisdiction over the matter, for the purpose of getting such assembly to alter the law, he might advance such reasons and argument to show why the law should be altered; but are we not now met—the very point which has been forgotten by some of the counsel—to determine the relative values of reciprocal privileges bestowed on each nation by the Treaty of 1871? Is not that Treaty the charter under which you sit? and does not that expressly admit that we have this three-mile limit? And have not the Americans accepted all our terms? They got permission, by that treaty, to enter these limits; and you are here to assess the damages which they ought to pay to Great Britain for having that right extended to them? Why are these questions raised at all?

I must now refer to some language employed by Mr. Dana, which, I hope, he used unadvisedly. I am not going to say a harsh word at all; but, I confess, it struck me that a great deal of what he said was out of place; and I only refer to it for the reason, which I stated at the outset, that I cannot pass by these observations without notice, lest it should be said hereafter that they were put forth by a man of high reputation at the United States bar, and therefore advanced seriously on behalf of the United States and that Great Britain stood here, represented by her Counsel, and never dissented from these views. Let me now say what they are. I will first take one expression which he uses on page 69. He says:—

"But there were great difficulties attending the exercise of this right of exclusion—very great difficulties. There always have been, there always will be, and I pray there always shall be such, until there be free fishing as well as free trade in fish."

Now, I hope that my learned friend, Mr. Dana, used that language unadvisedly. If Mr. Dana had been a member of a high commission appointed to settle upon new treaties between two countries—two great and Christian countries, as Mr. Foster characterized Great Britain and the United States,—this language might then be used, and he might then pray that the time would come when there should be no such exclusion; but, I think it is a very different thing when the law stands as it does, fixed, and as yet unaltered, and unalterable for the next seven or eight years to employ this dangerous and incendiary language. I use the term, incendiary, in this way: I fear that this language will come to the ears, and be read by the eyes of a class of men, whom, the evidence laid before Your Excellency and Your Honors, if it be not entirely untrue, shows are not always the most peaceable and law-abiding citizens to be found in this world. Those fishermen are sometimes rather lawless men; and if they find language such as this used by the lips of a learned and eminent counsel of the United States, they may say at once: "This is United States doctrine, and they will back us up, and if we break through these laws, which we know perfectly well were passed for the purpose of preventing us having these rights, and passed for the purpose of preventing us entering these waters, the United States will back us up, for she has said so through her counsel." I deprecate that language very much.

In this connection, I will point out some other sentences, from which I entirely dissent, for the same reason. I will take the following statement, which will be found on page 71 of the argument:—

"There was, at the same time, a desire growing on both sides for reciprocity of trade, and it became apparent that there could be no peace between these countries until this attempt at exclusion by imaginary lines, always to be matters of dispute, was given up—until we came back to our ancient rights and position. It was more expensive to Great Britain than to us. It made more disturbance

in the relations between Great Britain and her provinces than it did between Great Britain and ourselves ; but it put every man's life in peril ; it put the results of every man's labor in peril ; and for what? For the imaginary right to exclude a deep-sea fisherman from dropping his hook or his net into the water for the free swimming fish, that have no habitat, that are the property of nobody, but which are created to be caught by fishermen."

I again say that these views might possibly be properly advanced by high commissioners appointed to settle upon new treaties between nations; but in respect to a definite treaty which cannot be altered, and over which this Commission has no power whatever, this language ought never to have uttered.

Again, on page 72, we find the following :—

"That, may it please the tribunal, is the nature of this three mile exclusion, for the relinquishment of which Great Britain asks us to make pecuniary compensation. It is one of immense importance to her, a cause of constant trouble, and, as I shall show you—as has been shown you already by my predecessors—of very little pecuniary value to England, in sharing it with us, or to us in obtaining it, but a very dangerous instrument for two nations to play with."

Now, I cannot conceive why any danger should exist in connection with any solemn agreement made by two great nations which clearly understood their respective rights under that agreement. I am not now talking of the headland question at all. I am not discussing that; but there is an explicit agreement that these people shall not enter within three miles of the land, and how that became a "dangerous instrument," unless one or other of the parties to it intend to commit a breach of it, I cannot understand. Of course, Great Britain does not intend to commit any breach of it, because she gained no privilege under it; and unless the United States fishermen intend to violate it, and the United States intend to uphold them, in committing this breach of international law, and this breach of faith, I cannot see where this "dangerous instrument" is.

Mr. Dana :—Does the learned counsel refer to the present Treaty?

Mr. Thomson :—Oh, certainly not. As I stated at the outset, I cannot perceive why this language was used at all, because, under the treaty by virtue of which you are now sitting, there is no question about this at all. The treaty of 1818 has nothing to do with this enquiry, except, indeed, showing how Americans were formerly excluded from the limits, and, therefore, what privileges they had under it.

So, on the same page. 72, he says, after alluding to the abrogation of the Reciprocity Treaty :—

"We were remitted to the antiquated and most undesirable position of exclusion ; but we remained in that position only five years, from 1866 until 1871, until a new Treaty could be made, and a little while longer, until it could be put into operation. What was the result of returning to the old system of exclusion? Why, at once the cutters and the ships of war, that were watching these coasts spread their sails; they stole out of the harbors where they had been hidden; they banked their fires; they lay in wait for the American vessels, and they pursued them from headland to headland, and from bay to bay; sometimes a British officer on the quarter-deck,—and then we were comparatively safe,—but sometimes a new-fledged provincial, a temporary officer, and then we were anything but safe. And they seized us and took us, not into court, but they took us into harbor, and they stripped us, and the crew left the vessel, and the cargo was landed; and at their will and pleasure the case at last might come into court. Then, if we were dismissed, we had no costs, if there was probable cause; we could not sue, if we had not given a month's notice, and we were helpless."

I repeat that I deprecate these terms. Who brought the cutters down upon them after 1866? Did Great Britain do so? Did the Dominion of Canada do so? Most certainly not. The United States did so. Their eyes were open to the consequences of their act, and the United States, under these circumstances, of their own mere motion, abrogated the treaty of 1854, by which common privileges were given to American and British fishermen. It was their own act by which that treaty was abrogated; and as a consequence they were remitted to the old system of exclusion. We did not do this. According to Mr. Dana, during all this time, during the twelve years that this treaty was in force, our cutters were lying in all our harbors, with their fires banked, and new-fledged officials, clothed in a little brief authority, strutting the quarter-deck, waiting to come out and make piratical excursions against American fishing vessels.

Is that description borne out by the evidence? I appeal to your Excellency and your Honors whether that is language which ought to have been used on this occasion. I emphatically say that it is not. I say that it is calculated to excite a bad feeling amongst these fishermen who are not too much disposed to be quieted by the law any way, and to make them more lawless in the future then they have been in the past.

I will now read another statement, to which I take exception. It is to be found on page 73. While speaking of the imposition of the licenses, and of their prices being raised, etc., he said this :—

"Why, this was the result,—I do not say it was the motive,—that it left our fishermen unprotected, and brought out their cutters and cruisers, and that whole tribe of harpies that line the coast, like so many wreckmen, ready to seize upon any vessel and take it into port and divide the plunder. It left us a prey to them and unprotected."

Now, may it please your Excellency and your Honors, I would be less than a man, and be doing less than my duty, if I did not repudiate that language; and if I did not say—there is not a tittle of evidence to warrant that language being used in this Court. This is not a matter to laugh at, and joke about at all. These are serious statements which go forth to the public, and statements which, if they are uncontradicted, are calculated to prejudice not only the good relationships which subsist between the United States and Great Britain, but also those that exist between Great Britain and the Dominion of Canada herself. If it were true, that her officers were a set of harpies, preying on the United States fishermen, and seizing their vessels, taking them into her harbors, and dividing the plunder, it would be time that England should interfere; but such is not the case. I appeal to every member of this Commission,—to your Excellency and your Honors, whether there has been a tittle of evidence adduced warranting the use of language such as that. We have had no evidence at all upon this subject, except the testimony, I think, of a witness whose name I forget, and who gave evidence about a Mr. Derby, who commanded one of the government vessels. He stated that Captain Derby came on board and was going to seize the vessel, when the master said that he would go on board of the cutter, see Mr. Derby and settle the matter up; and that the master, when he came back, said that he had settled it up with Mr. Derby for 25 barrels of mackerel. On cross-examination of this man, I discovered by his own admission, that they had been in the harbor of Margaree that morning, or somewhere on the coast of Cape Breton, and had then taken more than 25 barrels of mackerel within the three-mile limit.

So that if his statement were true, all that Captain Derby had done was, instead of putting the law into force and seizing that vessel, and confiscating her tackle and apparel and furniture, and all the cargo she had on board, he had let the man off by taking only 25 barrels, which had been caught within British limits.

Does that look like the act of a man who was a "harpy" or a "pirate," or who was disposed to "divide the plunder?" But I say, moreover, it is convenient to make these charges,—I speak now of the witnesses, and not of Mr. Dana,—it is convenient for a witness to make charges against a man who is dead. Captain Derby is now lying in his grave. The tongue that could come forward and show the falsehood and slander of that statement is silent forever; and it is cheap work for this witness, with respect to a dead man, to say that such and such a thing was done, when he knows that the falseness of his statements cannot be proven. I pay very little respect to such testimony; and, with the exception of this not a particle of evidence has been presented in the course of this long

enquiry, which would justify the making of this very serious charge, by Mr. Dana. On behalf of Her Majesty's Government, I repudiate that language; I say that it is not called for in this case; and that there are no facts proven to warrant it.

Again, we have very strong language used in reference to Mr. Pattilo, and it has been said that if a portion of his blood had been shed, the seas would have probably been "incarnadined." But what is Pattillo's own statement? A curious subject was Mr. Pattilo to go to war about. What kind of a character he was when young, I know not; but some person told me that he had experienced religion before he came into this Court. I thought that if he had, the old man was not entirely crucified in him when he gave his evidence there. What did he tell you? That he was a Nova Scotian by birth; that he went to the United States, as he had a right to do, and that he took the oath of allegiance there, as he had a right to do. And when I put him the question as to whether, when he had taken this oath of allegiance, he had not taken an oath of abjuration against Queen Victoria and everything British he admitted that he had. Now, in this there was nothing criminal. He had a perfect right to take the oath of allegiance there; and certainly nobody cared to have him remain in Nova Scotia. But what did he do? After becoming an American citizen, and a citizen more American than they are themselves, he takes his vessel into the Gulf and systematically trespasses on our fisheries. It is not attempted to say that when it suited his convenience he did not go in and trespass on our fishing rights. He had no scruples, when it suited him to do so, about fishing inside the limits, and so far did he carry this matter, that he absolutely sailed up into the territorial waters of Newfoundland, and got into the ice close up to the shore; and when some officers came there, he armed his crew and set them all at defiance. He said that he drove away the "whole calabash" of the officers. At all events he kept them off and stayed there the whole Winter, cutting holes in the ice, fishing, taking herring up and walking off with them. This man did not appear to understand that there are national rights which he could at all infringe. Was a man like that a man to go to war about?

Take his own account of the circumstances, and of the shots fired at his vessel, and what was it? He was passing through the Gut of Canso, and having the advantage of those very lights which one of the Consuls of his adopted country, Mr. Norton, has stated in his despatches, to be absolutely necessary to their fishermen, and for which they ought to pay. Now, for the use of these lights, which save vessels from being destroyed, which warn them of their danger, when danger is near, he refused to pay the dues; he does not pretend to say, that he did not know that the officer in question had a perfect right to collect these duties, but nevertheless, instead of paying, he asks, "where are your papers?" The officer replies—"I have left my papers on shore." Then, exclaims Pattilo, "be off out of here;" and he gives a most graphic description of how he turned the officer into his boat. I should think that he was a nice subject to go to war about.

Mr. Foster:—This affair arose, not because he would not pay the light dues, but because he had the charity to bring home a woman.

Mr. Thomson:—No; it occurred on account of the refusal to pay light dues.

Mr. Foster:—There is no evidence to that effect.

Mr. Thomson:—I will turn to the evidence and we will see. I think that your Excellency and your Honors will recollect that it was the light dues which the officer wanted to collect. If Pattilo stated that it was for bringing home and landing a lady, who wanted to be landed there, I should say at once, that you would not believe it. To suppose that any officer of any English or Dominion cutter would undertake to fire shots after him, because he landed a lady to whom he had charitably given passage to some place in the Gut of Canso, is simply too ridiculous a a supposition to be tolerated for a moment. Well, I will not take up your time now with this subject, but if my learned friend will turn to the evidence, and point out that I am mistaken in saying that the trouble arose with reference to the light dues, I will admit my error.

Mr. Foster:—Will you read these two paragraphs?

Mr. Thomson:—In the course of my cross-examination of this witness, the following evidence was given:—

Q. Were you lying close inshore? A. I was at anchor and not fishing.

Q. Lying close inshore? A. Yes, right close in, under Margaree for shelter. He did not attempt to take me; if he had I would have given him a clout, but he took another vessel, the Harp, Capt. Andrews. I kept a watch all night, but they did not come alongside; if they had, we would have given them grape shot, I bet.

I thought that I could not be mistaken at all about it.

Q. Had you grape shot on board? A. We had a gun, loaded with slugs or something of that sort.

Q. In fact then you were never boarded by a Customs or seizing officer? A. I was boarded by an officer who came for light money, at Little Canso, that same year.

Q. Did you pay the light money? A. No.

Q. Why? A. Because this man was not authorized to receive it.

Q What did you do? A. I hove him into his boat, of course, and got rid of him.

Q. You knew that the light money was due? A. Certainly; and I was willing to pay it, had the right man come for it.

Q. Did he represent himself to be a Custom House officer? A. Yes.

Q. Did you ask him for his authority? A. Yes.

Q. And did he show it? A. No.

Q. And then you threw him overboard? A. I told him he had to leave, and seeing he would not go, I seized him by the nape of the neck and his breeches and put him into his boat.

There is an express distinction made in his statements.

Mr. Foster:—You want to read only what you please of the whole story. Read on.

Mr. Thomson:—If Mr. Foster seriously thinks that I am wrong in saying that this man refused to pay the light-money, I will do so. The officer distinctly came to collect the light-money; and this man put the officer overboard, and into his boat. I will continue the quotation:—"He was bound to take me because I had landed a poor girl."

Q. Was this girl contraband? A. Yes, I suppose they called her so at any rate. I do not know that she is now in town, but she became lawyer Blanchard's wife afterwards. I merely took her on board as a passenger, and landed her. Afterwards I was fired at and chased by three cutters.

Q. For putting this officer overboard? A. No, I did not put him overboard but I put him into into his boat.

Q. In lawyer's phrase, did you gently lay hands on him? A. I put him in his boat in the shortest way. He stripped off and said it would take a man to handle him, but I made up my mind that he should not stop, though I did not want to fight; still I was quite able to take my own part. I talked with him and told him that I had merely landed a poor girl with her effects, a trunk and a band box, etc.; but this would not do him; when he came on board he asked: "Who is master of this vessel?" Says I, "I am for lack of a better." Says he, "I seize this vessel," and with red chalk he put the King's broad R on the mainmast. He wanted the jib hauled down in order to have the boat taken on board. We had not come to an anchor; but I told him that he would have to wait a while. Finally he came down below and I took the papers out of a canister; and being a little excited of course, in hauling off the cover a receipt for light dues, which I had paid that year, dropped on the forecastle floor. He picked it up and said he would give me a receipt on the back of it. Says I, "who are you?" He answered, "I am Mr. Bigelow, the Light Collector." Well, says I, "where are your documents." Says he, "I have left them ashore." Then, says I, "go ashore, you vagabond, you have no business here." Says he, "won't you pay me?" "Not a red cent," says I, "out with you." He cried out, "put the helm down."

Says I,, " put the helm up;" but he came pretty near shoving us ashore, as we were within 10 fathoms of the rocks. Says he, " who are you?" I said, " I am Mr. Pattullos." Says he, " you vagabond, I know the Pattullos." Well, says I, " then you must know me, for there are only two of us." Says he, " I will take you anyhow; I will have a cutter from Big Canso. There will be a man-of-war there: and if there is not a man-of-war, there will be a cutter; and if there is not a cutter, I will raise the militia, for I am bound to take you." I asked him if he meant to do all that, and he said he was just the man to do it. I seized him to put him back into his boat, and he stripped off and told me that it took a man to handle him; with that I made a lunge at him, and jumped ten feet. If he had not avoided me, I would have taken his head off his body. I then seized him and chucked him into his boat. Then three cutters came down and chased me.

Now, there is the whole story. It is perfectly ridiculous to suppose that the officer when he went down to collect the money, went down to seize the vessel.

Mr. FOSTER :—The whole of that recital is something which you introduced in your cross-examination.

Mr. THOMSON :—I certainly introduced it in my cross-examination. There can be no doubt about that at all. There were a good many disagreeable things which I introduced into my cross-examination of American witnesses; I was probably here for that purpose. It was hard to get at all that this gentleman had done; but I wanted to discover it, and there is the story as told by himself. Taking his story, according to his own account, it is this :—He and the officer went down into the cabin, and the officer supposed that he was going to pay the light dues. This man opened a canister, and a former receipt for light dues fell out. The officer was going to give him a receipt on this paper, when Pattilo asked, " Where is your authority," followed with, " Get out you vagabond," when he found that the officer had not his papers with him. In reference to Mr. Dana's uncalled for remarks reflecting upon the officers of cruisers, which from time to time have been engaged in protecting our fisheries against the trespasses of American fishermen, I deem it my duty to make a few observations. To the instructions issued in April, 1866 by Mr. Cardwell, Secretary of State for the Colonies, to the Lords of the Admiralty, I have already had the honour to call the attention of this Commission.

The spirit of forbearance and courtesy in which they were written, speaks for itself. No unprejudiced mind can fail to appreciate it. The instructions issued by the Dominion Government for the guidance of its own cruisers are nearly similar in form, and wholly similar in spirit to those issued by the Mother Country. And here I would remark that the Imperial Government does not appear to have entertained for Dominion Commissions the same contemptuous opinion which, unfortunately for us, has taken possession of Mr. Dana's mind.

You will see that each of the Imperial officers is advised to obtain, if possible, Commissions from the Dominion Government.

Mr. Cardwell says " Any officer who is permanently charged with the protection of the fisheries in the waters " of any of these Colonies may find it useful to obtain such a Commission "

Now, you will see that, under these instructions, no power of immediate seizure was given, although such power to seize existed under the convention of 1818, and under a statute of George III, passed to enforce that convention; yet so liberal was the British Government that they absolutely required cruisers, before seizing any one of these vessels, which might be found trespassing over the lines, to give a warning of two or three days, and sometimes of twenty-four hours, as the case might be. You can see at once what was the effect of giving these instructions :—Every American vessel unless she persistently remained in these waters, and fished contrary to law, must of necessity escape. If they were found fishing in prohibited waters, they were warned off, and told not to offend again, but they could not be seized, of course, unless they committed an offence contrary to that warning; and yet these officers are represented as if they were a body of naval freebooters. If you judge of their character from the language of Mr. Dana, you would imagine that they were a lot of pirates, who remained in their harbors, with fires banked and steam up, ready to rush out on unoffending fishing vessels, to catch and bring them into port, and then to divide the plunder. This is the most extraordinary language that, I think, was ever used to characterize a respectable body of men, or that will ever again be used, in any court, and especially in a high court of justice, such as this. The instructions state that :—

" American vessels found within these limits, should be warned, that by engaging, or preparing to engage in fishing, " they will be liable to forfeiture, *and should receive the notice to depart, which is contemplated by the laws of Nova Scotia, " New Brunswick, and Prince Edward Island,* if within the waters of one of those Colonies under circumstances of suspicion. " But they should not be carried into port, except *after wilful and persevering neglect of the warnings which they may have " received,* and in case it should become necessary to proceed to forfeiture, cases should, if possible, be selected for that " extreme step in which the offence of fishing *has been committed within three miles of land.*"

Mr. FOSTER :—What year is that?

Mr. THOMSON :—1866, April 12th. This was just after the expiration of the Reciprocity Treaty.

Mr. FOSTER :—Vessels were seized without warning.

Mr. THOMSON :—Eventually, this was the case, simply because it was found to be of no use to treat these fishermen in this lenient manner. It had no effect on them, if they could in any way possibly avoid the cutters. They took these concessions rather as a right than as a favor, and in every instance in which they were tried, took the advantage they conferred without showing any gratitude at all. They endeavored, at all hazards, to force themselves into these bays; and then eventually to force themselves into the prescribed limits; and so it was at last found necessary by the Dominion Government to give up the warning system. It was found, that to warn these vessels was simply to give them the right, the moment that they received warning, to sail out, and then the moment that the cutter turned her back to sail in again; that is to say, they saved themselves from being caught by a cutter at all. They received several warnings, I think, and even if they had only one, they had the chance to escape, and the result, of course, was that nothing at all was done towards repressing the evil. These instructions, therefore, had to be altered, and made more stringent; but nevertheless, it was still required that vessels should not be seized, except when caught *flagrante delicto*, and actually fishing, or preparing to fish, within the prescribed limit. In truth, to preserve these waters, as they ought to be preserved, the moment that a vessel has once entered the limit, and incurred forfeiture, no matter where she sails to afterwards, she should be liable to be seized, and ought to be seized in my humble judgment, and condemned, unless it could be clearly shown that the captain, when he entered such limit, supposed that he was not committing any breach of the law, and believed that he was four or five miles offshore, when in fact he was within the three mile limit. In such case, of course, no harshness should be extended towards him. I will show you, however, before I get through, that the American Government itself, having heard of these complaints—I dare say, very much in the language which Mr. Dana has thought proper to use on this occasion—sent down Commodore Shubrick to make enquiries into this matter; and you will find that Commodore Shubrick found that these stories were utterly unfounded.

A despatch dated September 9th, 1853, was as follows :—

[No. 23.]

"PRINCETON," AT PORTSMOUTH, N. H.,
September, 19, 1853.

SIR:—My despatches from the 1st to the 14th, inclusive, have informed the department of the movements of this ship up to the 16th of August.

After leaving Halifax, I ran along the coast of Nova Scotia to the Strait of Canso, which I entered on the evening of the 17th, and anchored at Sand Point. On the next day I anchored successively at Pilot Cove and Ship Harbor. At each of these places diligent inquiry was made of the masters of American vessels, and, at the last, of our consular agent, in relation to the treatment of our fishing vessels by the armed vessels of other nations, and no instance was learned of any improper interference. Some cases were reported of vessels having been warned off who were found fishing or loitering within three miles of the shores.

It was thought advisable to make particular inquiry in this strait, as it is the passage through which great numbers of vessels pass, and where wood, water, and other supplies are obtained; and although there were not many Americans in it at the time of our visit, I was informed by the consular agent that in the course of the last year eleven thousand vessels, of all kinds, were counted passing through both ways, and some must have passed in the night who were not counted.

From the Strait of Canso I went to Pictou. This port is the residence of the consul of the United States for the north coast of Nova Scotia, to whom complaints of interference would naturally be made, if any should be experienced within the limits of his consulate; but he had heard of none.

From Pictou I crossed over to Charlottetown, Prince Edward Island, and inquired into the case of the schooner "Starlight," seized by Her Majesty's steamer "Devastation;" the official papers in relation to which were forwarded with my despatch No. 15.

The "Fulton" having joined me at Pictou, accompanied me to Charlottetown, that some slight repairs might be made to her machinery, under the direction of chief engineer Shock. She was despatched on the evening of the 29th August, under instructions; copies of which accompany this.

Leaving Charlottetown, it was found necessary to anchor in the outer harbor of Georgetown, in order to make some repairs to the engine of the "Princeton"—the necessity of which was not discovered until after we had left Charlottetown, but which, fortunately, could be done by our own engineers.

On the 2nd September, at meridian, we anchored in Gaspe bay, Lower Canada, having, in the course of the night and morning, passed through many hundreds of fishing vessels, showing generally American colors. These were all fishing outside the bays. The ship passed slowly through them, with her colors set, but it was deemed best not to interrupt them in their fishing by boarding or running so near as to hail. If any one of them had complaint to make, communication could be easily had with the ship, and the slightest intimation of such a wish would have been immediately attended to, but none was made.

The "Fulton" was at anchor in the inner harbor. A copy of Lieutenant Commanding Watson's report of his proceedings, under my orders of the 29th ultimo, is with this.

Soon after I anchored at Gaspe, I was informed that the anchorage, which I had taken by advice of my pilot, was unsafe, if it should blow a gale from the east—of frequent occurrence at this season. No pilot could be found to take so large a ship into the inner harbor, and, as night was approaching, I got under way and put to sea with both vessels. It had now become necessary to replenish our coal, and I determined to go to Sydney, in Cape Breton island, for that purpose.

I arrived at Sydney on the 4th, the "Fulton" in company, and, after taking on board a supply of coal for each vessel, put to sea again on the morning of the 9th.

After a passage protracted by strong head winds, and a part of the time by thick weather, we anchored at St. John, New Brunswick, on the afternoon of the 13th.

A large number of persons, estimated at fifty thousand, were congregated at this place to witness the ceremony of breaking ground for the European and North American Railway. The occasion had brought the Lieutenant Governor of the province, Sir Edmund Head, to St. John. We received from the Lieutenant Governor, and the authorities of the city, the most cordial welcome, and every hospitality was extended to us, nationally and individually.

The absence from St. John of the consul for the United States prevented my getting any official information on the subject of the fisheries; but from no source could I learn that there had been any occurrence of an unpleasant nature; and by all persons, official and private, here as in the other provinces, a most anxious desire was expressed that the rights and privileges of the citizens of the United States, and of the inhabitants of the provinces, in relation to the fisheries, might be so distinctly defined, and so authoritatively announced, that there should be no room for misunderstanding, and no possible cause for irritation on either side.

I left St. John on the morning of the 17th instant, the "Fulton" in company, and anchored outside of this harbor on the evening of the 18th, in a dense fog. This morning we have succeeded in getting to a good anchorage, off Fort Constitution.

It is with great diffidence that, from the experience of so short a cruise, prosecuted, as is known to the department, under circumstances of unusual embarrassment, I offer a few suggestions as to the description of force most suitable for the protection of the fisheries, and as to the time most proper for its operations.

Some of the most valuable fisheries, such as those in Miramichi bay, Chaleur bay, and north as far as Gaspe, are carried on in small vessels and open boats, and close inshore. If, therefore, the privilege to fish in those bays is to be maintained by us, the vessels for that service should be small steamers of light draught of water. The shores of Prince Edward Island abound with fish of all kinds. The mackerel strike in early in the season, and can only be taken close inshore.

The fishing season around Magdalen Islands, through the Strait of Belleisle, down on the coast of Labrador, commences early in June. The herring fishing commences in George's bay, Newfoundland, as early as April, and continues about a month. After that, the fishing on that coast is only for mackerel and cod; and it is to be remarked, that where mackerel is found, cod is also abundant. These fisheries are carried on in vessels of larger size, but still of easy draught of water; and the vessels intended for their protection should also be of easy draught.

The coasts of Nova Scotia, New Brunswick, the south side of Prince Edward Island, Cape Breton, Newfoundland, and Labrador, abound in good harbors, some of them capable of receiving and accommodating large navies; but there are numerous harbors to which the fishing vessels principally resort, which will not admit vessels of heavy draught; and where the protected go, the protector should be able to follow. The narrow passages, the strong and irregular currents, and the frequent fogs and thick weather with which the navigator has here to contend, point emphatically to steamers as the best force for this service.

One steamer of suitable size for the commanding officer, and two or three of smaller size and easy draught, having speed and power, with light armaments, would be sufficient for all the purposes of this station. Coal, at a low price, and of suitable quality, could be contracted for at Sydney or at Pictou, both within the limits of their station; and the commanding officer having his headquarters at Portland or at Eastport, might control their movements, and make occasional visits to the different fishing grounds himself.

The establishment of such a squadron would, I know, give great satisfaction to the citizens of the United States all along the coast from Boston to Eastport; of this we had unequivocal evidence in our reception at every port where we touched. It would afford also an opportunity for the introduction into the navy of numbers of the hardy sons of New England, who, from rarely seeing a vessel of war, have imbibed unfavorable impressions of the public service. An infusion into the lower ratings of persons drawn from such a population would elevate the character of the service, and enable it to maintain a discipline founded on good sense, moral rectitude, and patriotism.

The smaller vessels should be—one on the coast of Labrador, about Newfoundland; one about the Magdalen Islands, Cape Breton, and the Strait of Canso; and the other from Pictou, Prince Edward Island, and up as far as Gaspe, Lower Canada—all to leave the United States by the first of June, and return by the last of September.

It would not be advisable for any of the vessels to remain in the Gulf of St. Lawrence after the 15th of September: the gales by that time become frequent and severe; sharp frosts commence, and the tops of the Gaspe mountains are generally covered with snow by the first of October. The north side of the Bay Chaleur has been known, I am informed, to be frozen to some extent by the middle of September.

I should do injustice to the excellent officer in command of the "Princeton," Commander Henry Eagle, if I failed to

make known to the department the able and cheerful assistance in the execution of my duties that I have received at all times from him, and from the accomplished officers under his command.

The "Fulton," Lieutenant Commanding Watson, has been most actively employed, a great part of the time under my own eye. She has been managed with great judgment; and I am under obligations to her commander and officers for the alacrity with which my orders have always been carried out.

The "Cyane" and the "Decatur," though cruising under my instructions, have not been with me. The reports of Commanders Hollins and Whittle are doubtless before the department; and, from my knowledge of those officers, I feel that they will be perfectly satisfactory.

Since writing the above, the report of Commander Hollins has been received, and is herewith enclosed.

I have the honor to be, sir, your obedient servant,

W B. SHUBRICK
Commanding Eastern Squadron.

Hon. J. C. DOBBIN, *Secretary of the Navy.*

There is not one word in the whole of this report which shows that anything had taken place for which there was cause for any complaint whatever; and Lieut. Commanding Watson, of the United States Navy, wrote the following despatch, addressed to Commodore Shubrick :—

U. S. STEAMER FULTON,
Gaspe, Lower Canada, September 2, 1853.

SIR: In accordance with your instructions of the 29th ultimo, I have the honor to report that I received on board at Charlottetown, Prince Edward Island, Major General Gore, commander-in-chief of Her Britannic Majesty's forces in Nova Scotia, and staff, hoisted the English flag at the fore, and proceeded to Pictou, where I landed them. General Gore expressed himself much gratified at your having placed the "Fulton" at his disposal.

After parting from you off the island of Pictou, I proceeded, according to your directions along the north side of the island, in Miramichi bay, Chaleur bay, and to Gaspe, where I was in hopes of meeting you. It was my intention to have gone further up the Bay of Chaleur; but a heavy sea induced me to run for Gaspe. While there, Her Britannic Majesty's steam sloop-of-war "Argus," Captain Purvis, came in. Captain Purvis immediately came on board, and an interchange of civilities took place on the most friendly and courteous terms. Captain Purvis states that he has not had the least difficulty with our fishermen, with one exception, and that so slight as not to be taken notice of.

On my way to this place, I passed between five and six hundred fishermen; and, in my conversation with those I spoke to, there appears to be the greatest harmony existing between them and the inhabitants.

On coming to anchor here, I waited on the collector and authorities of the port; and their statements tend to confirm my previous reports, that, so far from any dissatisfaction being felt at our fishermen, they are welcome on the coast, and nothing has yet transpired to alter my previously expressed opinion.

Very respectfully, I remain, your obedient servant,

J. M. WATSON,
Lieutenant Commanding, United States Navy.

Com. WILLIAM B. SHUBRICK,
Commanding Eastern Squadron.

Now, these are American official documents, which certify as to the treatment that the American fishermen had received at the hands of the cruisers up to that time. In order to show further what this treatment was, I will mention the case of the *Charles*, which was seized by the Captain Arabin, of the *Argus*, at Shelburne, on the 9th of May, 1823. Although this happened a long time ago, I cite it to show how the British Government treated these matters then and ever afterwards. The *Charles* was actually seized in the very act of fishing; and there could be no doubt about the right to condemn her. But the midshipman who was put in charge of her, while in the course of his passage from Shelburne to St. John, according to the instructions of Captain Arabin, stopped some other vessels which were fishing, and, I think, brought one or two of them into St. John. The *Charles* was then put in the Admiralty Court and condemned; but when the British Government learned what had been done, inasmuch as Captain Arabin had exceeded his instructions by using the vessel as a cruiser while *en route* from Shelburne to St. John, before her condemnation, not only gave her up, but also paid the costs of the prosecution, and the other two vessels which had been so taken,—whether they were liable to condemnation or not I do not know,—were also given up. This was the treatment which American fishermen received at the hands of the British Government.

Again, at Grand Manan, two vessels were taken by cruisers in 1851 or 1852—I think they were called the *Reindeer* and *Ruby*—or before that, because the account of this affair is found in the Sessional Papers of 1851 and 1852. They were actually taken in one of the inner harbors of Grand Manan; a prize crew was put on board, and they were sent to St. Andrews; but on their way up, as these two schooners passed Eastport, as they necessarily had to do, an armed force came out from Eastport, headed by a Captain of Militia, overpowered the crew, and took possession of them Correspondence ensued on this subject—to which I call your attention—between the British Ambassador and the American Secretary of State, in which it was pointed out by the former that this outrage had been committed on the British flag; but through the whole of this correspondence, I cannot find any apology was ever made, or that the British Ambassador's remonstrances on that subject were even answered.

I only see, in looking over the correspondence—also as given in the American sessional papers,—that a demand by the British Government for reparation, was made; they did not demand the punishment of these men, or even the restoration of the vessel; but simply demanded some acknowledgement for the outrage which had been committed on the British flag; and yet that was never made.

This conduct, I think, may be contrasted pretty fairly with the treatment which the Americans received at the hands of Great Britain, when Great Britain could have enforced the laws against them. The official list of the vessels that were seized, was put in evidence, I think. I now call your attention to it; you will find in looking over it, that in every instance where condemnation took place, there was no doubt that a breach of the law by American fishermen had been committed. There is one matter in this connection to which I desire to call your attention; it is to be found in the official correspondence, No. 17, and it throws some little light, I think, upon the extraordinary charges which Mr. Dana, I consider, has somewhat too hastily made. It is No. 17 of the official correspondence put in; it is a return of American vessels detained and prosecuted in the Registered Court of Vice-Admiralty, at Charlottetown :—

REGISTRY OF THE COURT OF VICE-ADMIRALTY,
CHARLOTTETOWN, October 6, 1852.

A RETURN OF AMERICAN VESSELS detained and prosecuted in this Court for a Violation of the Convention made between the Government of Great Britain and the United States of America in the Year A. D. 1818, and prosecuted in this Court.

Name of Vessel.	Date of Seizure.	Date of Condemnation.	REMARKS.
Schooner Florida, of Gloucester, U. S. America.....	3rd Aug., 1852.	7th Sept., 1852.	Detained by H. M. Schr. "Telegraph," Hon. H. Weyland Chetwynd, Commander, on the northern coast of P. E. I.
Schooner Union, of Brooklyn, U. S. America.....	20th July, 1852.	24th Sept., 1852.	
Schooner Caroline Knight, of Newburyport, U. S. America,	11th Sept. 1852.	* Not yet adjudicated.	Detained by H. M. steam sloop "Devastation," Colin Yorke Campbell, Commander, on the northern coast of P. E. Island.

* Subsequently condemned.

WILLIAM SWABEY, Registrar.

In addition to this return, the schooner *Golden Rule*, of Gloucester, U. S., was detained by the *Telegraph*, Lieutenant Chetwynd, and brought into Charlottetown. Before she was delivered over to the proper authorities, in terms of the Imperial Statute, Vice Admiral Sir George Seymour arrived in Her Majesty's steam sloop *Basilisk*, to whom the Master of the *Golden Rule* appealed, stating he was part owner of the schooner, and would be ruined if she was condemned. The Admiral on the 23rd August left authority with the Lieutenant-Governor to direct Lieutenant Chetwynd to liberate the schooner, provided the captain ackowledged the violation of the Convention, and that his liberation was an act of clemency on the part of the Commander-in-chief. Bartlett, the captain of the *Golden Rule*, left such an acknowledgment in writing, which was forwarded to Sir George Seymour, along with an addition on a question from the Lieutenant-Governor, that he had stood in shore to fish, mistaking the *Telegraph* tender for one of his countrymen's schooners.

A. BANNERMAN, Lieut.-Governor.

P. E. I., October 11, 1852.

Here is the case of a man caught in the very act, but who made his appeal *ad misericordiam*, and was permitted to have his schooner back again simply because he said he would otherwise have been ruined. This is the treatment which American vessels have received at the hands of British officers. The treatment which British officers received in return, is to be found recorded in the speech of Mr. Dana.

I will now pass to the next point. Mr. Dana, on page 74, says:—

"We were told that we were poisoning their fish by throwing gurry overboard, and for all that there were to be damages Now, these inflammatory harangues, made by politicians, or published in the Dominion newspapers, or circulated by those persons who went about through the Dominion obtaining affidavits of witnesses, produced their effect, and the effect was a multitude of witnesses who 'swore to those things, who evidently came here to swear to them, and took more interest in them, and were better informed upon them, than upon any of the important questions which were to be determined. When we came to evidence to be relied upon, the evidence of men who keep books, whose interest it was to keep books, and who keep the best possible books,—men who have statistics to make up upon authority and responsibility, men whose capital and interest and everything were invested in the trade, then we brought forward witnesses to whom all persons looking for light upon this question would be likely to resort."

A marked distinction is drawn, you will perceive, by Mr. Dana there, with regard to the witnesses called on behalf of Her Majesty's Government, as to credibility, and those heard on behalf of the United States. He refers to our witnesses in slighting terms; and says that they were brought here under the influence of inflammatory harangues, and articles published in Dominion newspapers, which Mr. Dana may have read, but which I never had the good or bad fortune to see. He states that they were brought here under that influence, and thus did swear to things which they appeared to know a great deal about. Now, I think that I can contrast the testimony given on the part of Her Majesty's Government with that given on the part of the United States, without fear of any damaging conclusion being drawn against our witnesses. And I put it to your Excellency and your Honors, whether during the long period that we have sat here, and witnesses on both sides have called,—a period extending over twelve weeks, at least,—one single witness called on the part of the British Government broke down under cross-examination; and I ask whether it can be with truth said that this was the result of the cross-examination of the American witnesses.

I consider that in many respects a number of the American witnesses appeared to great disadvantage; and I am surprised not only at Mr. Dana's remarks in this respect, but I am also surprised at his following up his remarks on this point by saying:—

"When we came to evidence *to be relied upon,—the evidence of men who kept books, etc.*"

Why, if ever there was a break-down that happened in this world, it was the break-down which Mr. Low made under the cross-examination of my learned and clever friend and colleague from Prince Edward Island, Mr. Davies. That man came forward to represent the fishing vessel owners of Gloucester, and the fish-dealers of Gloucester; and he brought forward their books,—or at least such books as they were pleased to show, and not the books we required to have, but their trip-books; and he put in statistics,—to which I will have the honor hereafter to call the attention of your Excellency and your Honors,—for the purpose of showing very small catches made in the Bay, and very large catches off on the American shore; and also for the purpose of showing that the catches in the Bay resulted almost in the ruin of those who sent vessels there, while they made large sums of money out of their catches taken on the American shore; but when under cross-examination by Mr. Davies, what was the result? It was this,—that those figures which were intended to establish, and which were brought forward here for the purpose of showing that state of facts, showed conclusively and proved directly the opposite.

Mr. Low, under Mr. Davies cross-examination, entirely broke down, and was compelled to admit that his figures proved the exact reverse of that which he had previously said and undertaken to prove; and the exact reverse of the pretended state of facts which his clients or his principals sent him here to prove. I am not misstating this matter at all. I will show you when these statistics come to be considered, and from the figures themselves, and from the very admission of Mr. Low himself, that this was the result. If there ever was a man who was utterly destroyed on cross-examination, it was Mr. David Low, the great statistician from Gloucester, who came up here intending to defeat us by cooked statistics, and manipulated figures.

My learned friend, Mr. Trescot, in the course of his observations, made a very humorous allusion to a time during the Revolution, when a schooner came down to Prince Edward Island, captured the governor and council,

and took them off and presented them to General Washington, who looked at them as curiosities, and then as Mr. Trescot says "Treated them as young codfish are treated, threw them back into the water, and told them to swim home again." Well, time brings its revenges, and the Premier of Prince Edward Island, I think, revenged that insult to his Island and his Government, for the great Low from Gloucester came down here, prepared to destroy, and bent upon destroying Her Majesty's case; but when he fell into the hands of my learned friend, Mr. Davies, I think that he revenged that insult to his Island. He captured Mr. Low, turned him inside out, and utterly destroyed his testimony; and taking him to the water,—if I may use Mr. Trescot's figure of speech, said: "Now, Mr. Low, I drop you down, and you had better swim back to Gloucester;" and he swam back to Gloucester as fast as he possibly could. But I will show that after he got there, he endeavored to retrieve his fallen reputation by sending down here affidavits, which were probably thought to be beneficial to the American case, but which I will have the honor to show, if they do benefit the American case, benefit it in this way; and that is that every important statement made under oath in these affidavits will conclusively prove a precisely opposite state of facts to that set forth in the affidavits which were fyled by the American Government in the earlier part of the case. If that be supporting the American case in any respect, I am quite ready to give them all the advantage that can accrue to them from it.

TUESDAY, NOV. 20, 1877.

The Conference met.

The closing argument delivered on behalf of Her Majesty's Government, was resumed by Mr. Thomson, as follows:—

When I left off last evening, may your Excellency and your Honors please, I had not the book in which the decision of the Queen vs. Keyn is reported. I have that book now, and, as I supposed, I find that my learned friend, Mr. Dana, was in error in intimating that the Common Law lawyers in that case were entirely afloat. I thought, from my recollection of the case, that the Judges who decided it were all Common Law lawyers, as I said yesterday, except Sir Robert Phillimore, a Judge of the High Court of Admiralty. I hold in my hand a report of the case, and I find that my recollection of it was accurate.

Mr. Dana, also, in his remarks, referred to the decision of the Judicial Committee of the Privy Council, given in the case of the Direct United States Cable Company vs. the Anglo-American Telegraph Company. It is reported in Law Reports Second Appeal Cases, 394. It was an appeal from the Supreme Court of Newfoundland to the highest Appellate Court in the Realm on matters either connected with the Admiralty jurisdiction of England, or with Colonial matters. This Court is composed of the Lord Chancellor for the time being, and of all ex-Chancellors, and there may be a number of them—and of several paid Judges, and quite a number of other eminent men besides—all or nearly all of them great lawyers. The judgment in this case was delivered by one of the ablest men on the English Bench. I mean Lord Blackburn, who was transferred from the Common Law Bench to the House of Lords, under a new Act which authorizes peers to be created for life.

Mr. Dana appeared to think that Lord Blackburn, in delivering this judgment, merely spoke for himself; but this was not simply his own judgment—it was also the judgment of the other judges who were associated with him. He simply pronounced it, that is all; and he undoubtedly wrote it, but all the judges agreed with him. He said—I cite from page 421:—

"There was a Convention made in 1818 between the United States and Great Britain relating to the fisheries of Labrador, Newfoundland and His Majesty's possessions in North America, by which it was agreed that the fishermen of the United States should have the right to fish on part of the coasts (not including the part of the island of Newfoundland on which Conception Bay lies)."

I may mention here that the simple question at issue was whether Conception Bay was a British Bay, and I think that it is 20 or 30 miles wide at the mouth."

"And should not enter any 'bays' in any part of the coast except for the purpose of shelter and repairing and purchasing "wood and obtaining water, and no other purposes whatever. It seems impossible to doubt that this Convention applied to "all bays whether large or small on that coast, and consequently to Conception Bay. It is true that the Convention would only "bind the two nations who were parties to it, and consequently that, though a strong assertion of ownership on the part of "Great Britain, acquiesced in by so powerful a state as the United States, the Convention, though weighty, is not decisive. "But the Act already referred to, 59 Geo. 3, ch. 38, though passed chiefly for the purpose of giving effect to the Convention of "1818, goes further. It enacts not merely that subjects of the United States shall observe the restrictions agreed on by the "Convention, but that persons not being natural born subjects of the King of Great Britain, shall observe them under "penalties."

Now, I think in regard to this case that if my learned friend had really taken time to read and consider this decision he would have seen that it goes further than he supposes.

MR. DANA:—I did read it.

MR. THOMSON:—Then you are laboring under a misconception in reference to its scope.

Before I pass to Judge Foster's argument,—and in point of fact this is part of his argument,—I want to call your attention to a complaint that was made—it struck me, very unnecessarily—by the counsel of the United States with reference to a law of 1836, contained in the Statute Book of Nova Scotia, which law shifts the burden of proof from the crown to the claimant of any vessel seized. At first sight it appeared to be unfair, but I believe that the revenue laws of every country—certainly the revenue law of England, from time immemorial—have contained that clause. and I think that the same is true of the revenue laws of the United States, as I will have the honor of pointing out hereafter. These laws in effect enact simply this: that with regard to any seizure made by a public officer in his public capacity, the burden of proof must lie on the claimant, and you must recollect

that this provision applies not only to the seizure of a vessel, but also to the seizure of any goods liable to seizure and condemnation. The law enacts that when the claimant comes into court, he shall be compelled to prove that all that may have been done—has been done legally. Well, that is fair enough, is it not? for within his cognizance lie all the facts of the case. He knows whether everything has been fairly done, and whether he has honestly paid the duties; and he knows—if we take, for instance, the case of a vessel which has entered the limits here—very well for what purpose she entered, and he can prove it. He knows that under this Convention fishing vessels can enter for certain purposes British waters; that is to say, for the purpose of getting wood and water, for the purpose of repairs, for shelter in case of stress of weather, and for no other purpose whatever. He knows that, and he can show therefore that although his vessel was seized within the limits, he was really in there for no other purposes than those prescribed by the Convention of 1818. Thus there was no great injustice put upon him. Besides this all public officers, while acting in the discharge of their duties, are supposed to have no private interest involved, and it would be very hard to subject them to the annoyance of actions, if even *prima facie* grounds are shown for acting as they did; the law, therefore, declares that no action shall lie under such circumstances, and even if it turns out that the seizure was strictly speaking illegal, nevertheless if the judge certifies that there was reasonable and probable cause for the seizure being made, the Plaintiff shall not recover costs. There is nothing unfair in that, is there?

Mr. Dana:—It is also prohibited to sue.

Mr. Thomson:—Well, they may be virtually prohibited from sueing at all, but I do not think that the Act says so. I am, however, quite willing to admit that this clause is just as bad as a clause prohibiting from sueing at all, because as the party cannot recover damages or costs on such certificate being given, it practically prevents him from sueing at all. I am quite satisfied, however, that he could not get the question before a Court, unless he had the right to sue.

Mr. Dana:—I believe that you are right about that. This is decided by the Court of first instance. The Court tries the question of seizure, and gives the certificate.

Mr. Thomson:—That is it, and it certainly practically prevents sueing at all; otherwise a person acting in the discharge of his duty would not be for a moment safe from annoyance. The moment the judge grants a certificate stating that there was reasonable and probable cause for the seizure, no suit can be further maintained.

Mr Foster:—Where there is probable cause for seizure, he cannot bring any action to recover any costs, nor any damages. What I would like to call your attention to is this: I think that you will be unable to find any statute of Great Britain or of the United States where this seizure by an executive officer is made *prima facie* evidence of the liability to forfeiture.

Mr. Thomson:—Well, we will see about that before I get through.

Mr. Dana:—The owner is not a party to that suit in which such certificate is given.

Mr. Thomson:—It is a proceeding *in rem* and the owner is clearly a party to it. I may explain to your Excellency and Honors who are not lawyers, that the proceeding *in rem* is one directly against *the property* and not against the person of the owner. He gets formal notice of the libel fyled by the Serving Officer, and has the right to appear and defend. If he does not, his property will probably be condemned. I say, therefore, that it is idle to assert that he is no party to the suit. Should he elect to bring a suit against the Seizing Officer he is of course the party Plaintiff.

Mr. Dana and Mr. Foster have both pointed to the Bond for Costs required to be given by a claimant of property seized, and characterizes the law requiring it to be given as oppressive and unjust. Let is see why this bond is required.

The proceeding *in rem*, as I have already stated, is not against the owner of the goods *personally*, but against his *property*. If he chooses to contest the legality of the seizure by resisting a condemnation, he ought to be made liable for costs in case of failure. But he cannot be made so liable unless he gives his bond to that effect. Where is the oppression or the injustice of this rule? Without it the Government would be forced to contest at its own expense every seizure made by its officers.

I am surprised at this objection to our law being raised by legal men, and your Excellency and your Honors will no doubt be surprised when I assure you that the law of the United States on this subject is similar to our own as I shall proceed to show, to the entire satisfaction, or dissatisfaction, of my learned friends on the other side.

I will now read from the Revised Statutes of the United States at page 171, Section 909:—

"In suits or information brought where any seizure is made pursuant to any Act providing for or regulating the collection of duties on imports or tonnage if the property is claimed by any person, the burden of proof shall lie upon such claimant."

Here is the United States statute; and I am surprised, I must confess, at United States lawyers making any charge against British legislation when their legislation on the same subject is in no wise different. The clause thus concludes:—

"Provided that probable cause is shown for such prosecution, to be judged of by the Court."

There is no difference whatever between our law and theirs on this subject.

Then again on page 182 of the same volume, section 970, it says this:

"When in any prosecution commenced on account of the seizure of any vessel, goods, wares, or merchandize, made by any Collector or other officer under any Act of Congress authorizing such seizure, judgment is rendered for the Claimant, but if it appears to the Court that there was reasonable cause of seizure the Court shall cause a proper certificate thereof to be entered, and the Claimant shall not in such case be entitled to costs, nor shall the person who made the seizure, nor the prosecutor, be liable to suit or judgment on account of such suit or prosecution; provided, that the vessel, goods, wares, or merchandize be, after judgment, forthwith returned to such Claimant or his Agent."

This clearly proves what is done in case the Seizing Officer is in the wrong, and when consequently the property seized has to be restored, and if that enactment is not on all fours with ours I do not know what is.

Mr. Foster:—There is no such provision for the return of the property in your Act.

Mr. Thomson:—I am really surprised at Judge Foster saying so. What is the result of a proceeding *in rem*? Can there be any doubt about it at all? It must result in a judgment one way or the other. There are only two judgments possible in a proceeding *in rem*; judgment of condemnation, or judgment of acquittal, which restores the property at once; while it is transferred to the Government in case of condemnation. I have not time to look for the matter in this immense volume, but I have here another book which shows that a bond must be given in these cases in the United States as well as here. I think that the United States look after their interests about as well as any other nation; and I believe that in the volume which I now hold in my hand it will be found that a bond has to be given. This volume contains the customs regulations of 1874, and Epitomes of the different Acts as I presume for the guidance of the Customs officers. In Art. 842, page 397, it says that "seizures may be

made by any private person, but at the peril of responsibility in damages in case the seizure is not adopted by the Government." Well, this is a most extraordinary law, and it altogether eclipses the English or our law on the subject.

In case the act is adopted by the government such person is secure from action, or, in other words, any American citizen who chooses to make a raid against any person who has committed any infraction of the customs or other laws of the country, can do so, and the latter cannot bring an action against him if the government chooses to adopt his case. It is further stated on page 398.

"From that danger officers of customs are protected by law in all cases where reasonable cause of seizure shall appear.
"It is immaterial who makes the seizure, or whether it was irregularly made or not, if the adjudication is for a sufficient cause."

On page 402, art. 859, it is stated, and there is cited in the margin an Act of July 18th, 1866; so you see that this "inhospitable legislation" is of very recent date:—

"Any person claiming the property so seized; or any part thereof, may within the time specified file with the Collector a claim, stating his or her interest in the articles seized, and deposit with such Collector or other officer a bond to the United States in the penal sum of two hundred and fifty ($250) dollars with two sureties, to be approved by such collector, conditioned that in case of the condemnation of the articles so claimed, the obligors shall pay all the costs and expenses of the proceedings to obtain such condemnation."

And art. 860 says:—

"But if no such claim shall be filed nor bond given within the time specified, such Collector shall give not less than fifteen days' notice of sale of the property so seized by publication in the manner before mentioned, and at the time and place specified in such notice, he shall sell at public auction the property so seized, but may adjourn such sale from time to time for a period not exceeding thirty days in all."

Now I think that I have conclusively shown for the benefit of my learned friends opposite that had they looked at the "inhospitable laws" of their own country, they would have hesitated before making the attack which has been directed against ours. I said last night that it would be my duty to point out to you some extraordinary discrepancies which are to be found between the two sets of affidavits which have been fyled by the United States; and the pledge which I then gave I shall now proceed to redeem. I shall be glad indeed—I say it in all sincerity—if my learned friends opposite can, as I am pointing out these discrepancies, get up and say that I am mistaken, and show me how they can be reconciled, for I am desirous of not making one single statement which is not borne out by the facts. If, therefore, the learned agent of the United States, or either of the learned counsel who are associated with him, can say that I am wrong, before I get through, I shall be quite willing to permit them to interrupt me and point out my error; I will then at once withdraw my statements and apologise, if necessary, for having made them; but at present I cannot see how they can be explained at all.

In order that I may be understood on this point, I think that it would be advisable that your Excellency and your Honors should have before you the two statements, Appendix M and Appendix O. Appendix M contains the set of affidavits which was first fyled by the United States, and Appendix O contains the later body of affidavits which they fyled in this case.

Now, in Appendix O, you will find—towards the middle of the book—a set of statements, which purport to have been taken from the books of Gloucester firms, they were produced by Mr. Babson, and fyled by Mr. Foster, on Oct. 24th, 1877.

Now, I take the finished statement made by David Low and Company, and this David Low is the Major Low who made such a pleasant figure before the Commission.

MR. FOSTER:—He is an entirely different person, Mr. Thomson.

MR. THOMSON:—Are you sure about that? I think not.

Now, if you look at page 110, Appendix, M. you will find affidavit, No. 70, made by the firm of David Low & Company. They state that the number of trips made to the Bay of St. Lawrence in 1872, was five; and that the number of barrels of mackerel taken was 1,250. In 1873, they say, that there were five trips made, and that the number of barrels of mackerel caught was 750 In 1874, they swear that two trips were made, and that 440 barrels were taken. In 1875, they say only one trip was made, and 200 barrels caught, while in 1876, no trip was made at all.

Now, let me turn your attention to the statements fyled concerning the years 1872, 1873, and 1874, for this firm in the second set of affidavits contained in Appendix O. What do they here say for 1872? David Low and Company have been pleased to declare here that in 1872, they had 3 vessels in the Bay, and took 460 barrels of mackerel. In 1873, they had 8 vessels, which took 1,944 barrels. In 1874, 4 vessels which took 1,328 barrels. In 1875, 1 vessel, which took 205 barrels; shewing a discrepancy between the two affidavits, of 1,297 barrels. I regret to say that this is no solitary instance, as you will see if you will kindly follow me while I state the result of these conflicting depositions.

I objected as your Excellency and your Honors recollect at the very outset on behalf of Her Majesty's Government, against the system of putting in these affidavits at all. I have no faith in them—no, not the slightest. I wanted the matter to be tried by living witnesses, who should go on the stand there, tell their story and be cross-examined; and then if they came out of the ordeal of cross-examination untouched and unscathed, their evidence would be entitled to weight; but these men can sit down and make up what statements they like, they have not to submit to any cross-examination. No eye can see what they are about except the eye of the Almighty.

Now, I have shown by the figures which appear in the affidavit, No. 70, and the statement in Appendix O, that a discrepancy of 1297 barrels exists between these statements, the latter of which was fyled by Mr. Foster in October last, only last month; and I say that these figures cannot be reconciled in any way—or, at least, if this can be done, I will be very glad to hear it.

Mr. FOSTER:—You know all that is to be said about that is this, the last statement is more favorable to you than the first one; and it was prepared with great care.

MR. THOMSON:—It is an extraordinary fact that both of these statements were produced from the books of David Low & Co., and I can only say that when persons fyle two statements, one of which is diametrically opposed to the other, that it is very little to the credit of the person who fyled them to say that the last statement is more favorable to the persons they were intended to injure than the first.

MR. TRESCOT;—There was no intention to injure.

MR. THOMSON:—If a statement was put forward with a view of making a correction it would be another matter, but this is not the case, and the next one to which I will call your attention is to be found in letter L Appendix O, affidavit No 75, both made by same parties which says that the number of trips which were made by the vessels of John F. Wonson & Co in the Bay of St. Lawrence, in 1872 was three, in which trips they got 500 barrels, while in this statement in Appendix O, they say that in 1872 they took in the Bay of St. Lawrence 475 barrels, showing

a discrepancy of 25 barrels. You may say this is a small number, but recollect it is said that these two statements were taken from the books of the firm; and these are the books which we were asked to go to Gloucester and examine,—and this matter I beg to call to the attention of your Excellency and your Honours.

In 1873, they say, in this affidavit, that two trips were made and 450 barrels of mackerel taken, while in this statement, Appendix O, they say that in 1873, four trips were made and 980 barrels taken.

In 1874, according to affidavit No. 75, they say that 510 barrels of mackerel were taken in two trips; and in the statement, Appendix O, they say that three trips were made and 620 barrels taken.

In 1875, they say, in the affidavit No. 75, that one trip was made, and 120 barrels taken; and in 1875, according to the statement contained in Appendix O, two trips were made with a catch of 203 barrels; or, in other words, there exists a discrepancy of 698 barrels between these two statements. One or the other of them must be untrue.

Mr. Foster:—That gives the same result: the latter statement was more carefully prepared and is more favorable to you than the former.

Mr. Thomson:—You will find that some of these statements are just the other way—so that argument will not help you. My object is not to show which set of affidavits is more adverse or more favorable to the United States, or which is more favorable to Canada or England; but it is to shew that these statements cannot be relied upon. They have been put in here for a purpose, but what that purpose is, of course I do not know.

I will now pass on and examine the next statement to which I propose to call your attention. If you look at the statement, which appears on the next page of Appendix O, and the corresponding affidavit, which is No. 54, you will see that it is stated in the latter that over the signature of Samuel Haskell, that in 1872, four trips were made into the Bay of St. Lawrence, and 1,100 barrels of mackerel taken. While in the statement contained in appendix O, it is represented, that they got none at all in the Bay of St. Lawrence.

This is an instance where the idea which Mr. Foster has mentioned, is reversed.

In 1873, it is stated in the affidavit, No. 54, that two trips were made and 420 barrels of mackerel taken and in 1873, they are pleased to say in the statement, Appendix O, that four trips were made in the Bay and 672 barrels taken. Here the catch of 672 barrels is admitted, while in the other affidavit that catch is represented as having been 420 barrels.

In 1874, they say in affidavit No. 54, that they took 383 barrels in the Bay of St. Lawrence, while they admit in the last statement, Appendix O, that the catch in the Bay that year was 720 barrels, taken in two trips. In 1875, they say, none were taken, and in 1876, also none. Now there is a discrepancy of 911 barrels between, these two statements which are utterly irreconcileable.

If you will now pass over to Appendix O, letter R, to the statement of Dennis and Ayer—the corresponding affidavit is No. 59—you will find that Dennis and Ayer say that "since the Washington Treaty, so called, has been in effect our vessels have been employed as follows;" since 1871, they state that they made six trips in the Bay of St. Lawrence and caught 1800 barrels of mackerel, while in 1871 according to this statement, Appendix O, they took 2,585 barrels of mackerel in the Bay of St. Lawrence. In 1872, they say, in this statement, Appendix O, that the catch in the Bay of St. Lawrence was 2,287 barrels; in 1873, 2,504 barrels; in 1874, 2,455 barrels; in 1875, 116 barrels, and in 1876, 136 barrels; contrasted with the catch of 1800 barrels according to affidavit No. 59. If the figures are rightly given your Honors will see that for that period their catch was 10,083 barrels, that is to say—they caught in the Bay of St. Lawrence 10,083 barrels of mackerel according to this statement which was fyled last October, while they swear in their affidavit, No. 59, that this catch amounted to 1800 barrels.

Mr. Trescot:—This number was put in for six trips.

Mr. Thomson:—Oh, no. If you look at the head of the affidavit you will observe it is stated that—

> 'Since the Washington Treaty, so-called, has been in effect, our vessels have been employed as follows."

And again they swear to having made six trips during that time.

Mr. Trescot:—During which they got 1,800 barrels.

Mr. Thomson:—But it turns out that they made a great many more trips during this period, and caught 10,083 barrels of mackerel.

Mr. Trescott:—They are only credited with having made six trips.

Mr. Thomson:—Then Mr. Trescot wishes your Excellency and your Honors to understand that although the heading of this Affidavit is that it purports to be a statement of all the trips made since the Washington Treaty up to the time when the affidavit was made, it is in fact a *suppressio veri* and that they only swear to six trips.

Mr. Trescot:—I do not say anything about it. I have not as yet had a chance to look at it.

Mr. Thomson:—A discrepancy at all events exists between the number 1,800 barrels and the number 10,033 barrels, and a difference of 8,283. That is against us this time; and, moreover, this is a pretty large sum. The first affidavit was entirely against us, as they say in it that their catch in the Bay was only 1,800 barrels.

Mr. Foster:—I have already called your attention to the fact that the last statements are more correct than the earlier ones.

Mr. Thomson:—What must be the character of these books, when this gentleman who sends this last statement, swears that it was taken from them? What can be the character of these books, or the character of the men who have made up this statement from the books, and sent in such an affidavit as No. 59, from which I have just read. It is either a gross attempt to deceive the Commission, or else the books are wholly inaccurate and unreliable.

If your Excellency and your Honors will now look at letter T, to which I call your attention, you will find the statement of James Tarr & Bro.; the corresponding affidavit in appendix, M. is No. 72. It is stated in affidavit, No. 72, that the number of trips made in the Bay of St. Lawrence, in 1871, was four, and the catch 1,287 barrels of mackerel, while, according to this other statement, in 1871, they made three trips with a catch of 1054 barrels. In 1872, two trips were made according to the affidavit, No. 72, and 838 barrels were taken, while in 1872, two trips were made according to this statement, appendix O, with a catch of 727 barrels only. In 1873, according to the affidavit, four trips were made, and 672 barrels were caught, while in 1873, according to this last statement, the catch of mackerel in the Bay of St. Lawrence, was only 660 barrels. In 1874, three trips were made according to affidavit, No. 72, with a catch of 1,124 barrels, while in 1874, according to this last statement, they only caught 774 barrels in the Bay of St. Lawrence, thus cutting down the former statement very materially. In 1875, they say they got nothing in the Bay of St. Lawrence, and in 1876 they say in the affidavit, that they caught 190 barrels of mackerel, while in the statement, Appendix O, they state that in 1876 their catch in the Bay amounted to 197 barrels. Now these two affidavits cannot be reconciled,—the discrepancy is too great.

The next one in the list to which I will direct your attention is letter U. and the corresponding affidavit is No.

74; made by Clark and Somes. They say that "since the Washington Treaty, so called, our vessels have been employed as follows:" and then state that the number of trips which they made in the Bay of St. Lawrence in 1872, was four with a catch of 812 barrels of mackerel, while in this statement they declare that in 1872 they made nine trips to the Bay and got 2189 barrels—2189 *against what they are pleased to put down in Affidavit No.* 74, *as* 812. They swear, in fact, in the Affidavit—which was sworn to on the 6th of July last; that they only caught 812 barrels of mackerel in the Bay of St. Lawrence in 1872, while in this other affidavit they swear that their catch during that season in the Bay amounted to 2189 barrels; the discrepancy is tremendous.

Then in 1873 they say that they made four trips to the Bay and took 680 barrels, while in 1873 they admit in this other statement that they made seven trips and absolutely got 2,333 barrels. In 1874, they say in affidavit No. 74, they made two trips to the Bay and obtained 300 barrels, while in 1874, according to the statement in Appendix O, they made four trips and got 1,407 barrels. In 1875 they say that they got none in the Bay, and in 1876 60 barrels, while in this other statement they represent that their catch in the Bay in 1876 was 51 barrels. Now, the discrepancy between these two statements amounts to 4,128 barrels; and this is the kind of testimony on which the United States expects to get an award!

MR. TRESCOT:—It is still in your favor.

MR. THOMSON:—We will now turn to the very next page, Letter V, Appendix O. The corresponding affidavit is No. 55. Joseph Friend here makes the same statement which I have already cited, that "Since the Washington Treaty, so-called, has been in effect, our vessels have been employed as follows;" and he states that the number of trips made in the Gulf of St. Lawrence in 1872 was four and the catch 1,500 barrels of mackerel, while in 1872 only one trip was made and only 163 barrels taken, according to the last statement found in Appendix O. Evidently that was not done with the intention of helping the British case much. Then we find it stated that in 1873 three trips were made to the Bay, according to affidavit No. 55, and 1,200 barrels taken; while in 1873, according to this last statement, one trip was made, when only 145 barrels of mackerel were taken, cutting down everything. In 1874 they admit by the first affidavit getting 220 barrels in the Bay, while here they admit taking that season 201 barrels. There is a discrepancy between these two statements of 2,411 barrels—the number represented in this last statement being so much less than what they admitted in the first affidavit.

While I am upon this subject of these first affidavits, I will call your attention to one feature which runs through the whole of them, and which may possibly account for the very extraordinary testimony which has been given on the part of the American Government by the American witnesses with reference to the value of our inshore fisheries. *They swear that these in-shore fisheries are worth nothing.* You may recollect that during my cross-examination of Mr. Pattilo, I asked him the question What do you mean by saying that they are worth nothing? I suppose that this is the case because the fish are uncaught, and he answered—yes; that is the reason. In other words, he meant that swimming fish are of no value; and that was put forward in fact by some of the opposite counsel, I think, in the course of their argument.

Through all their affidavits this very same doctrine is maintained. I think that there is not one of them which does not contain the same statement. Select any one of them and you will see it is stated that the actual value of the fish in the water before they are taken is nothing. This is placed near the bottom of the statement; and it is contained in everyone of those affidavits. It is declared—"the actual value of the fish in the water before they are taken is nothing," and "the actual value of the mackerel in the water before they are taken is ditto."

We will now look over, if the Commission pleases, to B. B. the statement of Leonard Walen, the corresponding affidavit is No. 66. I do not mean to say that I have noticed all the discrepancies which are contained in these affidavits, I do not think that I have done so, as we have not had the time to examine them with sufficient attention. Leonard Walen, in his affidavit, No. 66, states that the number of trips made to the Bay of St. Lawrence in 1872 was two, and in 1873 one; and that on the trips made during these two seasons—1872 and 1873 he took 900 barrels of mackerel. Now on looking at his statement which is fyled here in Appendix O, I find that for 1872 and 1873 he absolutely swears that no trips were made to the Bay during these two seasons, and that no mackerel were caught there at all by him. How do you think that this gentleman would figure if he was brought up here and put to the test of cross examination on that stand?

Taking the next statement, C. C., the statement of William S. Wonson,—the corresponding affidavit is 64. He states that the firm of Wonson & Company "since the Washington Treaty, so called, has been in effect, have employed their vessels as follows."

In 1872, they made two trips to the Bay and caught 350 barrels of mackerel according to Affidavit No. 64, while in 1872, according to this last statement, not a single trip was made to the Bay by any of their vessels, as you see. In 1873, they say that two trips were made, when they got 400 barrels; while in 1873, according to the last statement, they caught in the Bay of St. Lawrence 923 barrels. In 1874, according to affidavit No. 64, 325 barrels, and according to Appendix O, 885 barrels. In 1875, they swear in their first affidavit, they made two trips to the Bay, and got 300 barrels; and in 1875, they declare in this last statement, that they made but one trip and caught 156 barrels. In 1876 they made one trip to the Bay, as they swear in their first affidavit, and caught 150 barrels of mackerel, while in this last statement they say that they got none at all in the Bay in 1876

I think I might go on if I chose, but it seems to be running them almost to the death to follow up this subject. These are affidavits obtained from persons whom they took care not to bring here to be examined.

There is another matter to which I wish to call your attention, in connection with these affidavits, to show how peculiarly they have been prepared. I do not at all seek to quarrel with the decision which was given by this Commission some time in September last, by which you excluded from the consideration of the Court the question of the value of the privilege which the Americans enjoyed, of buying bait and ice, and of transhipping cargoes. It was contended with great force by my learned friends on the other side that those privileges did not fall within the provisions of this Treaty; and I contended on behalf of Her Majesty's Government, that at all events in the view of that Government they did fall within the provisions of this Treaty; but of course if the American Government put a different construction upon it, and accepted the exercise of these rights at merely our will and pleasure, I thought that the consequences would be worse to them than to us. Your Excellency and your Honors adopted the view of the American Government on this point and ruled that those privileges did not fall within the province of this Treaty. As a matter of interest, now, perhaps, only historic because I do not ask you to reverse your decision on that subject I wish to call your attention to the fact that the United States at one time held a very different opinion from that which was here put forward by my learned friend Judge Foster, and his able co-adjutors. If you look at Question No. 29 in all these affidavits, you will observe a peculiar fact—a great number of these affidavits are prepared by question and answer, and they were taken a number of years ago, for some of them are dated as far back as 1873 and 1872, and possibly previously.

MR. FOSTER:—Those were taken in reply to a series of questions propounded by the Treasury Department.

MR. THOMSON:—Now, the Treasury department is a governmental department of the United States; and this question No. 29 is repeated in each affidavit. Wherever in these affidavits you find that number, you find the same question, although you will find divers answers given to it. The question is as follows:—

Do American fishermen gain, under the Treaty of Washington, any valuable rights of landing to dry nets and cure fish, or to repack them, or to tranship cargoes which were not theirs before? if so, what are those rights, and what do you estimate them to be worth annually in the aggregate?

And the answer of this particular witness in the first affidavit is :—

"I do not know how valuable the privilege granted by the Treaty of Washington may prove."

That is the question which is put throughout, and I say that this is the best evidence you can have in support of the view that the United States entertained at the time when these questions were framed; a very different opinion from that which they entertain now with reference to the privileges which they obtained under this Treaty.

I made in an earlier portion of my address some remarks with respect to the little value that is to be attached to affidavits, as a rule; and I think that I have exemplified the validity of my contention tolerably well.

Let me now turn your attention to two American affidavits, numbered 18 and 19. (Appendix M.) Look at question 11 in No. 18. It is as follows:

"Q. Will the admission of Canadian Fishermen to our in-shore fisheries cause any detriment or hindrance to the profitable pursuit of these fisheries by our own fishermen; and if so, in what manner, and to what extent annually? A. It will probably be a detriment to our markets to the amount of Two Hundred Millions."

On page 45, No. 19, the same question is put, and it, with the answer, is as follows :—

"Q. Will the admission of Canadian fishermen to our in-shore fisheries cause any detriment or hinderance to the profitable pursuit of these fisheries by our own fishermen; and if so, in what manner, and to what extent annually? A. It will. Probably a detriment to our markets to the amount of Two Hundred Millions."

We assumed at first that this answer was probably a misprint, but on referring to the originals which I hold in my hand, I find that this estimate, *two hundred millions*, is not only here in black and white, but also that it is not put down in figures; it is set down in plain legible handwriting; that such admission will be "probably a detriment to our markets to the amount of Two Hundred Millions."

Now, if we only value our fisheries at the same rate, I presume that they must be worth, for the twelve years in question twenty-four hundred millions. So much at present for these affidavits.

I will next turn my attention to Judge Foster's argument. The argument of the counsel opposite upon all the salient points of the case of necessity had to be the same; though they were clothed in different language and viewed from different stand-points, they were substantially the same: and I select Judge Foster's argument, not because these arguments were not put forward with great force by Mr. Dana and Mr. Trescot, but I select Judge Foster, simply because he is the accredited agent of the United States; and therefore, in that respect, and in that sense, his arguments are entitled, I suppose, to greater weight.

I think the first point I will have to call attention to is on page 37 of Mr. Foster's affidavit, in which he says :

MR. FOSTER :—You speak of my affidavit; I did not make any affidavit.

MR. THOMSON :—I intended to say Mr. Foster's speech. I should be very sorry to suppose Mr. Foster would make an affidavit such as this. It is an admirable argument on behalf of a very bad cause, but I don't think he would like to swear to it. Mr. Foster stated, in speaking of the affidavit of the British witnesses from Prince Edward Island, that they had been made on the assumption that the three mile line was a line outside a line drawn from East Point to North Cape. Now, there is no evidence of that. There is no evidence that the Bend of Prince Edward Island was ever claimed to be a Bay from East Point to North Cape.

MR. FOSTER :—Yes, there was.

MR. THOMSON :—At all events you can find in no official correspondence any such view, and I do not, as Counsel for Her Majesty's Government, present any such view now. I refer to this matter because, based on that theory, Mr. Foster made what I think was an unfair charge against the Prince Edward Island affidavits. He says in his speech, page 37 :—"The affidavits from Prince Edward Island, were drawn upon the theory that, that is the rule, and in two or three of these I found it expressely stated, "that all the mackerel were caught within the three mile line, that is to say, within a line 3 miles from a straight line drawn from East Point to North Cape."

But there were only two affidavits that could by any possible construction be made to bear such a meaning.

MR FOSTER :—Look at McLean's affidavit, page 42.

MR. THOMSON :—Yes, you referred to him by name. Now let me see what he says,—although even if one of them did make his affidavit upon that assumption it would not be a very important matter.

MR. FOSTER :—My argument was that they were all made in answer to the same series of questions, and the only possible interpretation of those questions is that such was the view entertained.

MR. THOMSON :—These affidavits were drawn up in answer to no questions whatever. There were no questions put to these people. They were substantive affidavits, drawn up, not by one man or by one hand.

MR. FOSTER :—Compare them, and you will see that every man answers in the same paragraph of the affidavit to the same question.

MR. DAVIES :—No, that is not the case.

MR. FOSTER :—Try them.

MR. THOMSON .—I will try McNeil. He says, in section four of his affidavit :—

4. "That the fish are nearly all caught close to the shore, the best fishing ground being about one and one half miles from the shore. in October the boats sometimes go off more than three miles from land. Fully two-thirds of the mackerel are caught within three miles from the shore, and all are caught within what is known as the three mile limit, that is within a line drawn between two points taken three miles off the North Cape and East Point of this Island."

He draws the distinction at once. He says two-thirds were caught within three miles of the coast, that is, following the contour of the shore; but if you are going to draw a line from point to point, and take the three mile line as a line outside of that, then they were all caught within that line. But you see that, for the purpose of our case, the fact that two-thirds were caught within three miles of the contour of the coast, is all that is necessary. There were only two affidavits, I think, that had any allusion of this kind.

MR. FOSTER :—See McLeod's affidavits, page 218.

MR. THOMSON :—In the 6th section of McLeod's affidavit he says :—

6. "That nine-tenths of our mackerel are caught within one and one-half miles from the shore, and I may say the whole of them are caught within three miles of the shore. There may be an odd catch of mackerel got more than three miles from shore, but that does not often happen. The greater part of the codfish caught by hand-line are caught at from two to five miles from the shore, and all the codfish caught by the trawl or set-lines are caught within three miles from the shore. There are no mackerel or codfish at all caught by the boats outside of the three-mile limit—that is, outside of a line drawn from points three miles off the headlands; while the herring are all caught close inshore, within two miles of the shore.

There is nothing in that. It has been very honestly put by the witness. He says nine-tenths of the fish were caught within three miles of the shore.

It is a pure assumption on the part of Judge Foster that this line he refers to is a line drawn from the headland formed by East Point to the headland formed by North Cape.

MR. FOSTER:—What other headlands are there?

MR. THOMSON:—There are headlands formed by the indentations along the coast; and he refers to them. It will be found, as I have stated, that the witnesses referred to draw a clear distinction. They say that two-thirds or nine-tenths of the fish, as the case may be, are caught within three miles of the shore, but that if you draw a line three miles outside of the line from North Cape to East Point, they are all caught within such a line.

At page 39 Judge Foster introduces the inshore fishery question in this way:—

"We come then to the inshore fishing. What is that? In the first place there has been some attempt to show inshore "halibut-fishing in the neighbourhood of Cape Sable. It is very slight. It is contradicted by all our witnesses."

I take leave to join issue with him on that statement, and I call attention to page 439 of the British testimony, where he will see what the evidence is. I am obliged to call the attention of the Commission to this, because Mr. Foster treated it as a matter of course, as he did the case of Newfoundland. On page 439 William B. Smith, of Cape Sable Island, is asked, and answers as follows:—

"Q. With regard to halibut fishing—is there any halibut fishing carried on near Cape Sable Island? A. Not by British people. The Americans fish there.
Q. Every year? A. Every year regularly.
Q. What is the number of the fleet which come there to fish for halibut? A. I have seen as high as nine sail at one time. I should suppose there was from 40 to 60 sail.
Q. Are the vessels cod-fishers at other times of the year? I think they are. During the latter part of May and June they fish for halibut; then they fish for cod until October, and then for halibut.
Q. In the spring and fall they fish for halibut, and in the summer for cod? A. Yes.
Q. Where do you live? A. On Cape Sable Island.
Q. Can you see the fleet fishing for halibut? A. Yes.
Q. Are they right within sight from your door? A. Yes. I can count the men on deck with an ordinary glass. I counted at one time nine sail at anchor fishing there."

At page 440 he is asked, just at the top of the page:—

"Q. How far from the shore are those Halibut caught? A. From one mile to two and a half or three miles perhaps off.
"Q. They are caught in shore. A. Near my place they fish within one mile and a half of the shore in 18 fathoms water."

Now here is the evidence of a credible witness, a very respectable man, whose testimony was not shaken in the least by cross-examination.

Cunningham gave evidence, which will be found on page 407, to the same effect.

MR. FOSTER:—Have you got through with these gentlemen?

MR. THOMSON:—Yes, because I am going to show how you attempted to answer the whole of that testimony

MR. FOSTER:—Shall you not want an observation upon the one you have referred to? It is this: If you follow the testimony through you will see that this witness, William B. Smith, testified that there was one spot where there was eighteen fathoms of water, and that was the spot where they caught the halibut. It turned out that upon the chart that depth could not be found. In reply to the question whether he could name any person who had caught halibut there within the distance he had named in eighteen fathoms of water, he gave us the name of one vessel, the *Sarah C. Pyle*, Captain, Swett (as it is in the Report) of Gloucester; and being asked if he is a halibut fisher, he says he thinks he is.

MR. THOMSON:—When Smith was under cross-examination the question was put to him whether there was eighteen fathoms of water in the place where the halibut was caught, and he said there was. A chart was placed in his hand, and whether he looked at it or not I do not know, and I do not care. It was said to him by the Counsel for the United States, "Look at that chart and you will find no such depth as eighteen fathoms." He said, "I have known it all my life time; I know there are eighteen fathoms there." And while the American case was going on, and while one of the witnesses, who had been brought for the purpose of contradicting Smith, was on the stand, I, myself, took the British Admiralty chart, and on the identical spot which Mr. Smith had referred to I found eighteen or twenty fathoms of water. I think Mr. Foster must have forgotten this incident when he interrupted me.

I now turn to the evidence of Cunningham, page 407. The following passage occurs in his evidence,—

"Q. How much within 3 miles do these vessels which fish for halibut within that distance from the shore, come? A. I could not say; Some, perhaps, fish within 1½ miles of the shore. Where I am engaged in prosecuting the fisheries, some of the American vessels fish within 1½ miles, and others within 2 miles of the shore, and so on.
Q. Are any cod and halibut taken outside of the three mile limit? A. Oh, yes! but this is not so much the case with halibut as with cod.
Q. Do many American fishermen fish there, outside of three miles from shore. A. Undoubtedly; some 75 American sail do so around the shores of the County of Shelburne."

The word "outside" in the last question but one must be a misprint for inside. My question was: "Do many American fishermen fish there inside of three miles from the shore?" And the answer was, undoubtedly, "Some 75 American sail do so around the shores of the County of Shelburne."

Now I will turn the attention of the Commission to the evidence of Patillo.

MR. FOSTER:—Do you understand Cunningham as having left his testimony that 75 sail of Halibut fishermen frequented the shores of the County of Shelburne.

MR. THOMSON:—No; American fishermen,

MR. FOSTER:—He said he could not tell how many fished for Halibut.

MR. THOMSON:—I dare say so; if he had been an untruthful witness he would have fixed the number at once.

I now turn to the evidence of Thomas R. Patillo,—not the Patillo of pugnacious reputation, and I want to refer specially to the remarks of my learned friend in reference to the evidence of Mr. Patillo, because it is a warning to the Commissioners to scrutinize the argument of my learned friend very closely. It is wonderfully ingenious, and unless you watch it very closely it will possibly mislead you. This is what Mr. Foster said,—page 39 of his argument,—

"So much for the in-shore Halibut fishery. I will, however, before leaving it, refer to the statement of one British witness, Thomas R. Patillo, who testified that occasionally Halibut may be caught inshore, as a boy may catch a codfish off the rocks."

Now he puts it as if Mr. Patillo had said that occasionally a Halibut might be caught, as a boy might catch a Codfish off the rocks, but that it was not pursued as a business. There is just enough truth in his statement to make it a little dangerous. This is the way the question is put:

"Q. Occasionally a Halibut might be caught in-shore, as a boy might catch a Codfish off the rocks, but pursued as a business Halibut are caught in the sea. A. Yes, in deep water."

Now, surely this answer is not an assent to the proposition that halibut are merely caught occasionally, as "*a boy would catch a cod off the rocks.*" It is an answer to the last branch of the question, namely, that the halibut are caught in the sea. The witness says: "Yes; they are caught in deep water." Now, surely it was not fair on the strength of this answer to quote Patillo as saying that occasionally halibut might be caught "as a boy would catch a cod off the rocks."

MR. FOSTER:—Now, wait a moment. I had previously asked, "To what banks do the fishermen whom you supply with bait resort?" and the witness had answered: "They chiefly go to the Western Banks and to Banquereau, and to our own offshore banks; the halibut is a deep water fish, and it is taken in 90 fathoms of water and upwards." Then I said, "You don't know of any inshore halibut fishing done by the Americans, which amounts to anything?" In answer to which the witness said: "Not inside of 90 fathoms of water." Then I asked: "Do you understand that the halibut fishing is substantially everywhere a deep sea fishery?" to which he answered, "Yes." Then put this other question: "Occasionally a halibut may be caught inshore as a boy may catch a codfish off the rocks, but pursued as a business, halibut are caught in the sea?" And the witness answered, "Yes."

MR. THOMSON:—No; the witness honestly enough says that the halibut fishery is usually a deep sea fishery, but the words describing it as merely an occasional thing to catch one inshore, are Mr. Foster's, and the witness does not assent to those words, but to the statement that halibut are caught in the sea, to which he replies: "Yes, they are caught in deep water."

I only refer to this as an illustration of the dangerous power possessed by my learned friend in the twisting of evidence. "So much," he says, in his speech, "for the inshore halibut fishery, and that brings me to the inshore cod-fishery, as to which I am reminded of a chapter in an old history of Ireland that was entitled 'on Snakes in Ireland,' and the whole chapter was 'There are no snakes in Ireland.'"

Now, that is a very amusing way of treating the cod fishery, but unfortunately it is not justified by the facts. If there is no more truth in the statement that there are no snakes in Ireland, than there is in the statement that there is no inshore codfishery, I am very much afraid that island is overrun with vipers. Now I will show you distinctly that we have the most conclusive testimony on the subject of the inshore codfisheries, and it is a very singular thing that my learned friend should have dismissed the subject so summarily as he did. I refer to the evidence of the British witness named Nicholson, page 207. Let us see what he says. By the same token, this is the very man that speaks of the halibut also. In the cross-examination by Mr. Dana, on page 207, the following passage occurs:—

"Q. Well, cod are often caught inshore, but would not you say cod was a deep sea fishery? A. Yes.
Q. And halibut is the same? A. Yes.
Q. I believe one witness, a Mr. Vibert, of Perce, in the County of Gaspe, said that the halibut were altogether caught within the three mile limit, without any exception. He says, 'that is I believe what I have understood from our fishermen; they have told me that halibut could not be caught in deep water. (Reads from page 110 of the evidence). Should not you say that was a mistaken statement? A. Yes. The Gloucester folks go every winter. In fact they go the whole year round to catch them. In the summer they get halibut in shallow water, but in the winter they have to fish in 100 fathoms of water.
Q. So they are a deep water fish as a fish, but you can catch them inshore? A. They may be caught inshore.
Q. Do the Americans themselves pursue the halibut fishing except as a deep sea fishery? A. Oh, yes. They take them anywhere where they can get them.
Q. Do you think that on this coast the Americans fish for halibut? A. Yes.
Q. They take them as they find them, but do they undertake as a business the fishing for halibut inshore? A. Certainly, the Treaty allows it. They will take them in our harbors if they can."

Now, if you look at page 413, the evidence of Mr. Ruggles, you will find some evidence upon this point:—

"Q. What kind of fish are caught here? A. Codfish, haddock, hake, pollock, halibut, herring, and some mackerel when they strike our shores.
Q. Is it an inshore fishery? A. With the large proportion of the inhabitants it is an inshore fishery in small boats.
Q. Do you know where Cape Split is? Yes.
Q. Now does this fishery extend up the North coast of the Island and off Digby Neck as far as Cape Split? A. Yes. It is quite an extensive fishery up to the Isle of Haute, and that is well up to Cape Split.
Q. From Cape Split it extends all the way to your Island. Around the shores of the Bay, are there fisheries there? A. Yes.
Q. Around both sides of the Bay. A. That is Digby Neck side and Clare.
Q. And down the coast as far as Yarmouth? A. Perhaps on the south side of St. Mary's Bay on the French Shore or the Township of Clare it is not so extensive.
Q. It is not so extensively carried on, but is the fish as good? A. I could hardly say it was as good on the south side, but still there are a number that prosecute the fisheries there. It is increasing annually. The inhabitants are turning their attention more to the fishery business."

Now you will recollect that this evidence is wholly uncontradicted, and the same is true of the testimony of Mr. Payson, on page 399. He is Fishery Overseer for Long Island and Brier Island, residing at Westport, Digby County, N. S. His evidence is as follows:—

"Q. You are Inspector of Fisheries there? A. Yes, up to Tiverton and Petit Passage.
Q. What do you consider to be the value of the fisheries there? A. Last year the fishermen exported about $200,000 worth of fish.
Q. What parts of the coast does that include? A. The two Islands.
Q. From the two Islands, which constitute about 7 miles of the 30 miles of the Neck on one side of the Bay, the fish exported amounted to $200,000? A. Yes.
Q. The other portion of the fishery is as good as yours? A. Well, perhaps not quite. They are not as fully carried out.
Q. Fish are as plentiful? A. There is fishing all along the coast.
Q. The people on those islands live almost exclusively by fishing? A. Pretty much altogether.
Q. For a number of years your district has been frequented by small American schooners? A. Yes.
Q. What kinds of fish do they catch? A. They catch the same kinds as we do—cod, halibut, pollock and herring.
Q. They catch their own bait? A. The small vessels catch their own bait.
Q. Besides these small American schooners, your district is frequented by other American fishing vessels? A. A great many other vessels come in mainly for bait, sometimes for ice, and go out again.
Q. How often do they come in for bait? A. I have known some vessels to come three times in a season.
Q. Where do the small American vessels take their fish? A. To where they belong, I suppose. They come from along the coast down to Mount Desert.
Q. It is a business that is increasing? A. Yes.
Q. Do the American vessels fish there during the season? A. The small fishing vessels fish there during the season, and the other vessels come in for bait. There are fisheries at Whale Cove, and White Cove from one to three miles above Petit Passage, and quite an extensive fishery about five miles above. The people there complained of the small American vessels coming there and interfering with the fishery. I told them I could not do anything because the Americans are allowed the

same privileges as we are. I also heard complaints of the Americans transgressing the law by Sabbath fishing and throwing gurry overboard. In two cases I issued a warrant, but they got out of the way and it was not served upon them.

Q. Why do the American schooners come over to your district, and not fish on their own coast? A. They said the fishery on their own coast has failed, and they gave me as a reason that they thought it was a good deal due to the trawling practices.

Q. During how many years have they been coming there? A. Three or four years.

Q. They gave you that as the reason why they come to your coast? A. I talk to a great many masters of American vessels. My son keeps an ice-house, and they come there for ice, and I have talked with them about the fisheries, and they told me the trawling had, in a measure, broken up their fishing.

Q. How far from the shore do they catch cod, pollock, and haddock? A. From half-a-mile to a mile. The large vessels fish mostly outside the three miles, but the small vessels fish on the same ground as our own fishermen. The small vessels fish within half-a-mile or a mile of the shore. They anchor the vessels in the harbor, and go out in boats to fish; they fish close inshore.

Now, they did not contradict that evidence at all. I do not know what the extent of coast is from Cape Split to Digby Neck.

MR. FOSTER:—What counties does it include?

MR. THOMSON:—Kings, Annapolis and Digby.

There was an attempt to contradict this evidence by the evidence of Sylvanus Smith, page 338 of the American testimony. As the Counsel for the United States have not the privilege of replying, it is only fair that I should cite the pages of the American testimony that were presented in attempted contradiction of the evidence of our witnesses.

The evidence of Sylvanus Smith is as follows:—

"Q. How near shore to any place have you known of the halibut being fished? A. 150 miles may be the nearest point.

Q. These are banks, but haven't you known it to be done, or attempted, near shore? A. I have.

Q. Where have you known them? A. On the Labrador coast they have caught them large near the shore. I have known them catch them in 30 miles or 25 miles, around Cape Sable. I fished there quite a number of years,—around Seal Island and Brown's Bank.

Q. How near land there did you ever fish? A. I have fished in sight of land. I could see it.

Q. Did you ever fish within three miles? A. No; I don't think any one could fish in there, because it is not a fishing ground.

Q. You don't know of any one? A. No.

That is all he could give in the way of contradictions, if I recollect right. On page 340 this question is put to him:—

"Q. You cannot speak of the places where halibut have been caught since that time from practical knowledge? A. No.

Q. Previous to 1864 you were engaged. How many seasons were you engaged catching halibut? A. I think some six or eight.

Q. When you were then engaged did you go into the Gulf of St. Lawrence at all for halibut? A. Never.

Q. Are you aware that there is a halibut fishery around Anticosti? A. I never was aware of any.

Q. Well the fact that two vessels were seized there while inside trying to catch, would be some evidence that they believed the halibut were there? A. Well they look for them everywhere.

Q. Don't you think they must have had reasonable grounds? A. I don't think it. They are in the habit of looking everywhere where they may be.

Q. Do you stand by the full meaning of your answer that you don't think they had reasonable grounds for believing the fish to be there? A. Well a man might have reasonable grounds for believing they were in the water anywhere."

MR. FOSTER:—Have you the evidence where he says that one of his vessels strayed into the Gulf of St. Lawrence after Halibut? Look also at Swim's affidavit, page 238.

GLOUCESTER, October 10th, 1877.

I, Benjamin Swim, of Gloucester, Mass., on oath depose and say, that I was born at Barrington, Nova Scotia, am 27 years of age, and am now Master of schooner *Sarah C. Pyle*, of Gloucester, and have been since April of this year—have been engaged in codfishing during that time, have landed 150,000 lbs. of codfish and about 3,000 lbs. of halibut; and caught them all, both codfish and halibut, on Western Banks. The nearest to the shore that I have caught fish of any kind this year is at least forty miles.

BENJAMIN SWIM,
Master of schr. Sarah C. Pyle.

MR. THOMSON:—This is what Swim says: Mr. Smith gave the name of the *Sarah C. Pyle*, of Gloucester, Capt. Swett, as one vessel that had fished near shore in eighteen fathoms of water.

MR. FOSTER:—It is not Sylvanus Smith who speaks of that.

MR. THOMSON:—No; it is William B. Smith. The question is as follows:

"Can you give us the name of any of these vessels that you say have been fishing within that distance of the shore in 18 fathoms of water? Answer. I can give the name of one, the *Sarah C. Pyle*, Capt. Swett, of Gloucester. I supplied him in the summer with 2800 mackerel."

But whose affidavit have we? Not the affidavit of the Captain Swett, but of Benjamin Swim, of Gloucester. Now there is no word that during the whole of this season he commanded the *Sarah C. Pyle*. This evidence was given a long time ago, while the affidavit, which purports to be a contradiction is sworn on the 10th of October—months after he had given the evidence. Capt. Swim had the printed evidence, I presume; at all events some person must have had the printed evidence and communicated to him its purport. He must have read the statement that it was Capt. Swett who commanded her, and that the witness William B. Smith sold her 2800 Mackerel. Now this affidavit is altogether silent as to Capt. Swett. If it was intended to be a contradiction of the witness's statement, there should have been a statement that there was no such a person as Captain Swett in command of that vessel. Capt. Swim does not undertake to say that he commanded the vessel during the whole time since April last. He says:—"I am now master," &c., "have been since April." He may have sent another man out as Captain and himself remained Master upon the register. It would be quite consistent with anything that he has stated in his affidavit.

MR. FOSTER:—The affidavit is dated the 10th of October, while the evidence was given on the 28th of September. So there is not such a great while between.

MR. THOMSON:—But it is undoubtedly made for the purpose of contradicting William B. Smith, and I say that it is a most singular circumstance that they produced no affidavit from Capt. Swett.

MR. FOSTER:—There is no Capt. Swett. Probably the short-hand reporter got the name wrong.

MR. THOMSON:—If this affidavit was intended as a contradiction, it should have contained an allegation that there was no Capt. Swett, that there was no other *Sarah C. Pyle*, and that this deponent had been in command of her during the whole time. Even had all that been done there would have been this important question, whether

a man who comes here and subjects himself to cross-examination, and whose evidence is substantially unshaken, can be, or ought to be, contradicted by an affidavit made in a chamber by some interested person behind the back of the person to be affected by it, and absolutely protected against any hostile cross-examination. I say that any writing produced under such circumstances to contradict such a witness is not worth the paper it is written on, and ought not to be. What is the reason he did not come here? If he was intended to contradict our witness, why, in common fairness, didn't he either come here, or shew some reason that prevented him from attending as a witness in person? Shoals upon shoals of witnesses have come here from Gloucester and been examined. What is the reason that Swim did not come as Smith did and subject himself to cross-examination? Smith was not afraid of cross-examination. Why was Swim? I dismiss his affidavit as no contradiction whatever.

MR. FOSTER:—Don't dismiss it until I call attention to the fact that further on in the cross-examination of Smith he says he does not know where the *Sarah C. Pyle* caught her halibut at all, and that all he knows is that he supplied the bait.

MR. THOMSON:—Where is that?

MR. FOSTER:—Read right along in Mr. Dana's cross-examination. His statement on cross-examination is as follows:—

"Q. You have with you a memorandum concerning this vessel to which you sold these mackerel? A. Yes.
Q. What did they do with mackerel? A. They put the fish in ice on board. I do not know what became of the latter afterwards.
Q. What did the vessel do then? A. She went out to fish.
Q. Did you see her do so? A. Yes.
Q. Did she continue fishing with 2,800 fresh mackerel on board? A. The captain took them for part of his bait. We did not supply him altogether with bait.
Q. Did you go on board of her after she left the harbor? A. No.
Q. Do you know what she caught? A. No.
Q. Whether cod or mackerel? A. No.
Q. It might have been cod? A. Yes.
Q. Why did you say it was halibut? A. I said that we supplied him with bait, but I do not know that she caught halibut.
Q. As to those vessels, can you tell with your glass at that distance whether what they haul on board is halibut or cod? A. I do not know what they catch, but they say that they come there to fish for halibut. I frequently converse with them."

MR. THOMSON:—He says this Captain Swett is a neighbor of his, that the *Sarah C. Pyle*, of which Captain Swett was master, fished for halibut, that he supplied him with 2800 mackerel, that she went out to fish, and in answer to the question why he said it was halibut she caught, he says, we supplied her with bait, and in answer to the next question, he says he does not know what they catch, but that they say they come there to fish for halibut. Captain Swett told Mr. Smith that he came there to fish for halibut, and Smith believed his word, and I say that his evidence stands entirely uncontradicted, and in view of what I have seen of this evidence I shall dismiss the affidavit of Swim as being entirely irrelevant, and having no bearing whatever upon the matter.

But there is another man that was brought forward to contradict Mr. Smith. Confronted with the maps, and shown that the soundings were there that he had undertaken to say were not there, he was obliged to admit that he had not been there for eleven years, while Mr. Smith had given evidence referring to a period within a couple of years,

There is another witness that they put forward to contradict Hopkin's testimony. On page 417 of the British evidence, Hopkins testifies as follows:—

"Q. Are you aware that halibut is taken inshore by boats, as well as cod and pollock? A. By our boats? Yes, it is taken inshore.
Q. I think you said you had heard of Americans coming in within three miles, but you did not know. A. I do not know. Mr. Cunningham will know more than I do. It is a little aside from where my business takes me. I have understood they have been in a good deal around St. John Island just west of where I am.
Q. That is within 3 miles? A. Close in."

In this connection I will turn your attention to the evidence of Joseph Coutoure, page 280. He says:—

"I am 42 years of age. I live at Cape Despair in the County of Gaspe. I am a fisherman, and at present employ men in the fishing business. This fishery is carried on along the coast, from one to three miles from shore, and also on Miscou Bank. The Americans fish there. I have seen as many as 40 sail fishing there at the same time."

MR. FOSTER:—That was in 1857?

MR. THOMSON:—Yes; I want to show that the fish were there. The whole evidence shows that the codfish do not fall off.

Now on page 293 we have the evidence of Louis Roy, of Cape Chatte, Gaspe, fish merchant, formerly fisherman. His evidence is this:—

"Q. Is the cod as abundant now as it was 30 or 40 years ago? Do you get as much? A. Oh, yes, as much as 30 or 40 years ago. I am sure of it."

I will not read, but simply refer to the evidence of James Horton, James Jessop, and the Hon. Thomas Savage, which is all to the same effect as to this question of the codfishery, and therefore I submit that this was not a part of our Case to be summarily dismissed upon the principle that there are no snakes in Ireland.

Now I pass from the codfishery to the question of bait.

Upon that subject I want to be distinctly understood. I will just refer you in general terms to the question. Under the decision of this Commission the bait which the Americans who come into our harbors purchase, cannot be taken into consideration. The point, therefore, that I have to make in view of that decision, is this, that so far as the evidence shows that the Americans have gone in for the years that are passed, and have themselves fished for bait or employed others to fish for it, that must be taken into consideration, upon the principle that the man who employs another to fish for him in point of law fishes himself. I presume that will not be disputed. In reference to the years that are to come, the proposition that I submit is this:—That this Commission having decided that under the Treaty of Washington, the privileges of buying bait and ice, and of transhipping cargoes, are not given by that Treaty. American vessels have no right to exercise them, and if they do so, they are liable to forfeiture, under the Convention of 1818. Therefore, as regards these rights, we go back to that Convention, and American vessels exercise them at their peril. In reference, therefore, to the future of this Treaty, American fishermen must be presumed to bow to your decision, and obey the law. That being so, what will they do? They must get bait. They cannot do without it. And they will, therefore, have to fish for it themselves. In any case, you must assume that they will get whatever bait they require from our shores during the next eight years, according to law, either by fishing themselves, or going and hiring persons to fish for them, which, under the Treaty, they undoubtedly have a right to do,

Therefore the only remaining question is whether this bait is absolutely necessary for them or not. Now the whole evidence shows that without the bait they cannot prosecute the fisheries at all. Even their own codfisheries it is really impossible for them to carry on, unless they get our bait. That must be thoroughly understood by American fishermen, as indicated by the extraordinary efforts made to get rid of the difficulty. That is clear, because Professor Baird was put upon the stand to give evidence that a new process had been discovered by which clams could be kept fresh for an indefinite length of time, and that these could be used for bait. They were so fresh when preserved, I don't know for how many weeks by this process, that the Centennial Commissioners made up their minds, and bold men indeed they must have been, to eat these clams that had been preserved for six weeks.

But Professor Baird omitted to tell this Commission a matter which was very essential to the Enquiry, and that was what was the chemical process, and what was the cost of that process by which bait which would become putrid and useless under ordinary circumstances within the usual time, was prevented from becoming in that condition; and I think until that fact is made clear, your Honors must dismiss it from your minds. I only refer to it to show that the American Government felt that upon that subject it was in a very difficult position. It is clear therefore to my mind, and I think it must be assumed by this Commission, that without fresh bait American fishermen cannot get on.

The next question is, can they get a supply of fresh bait on their own shore? There is a consensus of evidence given by witness after witnese who went on the stand and stated that he came in once, twice, three times or four times during one season for fresh bait into ports of Nova Scotia, along the Cape Breton shore. I did not examine as to the Grand Bank fishing vessels, for that part of the case I left to my learned colleague, Mr. Whiteway; but as to the George's Banks fishery the supply of bait is obtained from our own shores. It is one of the matters your Honors must take into consideration, that if American fishermen were kept out of our shores so that they could not get bait, not only their mackerel fishing in the Bay, which was a subject of very considerable contest, would go down, but their codfishery would go down also. According to the evidence, if your Honors will examine it, we hold the keys in our hands which lock and unlock the whole North American fisheries,—I mean the North American fisheries for cod, halibut, mackerel and herring, in fact for all those fish which are ordinarily used for food.

Mr. FOSTER:—Do you say mackerel?

Mr. THOMSON:—Yes, in regard to mackerel, I will show that we hold the keys. It is probably forestalling my argument a little; but Mr. Foster, in the course of his speech asserts that because the larger proportion of mackerel, as he says, comes from the American coast, our mackerel does not have any effect on the market.

Mr. FOSTER:—I thought you were speaking about bait and the bait question.

Mr. THOMSON:—So I was. Even for mackerel, it is not much of pogie bait they use, and at all events they use other bait as well; but pogie is not necessarily an American bait, it is a deep sea fish, as has been shown by different witnesses.

Now, in regard to the quantity of bait, I refer you to the evidence.

John F. Campion, of Souris, P. E. Island, pp. 36, 37 and 45, says:—"There are large numbers of American trawlers off Cape North. They catch their bait around the coasts of Newfoundland, sometimes at St. Peter's Island, and at Tignish Bay. I have seen them catch herring for bait this Spring. *Three or four were setting nets right in our harbor.*"

John James Fox, Magdalen Islands, at p. 114, says:—"Americans catch bait largely in our neighborhood; the chief place for catching it is at Grand Entry Harbor; they set their nets on shore; they want this bait for codfishing."

Angus Grant, Port Hawkesbury, C. B., at pp. 184, 185, says:—"Americans both purchase and fish for squid; they catch squid by jigging; large quantities are taken at Hawkesbury. They buy and catch bait at Crow Harbor and those places."

James Purcell, Port Mulgrave, at p. 197, says:—"United States vessels get their bait in our harbor; they sometimes buy it and sometimes catch it. I have seen them catching it. I have seen 18 vessels taking squid as fast as they could haul them in, at Hawkesbury."

John Nicholson, Louisburg, C. B., at pp. 205, says:—"Americans both fish for their bait and buy it. I have seen them fishing for squid close to the shore."

John Maguire, Steep Creek, N. S., at pp. 213, says:—"American codfishing vessels sometimes catch squid for bait."

James Bigelow, Wolfville, N. S., at pp. 222, says:—"Americans frequently catch bait on our shores."

John Stapleton, Port Hawkesbury, C. B., at pp. 228–229, says:—"I have seen numbers of Americans catching squid in Port Hawkesbury; this year I suppose 15 or 20 sail; last year about 25 or 30. They cannot carry on the Bank fishery without procuring fresh bait."

Hon. Thomas Savage, Cape Cove, Gaspe, at pp. 264, says:—"I have seen Americans come in and catch bait themselves, or rather set their nets to do so; among our fishermen they seine for it; they would do very little at codfishing without the privilege of getting fresh bait."

James Baker, Cape Cove, Gaspe, at pp. 270, says:—"Americans fishing at Miscou Bank come in to different places along our coast for fresh bait; they principally catch it themselves, taking squid mackerel and caplin; they took it close inshore."

James Jessop, Newport, Gaspe, at pp. 277, says:—"Americans codfishers run up to Shippegan and Caraquette and fish for herring, for bait, with nets; thay also take mackerel and squid; they could not carry on the fishery profitably without coming in to get fresh bait."

William Flynn, Percé, Gaspé, at pp. 278, says:—"There are annually about 400 codfishers in the Bay; they get a great deal of their bait inshore along our coast by setting nets for it and sometimes by buying it. I have seen them seining herring and caplin, and have heard that they jig squid and bob mackerel. I don't believe they could carry on the codfishery profitably without coming inshore for fresh bait."

John Short, Gaspé, at pp. 284, says:—"American codfishers get a great quantity of their bait from the inshore fishery. I have seen them set nets and have no doubt of their catching ther bait inshore; they often draw seines to shore for caplin and small fish. Without the right of coming inshore they could not successfully carry on the deep-sea codfishery."

Abraham Lebrun, Percé, Gaspé, at pp. 288, says "I have heard from United States captains that there are 500 cod-fishers in the Bay. They get their bait on the coast. They take herring in nets. They also catch squid, and seine caplin. They take mackerel as well. They bring their nets with them. They had either to procure fresh bait or go without fish."

John F. Taylor, Isaac's Harbor, N. S.. at pp. 296, says:—"United States cod-fishers in the Gulf run inshore for bait—they go in boats to get them. Without the right of getting fresh fish inshore, they could not carry on the fishery with success."

George Romeril, Percé, Gaspé, at pp. 309, says:—"Most of the United States cod-fishers come inshore for bait; they get it with nets and by purchase; they take chiefly herring; they bring their nets with them, and catch the bait themselves close inshore. The cod-fishery could not be carried on successfully without access to the shores for bait.

James Hickson, Bathurst, N. B., at pp. 341, says:—"United States vessels come inshore and fish for bait when they can, and buy it when they can; they take squid inshore. They couldn't carry on the fishery without coming in for bait."

John Dillon, Steep Creek, N. S., at pp. 360, says:—"Some United States vessels come inshore and set their nets for bait."

Thomas R. Pattillo, Liverpool, N. S., at pp. 376, says:—"American vessels have this season been taking mackerel for bait in the harbor."

Peter S. Richardson, Chester, N. S., at pp. 390, says:—"I have known plenty of men catching their own squid in Newfoundland or Canso.

Holland C. Payson, Westport, N. S., at pp 399, says:—"The small American schooners fishing in our vicinity catch their own bait."

John Purney, Sandy Point, N. S., pp. 421, says:—"The other day, Americans were fishing for bait inside of Shelburne lights. One of the captains of the vessels told me he had taken 3 barrels that day in the harbor, of small mackerel for bait. The United States vessels could not carry on their deep sea fishery without getting fresh bait.

That is an epitome of the evidence, not the whole of it, and your Honors will find on examination that the evidence is strong on the point, and that nearly all the witnesses agree that they cannot get on without the fresh bait. I am not going to touch on that point, because it was successfully dealt with by my learned friend, Mr. Whiteway, who I think, effectually settled the question of salt bait. It is admitted on all hands that it cannot for a moment compete with fresh bait.

The next point to which I turn your Honors' attention is a part of our case which has been made the object of attack on the other side,—the Grand Manan fishery,—I mean the fishery round the Island of Grand Manan, Campobello and Deer Island and adjacent islands, and on the main shore of Charlotte opposite. I do not intend to call your attention to the evidence, for the time which has been given me in which to close my argument, will not enable me to do so; I therefore pass it over, by calling your Honors' attention simply to the result of that evidence. It is proved by Mr. McLaughlin, who is admitted on all hands to be not only an able man, but an honest, straightforward man, a man who had a practical knowledge of the fishing business, and a personal friend of Professor Baird, that the British catch was in value over $500,000 on the Island of Grand Manan alone. He had especial reasons for knowing it, because he was fishery warden, and it was his business to find out what the catch was; and he says the catch put on paper was below the actual catch, for this sufficient reason: that the men to whom he went,—and he went to every person engaged in the fishing,—were afraid of being taxed to the extent of their full catch, and therefore gave him an underestimate of the quantity. When he explained to them that in point of fact he was only fishery warden, they said they knew he was something else, and that he was a county councillor, and they were afraid he would carry the information he obtained as fishery warden to the county council. Mr. McLaughlin says that the figures are entered under the mark. He then says that the catch of the Island of Campobello and Deer Island is as large as the catch of Grand Manan. He says in regard to those three islands of Grand Manan, Campobello and Deer Island, and the adjacent islands, that the American catch round those islands is as great, or greater, than the British catch; that is to say, there are two million dollars worth taken round those islands. Upon the main shore, he says, from all he can learn, and he has talked with different men engaged in the business on the main shore, from Lepreau to Letite, there is as great a catch on the main shore as is taken round the islands. That statement of Mr. McLaughlin, which was a matter of opinion, is corroborated as a matter of fact by Mr. James Lord and Mr. James R. McLean, who were not only practical fishermen, but were personally engaged in the trade, and own fishing vessels. Mr. Foster says: "If you admit the statement to be true, look what follows. A larger quantity of herring is taken round Grand Manan than the whole foreign importation of the United States." We have nothing to do with that. The American counsel have undertaken to show that away out in the Bay of Fundy, on some ledges far beyond the three-mile line, at what they call the "Rips," they catch a great many herring, as also at different places along the coast; but it does not appear by the returns. The United States do not import a great many herring. There is no pretence for saying that we make use of the United States market for our herring. A number of witnesses have proved,—I have not time to read their testimony, but I state it as the fact,—that the large market for salt herrings is to be found in this Dominion, in the different cities and towns from St. John to Toronto, and one witness stated that he had at Toronto met American salt herrings coming over the border, and competing with him in the market. And our herrings are also shipped to Sweden and elsewhere. Therefore, the remark of Mr. Foster though true, in fact, really has no bearing on the case.

How was this evidence sought to be met? It was sought to be met by Eliphalet French, who is a merchant living at Eastport, a man who, if I recollect aright, had never been on the Island of Grand Manan. He said he had knowledge of the fishery there, and he put his knowledge against the personal knowledge of McLaughlin, Lord, and McLean, because, said he, the whole trade comes through Eastport. There happens to be a division in the Ameri-

can camp on that point, for Pettes, who was another witness brought to contradict the statements made by British witnesses regarding Grand Manan, swears that very few herring go to Eastport. Whether he told the truth or not I do not know and do not care. They are not our witnesses, and it is not my business to reconcile their statements. It is curious that when those people were brought to contradict our evidence they could not agree. They not only undertook to contradict the British witnesses, but they contradict each other. Then we had Wilford J. Fisher, who formerly lived at Grand Manan, but afterwards became a naturalized citizen of the United States, and now resides at Eastport. For eleven years back—for a number of years, at all events—his foot had never been placed on Grand Manan; he had no personal knowledge as to what the fisheries were for the last eleven or twelve years. Another witness was Pettes, who, after having stated that he was largely engaged in the fishing business, it turned out, caught about two hundred dollars' worth of herring in a year, was a boarding house keeper in winter, and at other times ran a packet to St. Andrews. This is the man who contradicted French as to the herring trade, with Eastport, and said none went there. And these are the men brought up to contradict McLaughlin! Asked if McLaughlin was an honest and respectable man, they acknowledged that he was; but Pettes, having no personal knowledge, undertook to say that his judgment in regard to the catch off the mainland and the islands was just as good as the judgments of those three men whose particular business it was to make themselves acquainted with it in every particular.

I never heard more reckless swearing—with great deference to the other side—in my life, except, indeed, the extraordinary affidavits may perhaps have out-Heroded it. For living witnesses, I never heard much more reckless swearing than was done by those gentlemen to contradict those whom they were obliged to admit were honest men, and whom they ought to have admitted possessed better means of knowledge. This is all I have to say on this point, except this: one of the witnesses, I believe Pettes, absolutely said he had never heard of the American fleet coming down there for herring.

Mr. FOSTER:—I think not.

Mr. THOMSON:—Then it was one of the others.

Mr. FOSTER:—I think not.

Mr. THOMSON:—It is not very important, except for the purpose of arriving at the conclusion as to whether this man told the truth or not. That is the only manner in which it is important. That the American fishing fleet comes down here every year is a settled fact. But there is an important point connected with this fleet, to which I respectfully call the attention of the Commission. It is a confessed fact that the American fleet does come down there, that very large quantities of herring are taken, and have been taken yearly, and will be taken for all time to come, I suppose; but not one single captain of all that fleet—and the names of the captains and vessels they commanded are known—has been put on the stand for the purpose of contradicting the British evidence in regard to the fisheries of Grand Manan and the adjacent shores of New Brunswick to the north of it. That is a most extraordinary coincidence, —that not a single man of all that fishing fleet has been called for the purpose of giving evidence on that point.

Mr. FOSTER:—You are entirely mistaken about that. Here is Ezra Turner, and Sylvanus Smith had been there.

Mr. THOMSON:—He had not been engaged in the fishery for eleven years back, if my memory serves me right. We will take Ezra Turner first. I am speaking now of within the time covered by the testimony of those witnesses whom the four witnesses were called to contradict. If you say Ezra Turner comes within the reference, I am quite willing to be shown that such is the fact.

Mr. FOSTER:—What time do you say is covered by the witnesses?

Mr. THOMSON:—I say it was during the time of the Reciprocity Treaty, and possibly a few years later.

Mr. FOSTER:—If you look at Ezra Turner's evidence, on page 227, you will find the following:—

Q. In regard to the herring fishery at Grand Manan, have you been in that neighborhood after herring? A. Yes; I suppose I was the man who introduced that business.
Q. How many years ago was that? A. That is 25 years ago, I guess.
Q. Did you go there to catch herring or to buy them? A. That is the way all our vessels do; they go and buy them from the inhabitants there, who fish the herring and freeze them.
Q. When were you there last? A. I was down there last year, last winter. I only stopped a little while.

Mr. THOMSON:—Was he down there as captain of one of the vessels?

Mr. FOSTER:—He is a man who has been captain all his life.

Mr. THOMSON:—What I said was, that of all the fishing fleet coming there, not one of the skippers had been called for the purpose of contradicting the evidence given by McLaughlin, Lord, and McLean, and they could not contradict it unless they were down there as captains during the period over which the testimony of these men runs. Now, as far as I remember, Turner has not done so.

Mr. FOSTER:—Here is the evidence of Lawrence Londrigan, who was there last winter in the *J. W. Roberts*. He does not come within the terms of the statement because he was not captain. P. Conley was captain of the vessel. Londrigan, in his evidence, says:—

Q. What were you doing last winter? A. I left to go in a vessel for frozen herring.
Q. What is the name of the vessel? A. *J. W. Roberts*.
Q. Where did she hail from? A. From Rockport, Me.
Q. Who was her captain? A. P. Conley.
Q. When did you start from Rockport? A. 16th December.
Q. How long were you gone? A. We were at Beaver Harbor and around Grand Manan about two weeks.
Q. Were other vessels there? A. Yes.
Q. How many? A. *Electric Flash, Madawaska Maid, Mary Turner, Episcatawa.*
Q. How many frozen herring did you get? A. Some were bought frozen and some were bought green, and took ashore, and some we froze on the deck of the vessel.
Q. What did you pay for them? A. For most of them fifty cents a hundred, for about 25,000 fortyfive cents a hundred.

Then I can quote from affidavits.

Mr. THOMSON:—I believe I am making an admission, which is not borne out by the evidence, when I say I admit you can turn out twenty such cases as this, which is no contradiction, nor does it fall within that to which I called attention. I said not a captain had been called as a witness—and I am willing to treat this man as a captain—for the purpose of contradicting the British witnesses. Our witnesses swear that the Americans come down and get an immense quantity of fish there, to the value of one million dollars yearly. This man (Londrigan) comes down and partly bears out that evidence. He comes down to tell you how many herring the captain of the vessel bought and paid for. Is that any contradiction? It is a direct affirmative. But if half a dozen captains were put on the stand and said they had been acquainted with the fisheries all their lives, and for the last two years, that no such catch of herring as was alleged was ever made by the American fleet, which we know from our experience is not possible—that would be no evidence in contradiction. So far from this evidence, to which Mr. Foster has called attention, being contradiction, it is direct evidence in confirmation.

Mr. DANA:—Is your position that we caught the herring?

Mr. THOMSON:—I say you either caught them or went down and hired people to get them and by the rule *qui facit per aliam facit per se* you caught them yourselves.

Mr. FOSTER:—Do you say we caught them or bought them?

Mr. THOMSON:—I say you did both I say that a large portion of them, according to the evidence you bought. This man comes down and buys. Suppose 500 people did buy, does it prove that 900 people did not come down and catch.

Mr. FOSTER:—We had Gloucester vessel owners here who testified that they fitted out their vessels, carrying no appliances to catch herring; that they carried money and brought back herring, leaving the money behind them.

Mr. THOMSON:—With great deference for Gloucester merchants,—I shall have to deal with their evidence by-and-bye,—those who have appeared before the Commission in affidavits do not stand so well that much attention can be given to their evidence. I want the evidence of men on the spot, of men who came down and fished. It was quite possible for some of the Captains, of whom there is a large body, to have been brought down; they could have been got. We have produced positive, affirmative evidence that they come down and catch fish, while no evidence has been given against that, and it is a significant fact in regard to the Grand Manan fisheries that not a single tittle of contradictory evidence of such a character as to diminish one pin's weight from the British evidence, has been advanced.

Mr. DANA:—Your statement was not that you did not believe the evidence, but that there was no such evidence.

Mr. THOMSON:—I am not going to say I do not believe the witness. I take the witness to whose evidence Mr. Foster called attention, and I say I am willing to admit you could produce twenty such witnesses, and so far from their testimony being contradictory it is affirmatory. The American Counsel have not shown that every man who obtained herring bought them; they could not prove their proposition in that way. It did not prove that because somebody bought, therefore nobody caught any.

I pass from that to a principle which is laid down by Mr. Foster at page 41 of his speech, in which he says, "you must look at this case as you would at a mere business matter, pencil in hand, and figure up how much to charge against the Gloucester fishermen." This is the error, the fallacy that underlies the whole American defence to our case,—that the question to be decided is one between Great Britain and Gloucester fishermen. It is no such thing. It is a question between the United States and Great Britain, and not whether these fishermen have been injured or the reverse. The question is whether the United States have got a greater benefit by the advantages which have been given them under the Treaty than we have by the advantages given to us.

What is the effect of free fish going into the United States? Is not the effect that the consumer gets it cheaper? and the consumers are inhabitants of the United States. It is alleged that the business is going to be broken down. When that happens it is time enough to talk about it. It is said that the fresh fish business is going to entirely destroy the trade in salt fish, for fresh fish can be packed in ice and sent over the Dominion, and as far as Chicago and St. Louis. I do not doubt but that that may be done to some extent, but it will be very expensive. I doubt whether fresh fish can be carried as cheaply as salt fish; it must be very expensive to carry it in the refrigerator cars, and fresh fish of that description can only be purchased by large hotels and people who have plenty of money; but the ordinary consumer cannot afford to eat fresh fish, which is much more costly than salt fish. The trade in fresh fish must be confined to the line of railroads; it cannot be taken by carts into the country, while barrels of salt fish could be rolled off at any station. Therefore, this point is entirely out of the argument. But the principle laid down is entirely incorrect.

The question is what benefit is the Treaty to the whole United States? I will show you by figures, which cannot possibly be mistaken, that previous to the Reciprocity Treaty the price of mackerel in the United States was at a pretty large figure. The moment the Reciprocity Treaty threw open the American market and there was a large influx of our fish, the prices fell. That state of things continued from 1854 to 1866. In 1866, when by the action of the United States Government, the Reciprocity Treaty became a dead letter, the same state of things as existed before the Treaty again existed Fish, which, during those years, had been cheap to the consumer, rose in price. I will show that the moment the Treaty of 1871, the Washington Treaty, under which this Commission is now sitting, was passed and went into operation, the same result again followed. The prices of mackerel and other fish which had been high, fell. What is the argument which necessarily flows from that? It is that the consumer thereby gets his fish a great deal cheaper; there can be no doubt about that. But there is another view which must be taken. If it be true, as has been contended in evidence, that Gloucester merchants could not carry on their fishing operations without having access to our shores; and I think it is clear and conclusive that they cannot carry on the mackerel fishery, in the Bay, for instance, without going within the three mile limit; there is an end to the question. They cannot carry on a large business in their own waters without the assistance of our fisheries; they cannot carry on the fishery in the Bay—the great mass of the testimony shows that—unless they got access to the shore line. To concede, for the sake of argument, that large schools of mackerel are to be found in the body of the Bay of St. Lawrence, and sometimes taken by seines and sometimes by hook and line; those schools, in order to be available to the fishermen, must be followed by them, and if they undertake to follow the schools, they must make up their minds to go within three miles of the shores or lose the fish. The whole evidence shows that, and that the fishermen came into the inshore waters, even when the cutters were there, and ran the risk of seizure; and that was to them a dreadful occurrence, the forfeiture of the vessel. They knew the dangers, and yet they ran the risk. These men knew their business, and would not incur the risk to their property without obtaining a return. And what was the reason? They could not do without the inshore fisheries, and rather than go home without a catch, they ran the risk of seizure.

It is said, on behalf of the United States, that during the last few years, notwithstanding the American fishermen have been free to go into any portions of the Bay, they could not make catches. Let me dispose of that at once. If it be true that the Americans have gone into the Bay since the Treaty went into operation, and failed to get large catches, it has resulted from the ruinous system of purse-seining, a system which has destroyed the fisheries on their own coast, and will do so everywhere else. The effect, as has been graphically described by a number of witnesses, has been such that all the fish which can be gathered in the net, which is swept round for a mile or more, are taken in that tremendous seine,—thousands of barrels at a time; they can only take out so many at a time, in the interval a large portion die and are unfit for food. It is a most disastrous mode of carrying on any fishery, and must be ruinous; and I hope, for the sake of the United States themselves, and the fishermen who carry on the fisheries, that the day will come, and will soon come, when the destructive purse-seine fishing will be prohibited.

There is one requisite, without which purse-seining in our own waters is an utter failure,—there must be deep water, or if there is not very deep water, there must be a smooth bottom. In the Gulf there is not very

deep water, and the bottom is exceedingly rough. Because some among American fishermen got exceptionally large catches with purse-seines off the United States shores, they persist in using purse-seines in the Gulf. What is the result? The fishermen do not dare to approach the shores for the purpose of using the seines. They would be quite useless near the shores, and are nearly so in the body of the Bay. What is the result? They come back without catches, and then undertake to say there is no fish in the Bay St. Lawrence. The truth is they go with appliances utterly unfit to take the fish there. That is the truth about the matter. I say it is the purse-seining that makes the whole difficulty; and if they had stuck to hook and line they would have had all these years back as good fishing in the Bay as they could get anywhere.

But under all the circumstances, can they get on without the right to enter the shore fisheries? The moment they get into the shore fisheries they get full fares. There is no conflict of testimony upon that point. And for this reason. We have shown by a mass of testimony that there are no large catches to be made without the right to go inshore. What is the evidence brought to contradict that? It is evidence given by men who have not caught any fish inshore. Very few have undertaken to say that they have gone inshore and failed. The whole testimony has shown that the American fishermen cannot get along without the inshore fisheries.

In estimating the value, if it be true that their own codfishery cannot be carried on without our bait; if it be true they cannot supply their own market with mackerel from the American shores without getting a supply from the Gulf of St. Lawrence; and that they cannot get mackerel in the Gulf without going inshore, we make out our case, do we not? It is not a question as to what each fisherman sailing out of Gloucester is to be charged. The question is this, whether the United States must not pay for the privilege that enables Gloucester to maintain its present state of prosperity. Every nation has said, every nation has considered, that the fisheries form the nursery of her fleet. It is a business which has been nurtured by large bounties by the United States and other countries. The class of fishermen is a favored, privileged class. This is the most ancient calling in the world. And can it be said it is nothing to the United States to keep up that class? Is it nothing that they have there the nucleus, out of which their naval force must be kept up. The United States cannot get on on without her navy; she must have a great navy. It is not sufficient that she should be a great power on land; she intends to be, and I hope always will be, an important and great power on the sea. And how can she be a formidable naval power in the world, unless she has some means of nurturing her marine; and how is that to be nurtured, except through the fisheries? It is one of the most important schools she can possibly have. I shall have to call your attention to speeches on this point in which it is shown to be one of the benefits accruing to the United States. I therefore say, that when Mr. Foster laid down the extraordinary rule that your Honors must approach the consideration of the question of value as a common matter of business, with pencil in hand, he took a narrow and erroneous view of the matter, for there is the fallacy underlying their whole case, that it is a question between the fishermen of Gloucester and Great Britain, when it is nothing of the kind.

Upon the question of the value of the two fisheries, alluded to by Mr. Foster, tables were put in by Major Low, to which I wish to call your Honor's attention. In Major Low's evidence, page 402, he gives two statements of Mr. Steele's transactions, showing the average of monthly earnings of Mr. Steele's fleet each year, from 1858 to 1876, in each department in which they were employed, after paying stock charges and so forth. In 1858, the number of vessels was 8. I am reading now from an analysis of Major Low's tables, made up very carefully by Mr. Miall, of Ottawa, a very able man in statistics, who has given me a great deal of assistance in this matter, and who is very accurate in his figures.

Mr. FOSTER:—Let Mr. Miall be put on the stand as a witness.

Mr. THOMSON:—All you have to do is to refer to Major Low's evidence. I want to call your Honor's attention particularly to this, because a large portion of the evidence submitted by the United States was for the purpose of showing that the cod-fishery was an important business, and the mackerel fishery was not. This is the sum total of Major Low's own figures, as put in for the years, from 1858 and 1876, the average earnings of each vessel in the cod-fishing business per month was $393, while the average earnings of each vessel per month in the Bay mackerel business was $442, and on the American shore only $326. These are Mr. Low's own figures, and the results which they prove. Here is the statement:—

ANALYSIS OF STATEMENT OF MESSRS. STEELE'S TRANSACTIONS, put in evidence by Major Low, a witness on behalf of the United States,—showing the monthly earnings of Messrs. Steele's fleet, each year from 1858 to 1876, in each department in which they were employed, after paying stock charges and crews' wages:—

	Year.	No. of Vessels.	Cod-Fishing. Time engaged. months.	Cod-Fishing. Time engaged. days.	Cod-Fishing. Vessel's Share.	Bay Mackerel-Fishing. Time engaged. months.	Bay Mackerel-Fishing. Time engaged. days.	Bay Mackerel-Fishing. Vessel's Share.	Shore Mackerel-Fishing. Time engaged. months.	Shore Mackerel-Fishing. Time engaged. days.	Shore Mackerel-Fishing. Vessel's Share.
During Reciprocity Treaty.	1858	8	31	7	$215	33	22	$318	...	1	...
	1859	10	33	9	271	42	13	246	.	..	...
	1860	11	42	15	211	33	18	273	7	24	$427
	1861	11	55	3	158	22	3	202	6	14	235
	1862	9	59	8	243	14	16	326	2	27	190
	1863	9	39	14	392	20	7	659	1	24	209
	1864	8	37	6	407	27	25	800	...	...	....
	1865	8	26	24	836	34	9	736	..	..	....
During Dutiable Period.	1866	10	36	6	551	43	9	617	...	..	....
	1867	10	52	9	410	34	13	464	..	18	130
	1868	10	66	6	488	17	16	301	..	..	...
	1869	8	48	21	545	19	3	392	...	...	....
	1870	7	37	26	404	...	..	...	17	18	426
	1871	6	35	17	383	..	..	...	14	9	299
	1872	10	56	9	416	5	5	513	7	13	209
Dur'g Wash-ing'n treaty.	1873	8	57	11	482	13	8	483	..	...	...
	1874	9	63	25	466	11	25	290	..	..	...
	1875	9	61	27	430	9	16	546	..	...	...
	1876	13	74	11	360	17	21	231	...	...	...
	Average	9 1-10									
	Time engaged annually		48 months			21 months, 3 days.			3 months, 3 days.		
	Do. per vessel		5 months, 8 days.			2 months, 10 days.			10 1-5 days		
	Vessel's earnings per month, per vessel		$393			$442			$326		

Mr. FOSTER:—I understand that this paper will be put in, that we will have an opportunity of examining it, and of replying to it, if justice is done.

Mr. THOMSON:—We will have no mistake about that matter. I am quoting from a paper what the result of Major Low's evidence is.

Mr. FOSTER:—Here is a table of statistics presented, and held in the hand, and we are told with what care and by what skilful hands it has been prepared, and yet they do not propose to give even the details from which the result is made up.

Mr. THOMSON:—I will hand over the figures, and you can look at them.

Mr. FOSTER:—I say we are entitled to have it to examine, and we are entitled to reply to it. If the learned counsel is allowed to read anything prepared by Mr. Miall, whom he has had at work all summer, and did not see fit to call as a witness, we certainly are entitled to examine it and reply to it.

Mr. THOMSON:—If you will look at page 402 A of the American evidence, you will find the table. You will find by that, which contains Major Low's figures, that, from 1858 to 1876, Mr. Steele's vessels made an average of $393 per month during the time they were codfishing That is what the statement shows; whether it is true or false, I neither know nor care. These figures also show that, in American waters, the earnings per month, per vessel, while mackerel-fishing, were only $326, while in the Bay mackerel-fishery, the vessels made per month, during the summer season, an average of $442. That table was put in for the purpose of showing the comparative values of the several fisheries,—the cod-fishery by itself, the mackerel-fishery on the American shore, and the mackerel-fishery in the Bay,—and the result is just what I state.

SIR ALEXANDER GALT:—The statement, I think, must be made as part of your argument.

Mr. THOMSON:—There is no intention to offer the statement as evidence; it is argument; but I think it would be very unfair if I did not point out where the result stated was to be found. Surely it is easy to see what the result is.

Mr. FOSTER:—We do not object to your assertion as to that being the result.

SIR ALEXANDER GALT:—It is now, I judge, the business of the Commission to say whether the evidence bears out the statement. The time has passed for receiving evidence.

Mr. FOSTER:—I assent to that, with a certain qualification. That is the ultimate business of the Commissioners; but when, at the end of the last argument, a statement of that sort is brought forward, of which no previous notice has been given, although ample notice might have been given, then common justice and the rules that apply before all tribunals that I ever heard of, give to the parties who have not the last word the right of making an explanation. It is just what we gave notice would happen, if, after all our arguments were made, the other side were allowed to reply, and sometimes in derision, and sometimes sportively, the phrase that fell from me that I believed masked batteries would be opened, has been repeated during the investigation. It is just what I meant by the phrase; it is bringing out at the end something that requires explanation, and then trying to cut off the opportunity of giving that explanation. I never knew that attempt to succeed in a court of justice, and I do not mean that it shall succed here till we have done our utmost to prevent it. So, then, the learned counsel puts in these statements at this time; we will have overnight to examine them, and if we require an opportunity to make an explanation, we expect to be heard upon it to-morrow.

Mr. THOMSON:—I can only say that not one figure has been referred to by me on this point, that is not to be found in Major Low's statement, put in a long time ago. But he absolutely admitted it himself, in so many words, in his cross-examination. I call attention to his evidence on page 389, given on 5th October, more than a month ago. At the bottom of that page, you will find his cross-examination by Mr. Davies, as follows:—

"Q. Dividing the number of the vessels into the results, what will it leave you? A. $623.

"Q. So that the average catch per month of the vessels employed in the American shore fishery from 1858 to 1865 amounted in value to $623, while the average catch per month of the vessels engaged in the Gulf of St. Lawrence fishery realized $998. A. Yes.

"Q. And the average value of the catch of the vessels engaged in the Gulf fishing for the same period of time was $998. A. Yes.

Now, how can my learned friend say that we are springing any new matter upon them. Here is their own testimony, given by the man of statistics from Gloucester, the great man who came here literally shielded by *Steele*. It is the most extraordinary thing I ever heard in my life.

Now, I want to follow this matter up a little. These statistics were put in for the purpose of proving two results, viz., that the mackerel catch on the United States shores was a first-rate one, and the catch in the Bay was a very bad one; but it happens that by their own showing, they prove just the contrary. I repeat what I said yesterday, that Mr. Davies captured that gentleman morally by his own confession.

We will now turn to another portion of his testimony. I call your Honor's attention to a statement put in by Major Low, at page 338 of his evidence. He is asked by Mr. Dana as follows:—

Q. Have you ever made up any statistics relative to the Shore and Gulf fisheries, showing the difference between the American shore fishery and the Gulf of St. Lawrence fishery? A. Yes, and the statement is as follows:—

Number of Fishing Vessels in Gulf of St. Lawrence Mackerel Fishing and the American Shore Mackerel Fishery.

1869.	194 vessels in Gulf, average catch 209 barrels	40,546 barrels
"	151 " offshore " " 222 "	33,552 "
	Mackerel caught by boats and some Eastern vessels packed in Gloucester	19,028 "
	Mackerel inspected in Gloucester	93,126
1875.	68 vessels in Gulf average catch 191 barrels	11,078 barrels
"	117 " Am. shore " " 409 "	47,853 "
		58,921

The average catch is based on the average catch of 84 vessels from 17 firms in 1869; and 28 vessels in Bay and 62 vessels off American shore from 20 firms in 1875. These firms have done better than the rest.

I desire particularly to call you Honor's attention to this extraordinary statement. They select as a specimen of the catches on the American shore, not a series of years, say from 1869 down to the present time; but they select 1869, which, according to the evidence, was the worst year of the fishery in the Gulf, and 1875 happened to be the best year the American fishermen have had on their own coast, and put the statement before this Commission as a fair average of the result of the two fisheries. Now, this man was under oath, and this statement was put in, and if I can show you from his testimony that he afterwards had to admit it was not a fair way of submitting the matter, and the average was totally different, I say I am justified in characterising this piece of conduct on the part of Major Low as a gross attempt to deceive the Commission.

Mr. FOSTER:—Major Low had made a collection of statistics in 1869 for the purpose of a report, as Town Clerk of Gloucester, long before the Treaty was made, and wholly without reference to it. In 1875 he made another, for the purpose of the Centennial, both of them wholly aside from the purpose of this investigation. Now, in seeking for light, we sought from him only the statistics he had made. As to 1875 being the best year on our coast, that is a very great mistake. If you will turn to Table B, Appendix O, which shows the number of barrels of mackerel packed and inspected in Massachusetts, from 1850 to 1876, you will perceive that 1875 was a very bad year, and far below 1876 and 1874, and the shortest year for quite a series of years. So the statement that 1875 was selected as a good year is quite out of the way.

Mr. THOMSON:—In view of what I showed this morning to be the contents of Appendix O, I think Mr. Foster is very bold to refer to it.

Mr. FOSTER:—It shows that the catch in 1875, even that of Bay St. Lawrence was a very small one.

Mr. THOMSON:—Let us see what Major Low says about this table at page 389.

Mr. FOSTER:—It is given at page 359. Four questions and answers contain an explanation of how they were made up, only you do not happen to read them. Just read them.

Mr. THOMSON:—This question is put to Major Low by Mr. Dana.

"Q. In order that the Commission may understand whether these Gloucester merchants, when making these statements here, are guessing at what they say, or have absolute data to go upon, and know what they are about, you have, at our request, made an examination of the books of one of the firms? A. I have examined the books of the most successful firm engaged in the Bay mackerel fishery.

"Q. That is the firm of Mr. Steele? A. Yes. I did this of my own accord, because I wanted the Commission to see how these books are kept.

"Q. Will you produce these books? A. I have the Trip Book, which I have numbered one, for the years since 1858 and 1859; their previous books were burned in the great fire at Gloucester in 1864. I have the trip books for the years extending from 1858 to 1876 inclusive, 19 years."

Mr. FOSTER:—Go back to what you were upon.

Mr. THOMSON:—It is as follows:—

"Q. You do not, I suppose, include in this statement any but vessels,—it has nothing to do with boat-fishing? A. No.

"Q. Will you state from what source you have made up these statistics? A. The information concerning the vessels which fished in the Gulf, and those which fished off our shore, I obtained and tabulated for the information of Gloucester, when I was Town Clerk, in 1869, and the report for 1875 was procured for Centennial purposes—not by myself, but by some one who did his work well.

"Q. Can you say, as a matter of belief, that these statistics were made up for Centennial purposes, and not with reference to this Tribunal? A. Yes, I believe that is the case.

"Q. From what sources were those for 1875, for instance, taken? A. The catch was taken from the reports of the number of firms I mentioned.

"Q. To how many firms do you refer? A. These include the most successful firms, George Steele, etc.

"Q. Those are firms that had been the most successful, whether on our shore or in the Gulf of St. Lawrence; which are to be considered the most successful firms in Gloucester? A. George Steele, Leighton & Company, Dennis & Ayer, and Smith & Gott.

"Q. These are generally considered to be the most successful firms. A. Yes.

"Q. Were they all included in this return? A. Yes.

"Q. The tonnage of the vessels was somewhat larger in 1875 than it was in 1869? A. I think not. I think it was about the same."

What does that amount to? That he made up the statement for 1869 for the Centennial, and the other for some other purpose; but he brings them both here for the purpose, as I charge upon him, of deceiving this Commission.

Mr. THESCOT:—He tells you what they are.

Mr. THOMSON:—I say again that when a witness puts in evidence statements such as these,—because

there was no object in showing what the catches were in 1869 and 1875, unless it was intended as a fair specimen of the average years,—and has the information in his own breast by which directly opposite results would be shown,—a witness who comes here and makes such a statement does so deliberately to deceive the Commission.

Your Honors will recollect that nothing but the trip books were produced; though we gave notice to produce the other books they did not do so. Look at page 385 and see what Major Low says on this subject, and then say whether he is a gentleman whose testimony can be depended on. At page 385, towards the bottom, there is the following:—

Q. In the first place, is George Steele a charterer of vessels? A. No.
Q. Then this statement, which assumes to relate to George Steele's business, as his name is mentioned as the charterer of the vessel, does not represent an existing state of facts, but is merely a theory which you put forth? A. I supposed I had mentioned on the account that it was an estimate.

At page 368 and 369 of Major Low's evidence, a statement is handed in entitled: "Number of vessels engaged during 17 years, from 1858 to 1876 inclusive, in the Gulf of St. Lawrence Mackerel Fishery, excepting the years 1870 and 1871, when none were sent, by George Steele, of Gloucester—107; average time employed yearly—4 months, 13 days; average number of hands employed yearly for 17 years—15." In regard to that, I desire to call attention to the evidence on page 385, your Honors bearing in mind the fact that Mr. Dana put to Major Low the question that he had examined the books for the purpose of giving a statement which could not lie,—no guess work but absolute verity, so far as the books were concerned. Mr. Davies on cross-examination elicited the following:—

Q. The owner would suffer no loss though the charterer would. It seems singular, does it not? You say this is where a man charters a vessel? A. Yes.
Q. In the first place, is George Steele a charterer of vessels? A. No.
Q. Then this statement, which assumes to relate to George Steele's business, as his name is mentioned as the charterer of the vessel, does not represent an existing state of facts, but is merely a theory which you put forth? A. I supposed I had mentioned on the account that it was an estimate.
Q. That is the real fact, is it not? A. Yes. The real fact is that I made a mere estimate in this regard.

Now, that is a most extraordinary statement.

Mr. FOSTER:—In what regard?

Mr. THOMSON:—In regard to this that Mr. Dana put forward Major Low, as a man who had examined the books of Gloucester merchants for the purpose of getting an absolutely correct statement, and no guess work; yet we find him coming forward with a deliberate piece of guess work.

Mr. FOSTER:—He made a statement from the books, and then made a suppostitious hypothetical case of one voyage, to show what the result would have been.

Mr, THOMSON:—At page 386, your Honors still bearing in mind that this was to be no imaginary matter, but absolutely made up from the books, a number of questions are put by Mr. Davies:—

"How did you get these 13 or 14 trips? A. I saw the trip books. I asked Mr. Steele for permission to show them to the Commission.
Q. You then had the opportunity of examining his books? A. Yes, as to his trip books but not as to his ledger.
Q. Did you ask for his ledger? A. I did not.
Q. I suppose if you had done so you would have obtained access to it? A. Probably I should.
Q. Therefore you do not know what his books show as to actual profit and loss sustained by him during this period? A. I do not.
Q. And the actual state of facts may be at variance with the theory you advance? A. I hardly think so.
Q. Supposing that George Steele stands in the position you assume in this statement, he would be bankrupt, beyond all redemption? A. Yes.
Q. You have proved him from theory to be bankrupt beyond all redemption, when in fact he is a capitalist worth $45,000, which exhibits the difference between the practical statement and the theory? A. Yes, but he had capital when he went into the business.
Q. Do you state that he brought it in with him? A. One-half of it was made in the sail-making business.
Q. Where was the other half made? A. In the fishing business, during 19 years, but that is only $1000 a year; and he ought to make that.
Q. The actual loss on each vessel, for 107 vessels, you place at $167? A. Yes.
Q. Will you make that up and tell me for how much he ought to be a defaulter? A. His loss would be $17,869.
Q. And that is not consistent with the facts,—he is not a defaulter to that amount? A. He has made it up in other parts of his business, but as far as his vessels are concerned, he has probably lost that sum.
Q. You did not get access to his profit and loss ledger? A. No.
Q. That would show exactly how it is, and this is an imaginary conclusion? A. Yes; I could not make it up without the actual bills of expenses for his vessels. I thought it was already understood that this was imaginary."

Now, this is the testimony that is given in answer to Mr. Dana's request that the statement should be perfectly true.

WEDNESDAY, Nov. 21, 1877.

The Conference met.

MR. THOMSON continued his closing argument in support of the case of Her Britannic Majesty.

Your Excellency and your Honors:—When we adjourned yesterday I was referring, I think, to a statement produced by the American witness, Low, the figures of which were prepared to show the respective values of the fisheries on the American shore and in the Bay St. Lawrence for a period of years, from 1858 down to 1876 inclusive. It appeared, however, on cross-examination that the earnings of the vessels engaged in codfishing averaged each $393 per month after paying off the crews and liquidating the "stock charges"; the vessels mackerel fishing on the American shore made $326 per month; while those mackerel fishing in Bay St. Lawrence averaged each $442 per month. These figures as determining the relative values of these fishing grounds, to which I will hereafter call your attention, are I conceive, conclusive. While Low was on the stand he put in statements from the books of George Steele and Sinclair and Low. The statement of Steele, which is to be found on page 402 of American Evidence, shows when the figures are examined that the Bay catch from 1858 to 1876 was 33,645 barrels of the value of $403,832. It shows that the catch extending over the same period of time on the American shore was but 5,395 barrels, of the value of $43,101. The average price of the Bay catch per barrel was $12, and of the shore catch $7.99. Now that, your Honors will see, is important, for it comes from Major Low, who came here for the purpose of proving directly the opposite. He came here to sustain the extraordinary view that was presented in the American Answer and by American witnesses, namely, that the fish caught on the American shore were more valuable than the fish caught in Bay St. Lawrence. Unfortunately the figures by which it was attempted to prove that, proved directly the reverse. Your Honors have only to take up the American Evidence at page 402, and take the statement A. to find the result. The statement of Sinclair and Low, which is found at pages 380 and 381, shows that in the years 1860, 1861 and 1862 the Bay catch was 3,645 barrels, bringing $23,059, or an average of $6.32 per barrel, whilst the catch on the American shore was 1,024 barrels, bringing $5,532, or an average of $5.42 per barrel. Sylvanus Smith, an American witness, when on the stand, produced a statement, or his evidence will establish, that from 1868 to 1876, his Bay catch was 10,995 barrels, realising $111,703, averaging $10.16 per barrel; whilst the United States shore catch was 19,387 barrels, bringing $176,998 or $9 per barrel, $1.16 less per barrel than the Bay catch. Procter's statement shows that his Bay catch from 1857 to 1876, for 19 years, was 30,499 barrels, realising $345,964, or an average of $11.57 per barrel. Procter gives no American shore catch, I suppose he had good reason for not doing so; I presume that the figures would not have compared favorably.

It is remarkable that the statement of Sylvanus Smith, (which is to be found at page 330 United States evidence) is taken for the period from 1868 to 1876, when the American Fisheries were said to be at their best, I think. But be that as it may, he shows—although he came here for a different purpose—that his Bay catch was 10,995 barrels, realizing $111,703, or an average of $10.16 per barrel; whilst his catch on the American shore was 19,387 barrels, realizing $176,998, or an average of $9 per barrel. Now these statements are put in by Mr. Low, with the exception of those of Sylvanus Smith and Procter, who, though brought here for another purpose, was obliged in cross-examination by Mr. Davies to admit the facts which I have shown. It is significant also that Low was put forward by Mr. Dana as a gentleman who would put in statements direct from books in order to insure accuracy, and Mr. Dana himself takes this view in his speech, for he says, after commenting somewhat severely on the British evidence, "Now, let us turn to evidence that can be relied on"—the evidence of books. Yet Low, though he had full access to the books, did not care to take the whole of the contents, such as they were, but he chose only to take certain figures and hold back those on the other side of the account in favor of the Gulf Fisheries; and he is obliged to admit that he made the statement up merely as an estimate. This is significant, because at first it was put forward that all these were accurate statements. Why the man who came here professedly to give the contents of the books of the Gloucester merchants engaged in the fishing business, should give an estimate instead of the actual facts, passes my comprehension.

MR. FOSTER:—You are entirely incorrect—the statement he came here with was an estimate. He made an estimate for one voyage, after putting in the result of the analysis of the trip books, and after the whole trip books were before you.

MR. THOMSON:—I say that the trip book only shows certain expenses connected with a particular voyage, not the whole expenses of the vessel. There was no record therein as to what was paid for provisions, for coal, and a number of articles. And while I am on that subject I may mention that hard coal was charged in one of the accounts—I forget which, but your Honors will recollect—at the rate, I think, of $10 a ton. It struck me as an exceedingly high price when it can be bought in St. John for $5.50 and perhaps less. It struck me as very odd.

MR. FOSTER:—It depends on the year.

MR. THOMSON:—Well, this year. Cordwood, for what purpose it is required I do not know, is entered at $8 or $10 a cord, while Mr. Patillo said in cross-examination that he had bought it at $2.75 per cord. These are all little straws on the current showing which way it is running.

MR. FOSTER:—He never said that in the United States he could buy it at that price.

MR. THOMSON:—He got it at Canso. He said the American fishermen all got their wood at Canso; and I then asked him how much they paid for it. It is wholly absurd to suppose that shrewd American fishermen would buy their wood in the United States and pay a high price, when they could get it at Canso, which was directly on their route, at $2.75 a cord.

MR. FOSTER:—He has been out of the business since the end of the war, and Steele's books are for later years.

MR. THOMSON:—I apprehend that Steele's trip books do not show what was paid for wood, and the other books have not been produced. It is true the extraordinary offer was made to us that we should go down and examine all the books of the Gloucester merchants. I greatly doubt whether the learned agent of the United States could have borne me out if I had gone into one of the Gloucester houses and asked to see their books.

MR. FOSTER:—You had better come and see.

MR. THOMSON:—And besides, judging from the two sets of affidavits which have been filed, both professing to come from one set of books, it appears as if these were different sets of entries in the same books relating to the same subject, or that they were taken from different books.

MR. DANA:—Do you mean that the offer was not made in good faith.

MR. THOMSON:—I do not mean to say the offer was not made in good faith. It was also rejected in good faith. We knew exactly where we were. I apprehend that the agent and counsel of the United States could have no possible authority to enable us to go into the stores of Gloucester merchants and search their books. I think that like Patillo they would have asked for our authority.

MR. DANA:—It is very well to make sport out of it, but you are calling in question the honor of persons.

MR. THOMSON:—If Mr. Dana thinks I am calling in question the honor of Counsel, I must say I am doing nothing of the kind. I would be very sorry to be misunderstood. We have got along so far very pleasantly at this Commission, and I hope we will do so to the end. I state most distinctly on my honor that I have not the slightest idea of charging any dishonorable motive on the part of the United States Counsel; but I mean to say, that, though the offer was made in good faith, it was rejected in good faith, and for the reason which I have stated.

These are the last observations I have to make in regard to Low. He certainly was a most preposterous failure, coming here as he did, paraded as a man of figures and statistics, having the title of Major in the army, and having filled the office of Postmaster, and I don't know how many more offices. He was brought here to destroy our case, and by his answers on cross-examination he really benefited it as much as a witness could possibly do. I think that the only parallel case to that of Low—and it may be a parallel case—occurred some thousands of years ago on the hills of Moab. I can imagine Mr. Collector Babson, who appeared to have charge of a great number of witnesses, and marshalled them in and out, saying to Low, after he had given his evidence, in the same language as was used by the King of Moab to the Prophet Balaam, "I brought you here to curse mine enemies, and "Low" you have blessed them altogether these three times; now depart into your own country." And I presume he departed.

There has been some difference of opinion as to the catch taken within the limits. It has been put down by a large number of witnesses as being at least a two-thirds catch; some of them have said it was a nine-tenths catch. Mr. Foster has based his argument on the assumption that it was a one-third catch. The evidence on our side is overwhelming on this point. I called your Honors' attention yesterday to the fact that the evidence produced to answer our case was given by *witnesses who had not been on the ground themselves at all;* they fished, they said, elsewhere, and did not value the inshore fisheries, simply because they did not choose to use them.

Let us refer to the testimony of some of our witnesses:—

Mr. Simon Chivirie stated that two-thirds at least of the mackerel caught off P. E. Island is taken within three miles of the shore, and some seasons none could be caught outside. (He spoke from an experience of thirty years,) the reasons being that mackerel come inshore to feed. In the Bay of Chaleur the fishing is all inshore, the reason being that in the centre it is deep water, with a strong current. On the South side are banks where fish food abounds.

Mr. McLean stated that he himself had seen vessels among schools of mackerel, as far as the eye could see either way along the coast, right inshore. He had seen mackerel taken with jigs in two fathoms of water. Mackerel, he said, are only taken when shifting, excepting in shoal grounds, or on banks. When he was in the habit of fishing, all the mackerel he took was within three miles of the shore.

Mr. Campion said he did not fish outside the limit, because there were no fish there. Some vessels used to drift off the land, but they would have to sail in again,—they could get no fish beyond the three mile limit.

Mr. Campbell stated that two-thirds of the fish taken by the fishing vessels in the Bay of Chaleur are taken within the three mile limits. The American fleet, he said, caught mackerel from two to two-and-a-half miles from the coast. There was not much fishing doing outside three miles.

Mr. Poirier stated that he could safely say from an experience of forty years, that he had never caught mackerel more than two miles from the shore.

Mr. Sinnett, of Gaspé, stated that he had seen American skippers fish two miles from the shore, and inside a mile for mackerel. He had never seen them further than that; they generally fished, said he, in by the shore. Codfish, said he, is caught in his neighbourhood at from one-and-a-half to two miles from the shore.

Mr. Grenier stated that he had seen some fishing for mackerel beyond three miles, but the majority fished within the limit. More than two-thirds of the whole catch of Americans is taken inside three miles.

Mr. MacLeod stated that American fishing vessels fished mostly within three miles, in the Bay of Chaleur. He himself had taken fish off Miscou and Shippegan within half-a-mile of the shore.

Mr. A. McKenzie stated that the American fleet took two-thirds of their catch inshore, but he added that *some skippers got all their catch in deep water, perhaps one vessel in twenty.*

Mr. Angus Grant spoke of the trips he had made, all inshore or close inshore, from one-half mile to one and one-half miles.

Mr. Brown made a statement to the same effect.

Mr. MacKay spoke of the catches he had made inshore off Cape Breton, so close that he would sometimes be at anchor among the boats.

Captain Hardinge, R. N., stated that the best fishing was without a doubt within three miles, there could be no two opinions on that point. From his experience and observation on his fishing station, and from information he had obtained, he stated it as his opinion that the outside fishing for mackerel was of no account whatever. He had never received any information to the contrary.

Mr, Nicholson stated that with regard to the mackerel he had seen taken, all the catch was within three miles of the shore.

Mr. McGuire stated that most of the United States captains with whom he had conversed, said that they caught their mackerel inshore.

Mr. Stapleton considered, as a result of his conversations with American fishermen, that three-fourths of the fish are caught inshore. In 1851 he had fished with fifty American vessels close inshore near Margaree and around Cheticamp, and all got full fares within a quarter of a mile of shore.

Mr. Baker stated that three-fourths of the mackerel taken by the Americans on the Gaspé coast and in the Bay of Chaleur was taken within the three-mile limit.

Mr. Jessop of Gaspé, had seen the Americans fishing in his district right along the shore, and within one mile or two miles of the shore.

Mr. Coutoure stated that he had taken cod in an American vessel on the Cape Breton coast, from one mile to one-and-a-half miles from the shore, and had made good catches of mackerel off P. E. Island, within two miles of the shore.

Mr. William MacDonnell stated that all the fish he had taken at Margaree and Cheticamp were within three miles of the shore.

Mr. Paquet likewise spoke to large catches taken inshore. The fish, said he, taken near Margaree, Cheticamp, Broad Cove, and Limbo Cove, on the Cape Breton shore are all caught within the limits. About P. E.

Island he said the fish were taken within half-a-mile and two miles of the shore. On the New Brunswick shore within two-and-a-half miles and three miles of the shore. In the Bay of Chaleur within a-half mile and two-and-a-half miles of the shore; but a few might be caught, he said, in the centre of the Bay. Along the south side of the river St. Lawrence fish were caught about one hundred and fifty yards from shore.

Mr. MacIsaac stated that about two-thirds of the entire catch of mackerel was taken inshore.

Mr. Tierney spoke of large catches of mackerel taken from within a mile to a-mile-and-a half of the shores of P. E. Island. He had fished for eleven years around the island, and had taken three-fourths of his catch within that distance.

Mr. McPhee stated that during the whole period of his fishing from 1862 to 1874 three-fourths of the fish he had caught had been taken within three miles.

Mr. John MacDonald also spoke to the large quantities of fish taken during a period of nearly twenty years, the greater proportion of which were taken inside the three mile limit.

Mr. John R. and Mr. John D. McDonald spoke to a similar experience.

Mr. Richardson who had fished in American vessels from 1850 to 1874, stated that nine-tenths of the fish he had caught while in them had been taken within three miles of the shore.

Mr. Clement McIsaac stated that he had never caught 100 barrels of mackerel outside of three miles.

Mr. McInnis, who had fished in American vessels from 1858 to 1873, stated that two-thirds of the catches he had made were within the three mile limit.

Mr. Benjamin Campion, speaking from an experience of seven years fishing, said that two-thirds of the catch had been taken within the three miles.

Many other witnesses testify to the extreme value of the inshore fisheries, but I think I have quoted enough for my purpose.

Let us now examine the testimony as to the number of United States vessels frequenting Canadian waters:—

Mr. Chivirie estimates the number of United States mackereling vessels in the Gulf annually from 1848 to 1873 at at about 400; since 1873 not over 200 or 300.

Mr. James R. McLean states that in 1858 the American fleet was 600 or 700 sail. Has counted 400 anchored under the south shore at East Point.

Mr. John Campion places the number from 1862 to 1866 at from 600 to 700.

Mr. Joseph Campbell estimates the number at from 450 to 500 in 1866 and 1867, and 400 in 1869, '70 and '71

Mr. Poirier stated that he had seen 300 sail come into the waters between Cascumpeque and Mimnigash; all fishing very close to shore.

Hon. Mr. Howlan, of Cascumpeque says:—I have seen 340 United States vessels annually in my harbor; generally when there was a gale of wind.

Gregoire Grenier states that he has seen more than a hundred sail in a season, and more than twenty came to an anchor in front of his place.

MR. FOSTER:—Grenier's evidence all refers to what passed more than seven years ago.

MR. THOMSON:—Well, even so, the mackerel have not changed their habits.

MR. FOSTER:—I thought that they had.

MR. THOMSON:—

Mr. McLeod says:—"During the season of 1852, there were from 460 to 470 American vessels in the Gulf—mackerelers. In 1854, from 200 to 300 American vessels were fishing in the Bay of Chaleurs. In 1855, from 200 to 300 in that quarter; probably 600 in the Gulf. They told me that there were about 600 inside of Canso. In 1856, about the usual number. In 1857, the same, and up to 1862, about the same thing; also in '64, '65 and 66 the same. In 1867, there were from 300 to 400 inside the Bay Chaleurs. I have seen in 1867, 250 lying at anchor in Port Daniel Bay, and as many more at Paspebiac on the same day, three-fourths Americans."

Mr. Philip Vibert, of Perce, Gaspè:—"Of late years few United States vessels have visited our district for mackerel, but I have seen two hundred or three hundred in sight at one time. Not more than four or five years ago, I counted 167 from my house. I have seen 300 in Bay Chaleurs and steaming up to Quebec, have seen as many more on the way up. The average number from the Gut of Canso upwards, I should put at not less than from 350 to 400, averaging 70 or 75 tons. Skippers come ashore and are communicative, in fact in many instances they are interested in other vessels, and they look after the catch, and can tell pretty well what it is. There is no difficulty in arriving at a general estimate of the take of boats."

"A vessel may come into Georgetown with a broken spar, and the captain state that there are 75 vessels at the Magdalen Islands, another vessel would report 100 vessels in Bay Chaleurs,—that is the only way in which you can get at the number of vessels in the Bay."

Mr. George Harbour of Sandy Beach, Gaspé:—300 is about the average. Has seen as many as 50 at one time in the harbor. In 1872 there were at least 300 sail.

Mr. William A. Sinnet, of Griffiin's Cove, Gaspe:—Has been told by American captains that there were 500 sometimes, as high as 500. Did not see all that number at one time, but has counted as many as 60 odd sail at one time at Madeleine River.

The testimony of Angus Grant, Port Hawkesbury, will be found on page 180. He says:—

From 1854 to 1856 average between 500 and 600 within the Bay. Has seen 400 sail in Port Hood at a time. The number increased from 1856 to 1869, and of larger tonnage. Since 1869 down, 600 to 700 sail. Quite a large fleet in 1873; about 500 in 1874; not so many in 1875; and 1876, perhaps not quite half of that. This year there is quite a large fleet coming. Has seen them coming every day. Lives on Strait of Canso, and can see them cross. Average number of United States codfishing fleet, from 200 to 300 sail.

I want to see whether he gives the proportion of the catches made inshore.

MR. FOSTER:—The bulk of your witnesses did so.

MR. THOMSON:—Yes, they did do so. Now, let me see what the Americans state in their own affidavits—my learned friend, Mr. Foster, assumes the catch taken in shore, for the purpose of argument, to be one-third, but I am going to show you that a number of his own affidavits—affidavits which were made by a number of his own men—give this catch *as about one-half*, interested as they were; some of our witnesses placed it at *nine-tenths*, and consequently I think that this Commission may fairly assume, that *at least three-fourths* of these catches are taken inshore.

I will take affidavit No. 201, contained in Appendix M.

MR. FOSTER:—Read the whole of it.

MR. THOMSON:—It runs as follows:—

I, Roderick McDonald of Low Point, N. S. do declare and say on oath as follows: I am living at Low Point, Inverness Co. Nova Scotia, am over thirty years old, have been fishing for about 12 years until three years ago, when I knocked off, because mackerel was scarce in the Bay, and it did not pay—the mackerel fishing has much fallen off during the last six or

seven years—during these six or seven years the average yearly catch has not been over ½ of what it was eight or ten years ago—during some seasons they will be much more off shore at other seasons more inshore—during hot weather they will work more off shore—the best place for mackerel I have ever seen is on Bradley Bank about twenty miles from North Cape, P. E. I.—sometimes the Americans when mackerel is plenty will catch about 2-3rd of their entire catch outside a line three miles from shore, but striking an average I think that during a season when mackerel is plenty, Americans will catch about one-half outside and the other half inside a line three miles from shore.

That is the only part of this affidavit which I need read at present.

MR. FOSTER :—Remember that Mr. McDonald is a Nova Scotian.

MR. THOMSON :—So is Pattilo a Nova Scotian.

MR. FOSTER :—McDonald lives there, and his affidavit was taken down there.

MR. THOMSON :—No matter where the affidavit is taken, the affidavit is here among those submitted by the American Government, and they must adopt it, as they have put it in. Having obtained this statement, if they did not like to put it in, they need not have done so ; but having put it in, they are bound by it.

MR. FOSTER :—That is a fair argument.

MR. THOMSON :—George Critchett, being duly sworn, says :—

I am living at Middle Milford, Guysboro County, Nova Scotia—I am 37 years old, from my 18th year until 4 years ago I have been out mackerel and codfishing mostly in American vessels—I left off fishing because the mackerel fishing had been poor for several years and is still ; whenever mackerel get to be plenty again I will be out fishing in vessels. I think that in former years, say from 10 years ago and longer, the average number of the American mackerel fleet was upwards of three hundred during the season—during the same period about 30 or 40 Provincial vessels were in the Gulf of St. Lawrence—the number of American vessels above referred to, is intended as the number in the Gulf of St. Lawrence—during the years previous to the last 10 years, the average catch of mackerel was two trips for each vessel—during the last 6 or 7 years they have scarcely averaged one full cargo during the season—I think that mackerel go where they find the best and largest quantity of feed, and that when the wind is off shore it drives the small fish on which mackerel feed into deeper water, and the mackerel follow them, and whenever there is a big fleet off shore and heave over much bait, the mackerel will follow the fleet—during the years I was out fishing we did better outside a line 3 miles from shore than inside that line—on an average, I am of the opinion, about from half to two-thirds of all mackerel caught by vessels in the Gulf is caught outside of a line 3 miles from shore.

This deponent states that from one-half to two-thirds of the catches were made outside, and thus virtually admits that one-half were taken inside of the three mile limit ; this is about as favorable as our own testimony. We all know that the language which appears in most affidavits is the language of the man who draws them up ; and this is true in nine instances out of ten ; and undoubtedly the most that they could get out of this man was, that from one-half to two-thirds of the trips were made outside of the limit.

MR. FOSTER :—He says that during seven years past, the vessels have not averaged a full cargo during the season.

MR. THOMSON :—That makes no difference. I only want to see what the catch is. I am not at present discussing any other question.

MR. FOSTER : He also states that until the present season, only two or three vessels seined in the Gulf.

MR. THOMSON :—That is another point ; and I am only touching on one point at the present moment.

In affidavit, No. 177, (Appendix M) George Bunker says :—

I, George Bunker do solemnly declare that I am 31 years old—that I am living at Margaret Bay 24 miles from Halifax I have been employed as a fisherman ever since I was a boy—for ten seasons I have been master of a fishing vessel, fishing in the waters off the American coasts, and those of Nova Scotia, the Gulf of St. Lawrence and Magdalen Island for cod and mackerel and herring—codfish is not at all caught by the American fishermen within three miles from the shore—about half of the mackerel caught by the Americans is caught within three miles from shore.

MR. FOSTER :—He states that the catch of mackerel has largely fallen off during the last five or six years.

MR. THOMSON :—I cannot read all through this affidavit. They are very interesting reading, I dare say, but they take time.

In affidavit No. 192, Appendix M, I find that Philip Ryan says :—

I, Philip Ryan, do solemnly declare that I am living at Middle Milford, I am 42 years of age—I think I was about 16 years of age when I first went out fishing in the Gulf of St. Lawrence in fishing vessels—I have mostly been mackerel fishing, although some seasons I have been codfishing in the Bay—I left off going in fishing vessels in 1872—the American fishermen don't dry their nets nor cure their fish on our coasts as far as I know— during the last eight or ten years mackerel fishing has much fallen off and during the last two years as far as I can hear, mackerel fishing has almost been a failure—porgies and clams as far as I know, is universally used in the Bay as bait, although a few Provincial vessels may occasionally use herring—porgies and clams get all from the States as far as I am aware—I should think that about one-half of all the mackerel caught by vessels is caught outside a line 3 miles from shore.

Now that is what he says. This you see is contained in the American testimony, and I say that it is conclusive against the case of the American government. If they did not like these affidavits they need not have put them in, but being in, I say that they are conclusive against the American case. Besides there is another matter which sets this question at rest. When Prof. Hind was on the stand, he gave evidence which was not only very interesting, but as I submit conclusive, in view of this conflict of testimony. I have no doubt that it was so to the Commission, as certainly it was to us. He pointed out the scientific reasons why the fish, such as the cod, mackerel, halibut and other fish of that description which are useful for food, inhabit the Bay of St. Lawrence. He says that these fish must necessarily live in water of the temperature of 37 or 40 degrees, or even of a temperature colder than that. He states that the great Aretic current which brings down from the North those immense icebergs, that make our climate so excessively cold and inhospitable—quite as "inhospitable" as many of the statutes of which my learned friends opposite have complained, also brings with these icebergs an antidote to the poison, in the shape of these fish of commerce. He says that this cold stream of water enters the Gulf of St. Lawrence, and the fish with it ; and he points out that on the American coast there can of necessity be but very little fish of this description. He also points out—and I am not going to take up your time by referring to his evidence *in extenso* at all—that on three or four points on the American coast, this great Arctic current impinges ; that it remains there for a certain period of the year, and in the spring that the fish go with it, and remain on the shore there until this cold current of water recedes ; but that the great Ocean River, as it is called by Lieutenant Maury, the Gulf Stream, in its summer swing approaches very near the American coast in some places, and touching it in other places, separates the surface current from the colder waters beneath, where these fish feed, and thus drives them from the American shore to colder regions. He further pointed out that even in the Gulf of St. Lawrence there are many places where these fish do not live; that zones of water of different temperatures are found there, some warmer and some colder than others ; and that in the colder zones these fish live, whilst in the warmer zones they are unable to live. You will

recollect, no doubt, without my calling your attention particularly to the evidence, that a number of witnesses, American and British, testified that every now and then after having tolled the fish out from the inshore waters by throwing pogie bait, they would suddenly disappear, and be lost to them; and this is accounted for at once by Professor Hind's evidence. The cause is this:—that the fish then suddenly find themselves in a zone of warmer water in which they do not care to live; consequently they at once dive to a greater depth for the purpose of finding a zone of water more congenial to their habits of life; and by and bye they find their way back to the shore. Another piece of evidence which Prof. Hind gave, struck me as being of great importance in this case. He pointed out one extraordinary phenomenon, which is observable in the great Bay of St. Lawrence. He says, that the tides come in through the Straits of Belle Isle, and are divided by the Magdalen Islands into two portions. One portion runs away along the southern coast of Labrador, around the island of Anticosti, and up the northern bank of the River St. Lawrence, while the other portion passes down to Prince Edward Island and into the Strait of Northumberland. He says, that in consequence of the great distance which one portion of the tide has traversed, while the other has travelled a shorter distance, the tide coming down from the northern coast meets the ebb tide about the middle of the Island, and as a consequence of that there is really high water always found about the centre of the Island; and for that reason the Island presents the peculiar appearance it does, having been hollowed out year after year by the action of these tides. The effect of that phenomenon is—and it is a phenomenon which I think Prof. Hind stated only occurs in one or two other places in the habitable globe—that the whole of the fish food is carried inshore. The cold water which is necessary to the existence of these food-fish of commerce, such as the mackerel and the cod and the halibut, is carried inshore in the bight of Prince Edward Island; it is carried inshore along the southern coast of Labrador; it is carried inshore along the northern bank of the River St. Lawrence. All this he points out, as being the necessary result of that tide. These fish are thus brought inshore, and they necessarily have to remain inshore in order to get the food which they most desire to feed upon.

I then put this question to Professor Hind: "If there should be two classes of witnesses here, each of them being a numerous class, and if one class swears that the catch of mackerel off the Prince Edward Island shore is very slight within the three mile limit, and the other that this catch is very good within the three mile limit, which would, you say, in a scientific point of view, is telling the truth?" "Undoubtedly," he replied, "those who swear that a very great portion of the catch is taken there within the three mile limit, because science says that this must be the case."

So you see that, supposing these witnesses came here and honestly told what they believed to be the truth, we have Science stepping in and deciding the question, and moreover deciding the question entirely in favor of the British case. I shall therefore not trouble your Excellency and your Honors any further with the evidence upon that point, but pass to another branch of my argument. I believe that I stated yesterday in the course of my argument, that were we to assume the American account of the inshore catch of mackerel in the Gulf to be correct, and fix it at one-third, that even then it would be quite impossible for them to prosecute successfully mackerel fishing in the Gulf, without having access to the inshore fisheries. The business would not pay. They would eventually be compelled to abandon the Gulf of St. Lawrence altogether, and in that case their market would not be supplied with mackerel.

The evidence shows that although an exceptional catch may be made in the Bay without going near the shore at all, yet that no man in his senses would fit out vessels and send them into the Bay, unless he had the privilege of following the schools of mackerel to the shore. There is a consensus of evidence on that point, I submit.

There was a statement made with reference to this fishery by Mr. Foster, in his speech, in connection with the evidence of George Mackenzie, which I think I can convince Mr. Foster was erroneous. No doubt he unwittingly misrepresented Mr. Mackenzie's statement.

MR. FOSTER:—What is it about?

MR. THOMSON:—You put in his mouth this language; it is quoted in your speech:—"There has not been for seven years a good vessel mackerel fishery, and for the last two years it has been growing worse and worse." Now, he did not say anything of the kind; and I want to show that this is the case. I will read you what you said:—

"We have the statement of one of the Prince Edward Island witnesses, George Mackenzie, on page 132 of the British evidence, who, after describing the gradual decrease of the American fishery by vessels, says, "There has not been for seven years a good vessel mackerel fishery, and for the last two years it has been growing worse and worse."

I wish to call the attention of the Commission to this matter to prevent their being misled by this statement. I do not, of course, charge any wilful mis-statement upon my learned friend, and consider that he has fallen into an unintentional error. Such language was never used by the witness in question: he never said—"and for the last two years it has been growing worse and worse." If my learned friend will turn up the evidence and point such a statement out, I will withdraw this assertion; but though I have carefully gone through his evidence, I cannot find it.

MR. FOSTER:—Do you think that I am quoting that expression of opinion?

MR. THOMSON:—It is printed with quotation marks. You put forward this statement as having been made by him; and I undertake to say that this statement in that respect has never been made.

MR. FOSTER:—I am put down as having quoted that continuously. I may say that I did not correct that portion or a great portion of my speech.

MR. THOMSON:—You say that this statement is to be found on page 133.

MR. FOSTER:—The following portion of his examination is to be found on page 133:

Q.—The fisheries failed pretty suddenly, did they not?
A.—No. For a good many years they were failing.
Q.—Which was the last good year?
A.—We have not really had a good year during the last seven years.

I think you are right. I do not think that the exact words of the expression which is placed in quotation marks is to be found there; but that statement contains the spirit of his evidence.

MR. THOMSON:—On page 128 he gives an opposite view.

MR. FOSTER:—I have just read from page 133. I must compare the statements, and see how they correspond. I should hate to be responsible for the accuracy of the printing.

MR. THOMSON:—I will not take up any more time about this matter, further than to say to the Commissioners that I have carefully gone through this evidence, and I cannot find it.

MR. FOSTER:—I say that the substance of this statement is there.

MR. THOMSON:—I differ from you on that point, but if you show that it is there, I will withdraw what I have said about it.

MR. FOSTER:—I have already pointed out the substance of it on page 133.

MR. THOMSON:—And I say that the substance of the statements which appear on page 128 is exactly the opposite.

MR. FOSTER:—I dare say. Mr. Davies was then examining; but the statements from which I quoted, were made in cross-examination.

MR. THOMSON:—The following statement appears on page 44 of Mr. Foster's argument:—

That would make 26,404 barrels caught in British territorial waters the first year of the Treaty. What were these mackerel worth? Mr. Hall tells you that he buys them, landed on shore for $3.75 a barrel.

This is the point to which I wish to call your attention. I cannot comprehend why Mr. Foster should assume the *value* of the privilege of taking these fish to be fixed by the cost of procuring them. It seems to me quite clear that the value of fish in the water, is just their value in the market—*less* the cost of procuring them and transporting them thither.

However, taking his own method of valuation, this calculation is based on the statement which Mr. Hall makes, that he bought up these mackerel for $3. 75 a barrel. I have looked over Mr. Hall's evidence, but it is very difficult to say whether he meant that he paid $3.75 a barrel by reason of having his men in his employ on particular terms, or that he got them at that price; but George McKenzie, who was also a witness, states on page 132 of his evidence, that he paid $6 a barrel for mackerel this year. Now, these two statements are entirely at variance, if Mr. Hall meant that such was the actual value of the fish when they were taken out of the water and transferred to him.

MR. FOSTER:—Mr. McKenzie testified as follows on page 132:—

Q.—Then do you pay as high as $6 a barrel for fresh fish?
A.—Yes.
Q.—How much did you pay last year?
A.—We did not then pay higher than $1.50
Q.—That would be $4.50 a barrel?
A.—Yes.
Q.—And the year before last?
A.—The price then was the same as it was last year.
Q.—How much did you pay four years ago?
A.—About the same, from $1 to $1.50.

MR. THOMSON:—As you will perceive, Mr. McKenzie states, as I said, that he has given $6 a barrel for these fish this year, as against the price which Mr. Hall chose to say he only pays, or $3.75 a barrel. Mr. McKenzie says that these fish cost him $6 a barrel. Mr. Foster's calculation is based on the statement made by Mr. Hall, and this is here confronted with the evidence of Mr. McKenzie.

If your Excellency and your Honor's believe that the evidence given on this point by Mr. McKenzie is correct, and you must judge between the two—the calculation of Mr. Foster is necessarily at fault.

MR. FOSTER:—Mr. McKenzie buys his fish by the hundred, and he estimates the number of fish contained in a barrel: that is the way in which he makes out the price as being $6 a barrel.

MR. THOMSON:—Mr. Foster says: "That would make 26,404 barrels caught in British territorial waters that year,"—which was 1873. Now I take Mr. Foster's own figures in this matter. He further says on page 44:

That was the first year of the Treaty, and there were imported into the United States from the British Provinces 90,889 barrels, on which the duty of $2 a barrel would amount to $181,778. The value of the fish that our people caught is $99,000, and the British fishermen gain in remission of duties, nearly $182,000.

This is the only year which Mr. Foster has selected.

MR. FOSTER:—I have taken the figures for every year since the Washington Treaty went into effect.

MR. THOMSON:—Even allowing, as the United States affidavits affirm, that the part of the Gulf catch which is taken by them within the three mile limit only amounts to one half, we have 40,000 barrels. To this quantity you have to add the quantity imported from Canada, which is nearly all taken inshore, amounting to 91,000 barrels, the total is 131,000 barrels, and consequently it appears from these figures that there were taken from British territorial waters about 45 per cent. of the entire consumption of the United States. And if the proportion of the voyages made in the Gulf, and taken within the three mile limit be two-thirds, then these figures are increased to 150,000, or to over 50 per cent., and this is the result which follows from Mr. Foster's own figures.

MR. FOSTER:—That is— you add the catch of your own people to the catch of our people, in the Gulf, and say that is such a percentage of the total amount that went into the United States market. I dare say it may be so.

MR. THOMSON:—So, as United States fishermen obtained in the Gulf that year 80,000 barrels, and there were imported into their market from the British Provinces about 91,000 barrels, that makes a total catch in the Gulf of St. Lawrence of 171,000 barrels, that is to say, the catch on the United States coast was 130,339 barrels, or 43 per cent., and the catch in the Gulf of St. Lawrence 171,000 barrels, or 57 per cent.,—this makes a total of 301,339 barrels. Now, these very figures themselves are about the very best evidence that can be advanced, as to the relative value of these two fisheries.

With reference to the value which the United States themselves put on our fisheries, I want to cite some of of their own figures; and the value which the Americans themselves have set on these fisheries is very conclusively shown by admissions of their own public men.

SIR ALEXANDER GALT:—Before you take up that point, Mr. Thomson, will you be kind enough to tell me what the proportion of the catch you claim as taken inshore, bore to the whole American consumption, 50 per cent. you have made it, and I think it was 33 per cent.

MR. THOMSON:—I say that if the proportion of the voyages, taken inshore, within the three mile limit be two-thirds, there were taken in British territorial waters about 50 per cent.

SIR ALEXANDER GALT:—50 per cent?

MR. THOMSON;—Yes. I will read the proposition again:—Now; allowing, as the United States affidavits affirm, that one-half of the catch was taken inshore;—viz., 40,000 barrels, add importations from Canada, 91,000 barrels, which makes 131,000 barrels; and therefore there have been taken in British territorial waters 45 per cent. of the entire consumption of the United States. That is what I said.

MR. FOSTER:—That is assuming the whole of your catch to have been taken inshore.

MR. THOMSON:—Yes; and if the portion vouched for as taken from within the three mile limit be two-thirds, then these figures would make 152,000 or over fifty per cent. of that consumption.

MR. FOSTER:—I hope that the Commission will not charge us for the privilege possessed by British fishermen of catching mackerel.

MR. DANA:—Some of the British catch is taken eight miles from land.

MR. THOMSON:—In order to show the value, as stated by Americans themselves, of these fisheries, I will quote the language of Mr. Secretary Seward, which is quoted on page 16 of the British Reply to the United States Answer. Mr. Secretary Seward said:—

Will the Senate please to notice that the principal fisheries in the waters to which these limitations apply are the mackerel and the herring fisheries, and that these are what are called "shoal fisheries," that is to say, the best fishing for mackerel and herring is within three miles of the shore. Therefore, by that renunciation, the United States renounced the best mackerel and herring fisheries. Senators, please to notice also, that the privilege of resort to the shore constantly to cure and dry fish, is very important. Fish can be cured sooner, and the sooner cured the better they are, and the better is the market price. This circumstance has given to the Colonies a great advantage in this trade. That stimulated their desire to abridge the American fishing as much as possible; and indeed they seek naturally enough to procure our exclusion altogether from the fishing grounds.

MR. FOSTER:—What year was that?

MR. THOMSON:—1852. Touching the mode in which the Treaty of 1818 as regards large bays shall be construed, Mr. Secretary Seward said this:—

"While that question is kept up, the American fisheries, which were once in a most prosperous condition, are comparatively stationary or declining although supported by large bounties. At the same time, the Provincial fisheries are gaining in the quantity of fish exported to this country and largely gaining in their exportations abroad.

Our fishermen want all that our own construction of the convention gives them, and want and must have *more*,—they want and must have the privilege of fishing within the three inhibited miles, and of curing fish on the shore."

Certainly the circumstances which induced Mr. Secretary Seward to use that language in 1852, have not since changed in such a manner as to authorise the United States, or any of her public men to use different language to-day.

Senator Hamlin, after describing the magnitude and importance of the American fishery as the greatest fountain of their commercial prosperity and naval power, declared that if the American fishermen were kept out of our inshore water, an immense amount of property thus invested would become useless, and the fishermen would be left in want and beggary, or imprisoned in foreign jails.

And in the House of Representatives, Mr. Scudder of Massachusetts, referring to this subject, said:—

"These fish are taken in the waters nearer the coast than the codfish are. A considerable proportion, from one-third to one-half are taken on the coast and in the bays and gulfs of the British Provinces."

Now, upon that question, not only as to the value of our fisheries, but also as to the proportion of the catch which is there taken, this seems to be very strong testimony coming from an American statesman. He continues:

"The inhabitants of the Provinces take many of them in boats and with seines. The boat and seine fishery is the more successful and profitable, and would be pursued by our fishermen, were it not for the stipulations of the Convention of 1818, betwixt the United States and Great Britain, by which it is contended that all the fisheries within three miles of the coast, with few unimportant exceptions, are secured to the Provinces alone."

Mr. Tuck, of New Hampshire, said:

"This shore fishery which we have renounced, is of great value, and extremely important to American fishermen. . . From the first of September to the close of the season, the mackerel run near the shore, and it is next to impossible for our vessels to obtain fares without taking fish within the prohibited limits. The truth is, our fishermen need absolutely, and must have the thousands of miles of shore fishery which have been renounced, or they must always do an uncertain business."

He may well call them thousands of miles, because we have shown by evidence here, that they amount to no less than 11,900 square miles. He further says:

"If our mackerel men are prohibited from going within three miles of the shore, and are forcibly kept away (and nothing but force will do it) then they may as well give up their business first as last. It will be always uncertain."

This is a significant observation. We find through all these speeches allusions made to the trouble which the course that had been adopted under the provisions of the Treaty of 1818, towards the body of American fishermen coming on our shores to fish, would continue to bring upon the two countries, and that war was imminent. Why was this? Surely if the fishery on their coast is so valuable, they can stay there; and if the fisheries on our coast are so valueless, they can stay away! We have not asked them to come into our waters. And it does appear to me that it comes with extremely bad grace from these people, to make complaints that harsh measures are used to keep them out of them. What right have they at all? They have renounced all right. They have solemnly, as far back as 1818, renounced any right to enter these waters, and that Convention is in full force still, save as temporarily affected by the Washington Treaty. We have no right, except temporarily, under the same Treaty, to enter their waters. But, according to the argument of Mr. Dana, we have the right to enter them, because he says that there are no territorial waters belonging to any country. In that sense, you cannot be prevented from fishing in any waters, if I understand his proposition correctly; and we therefore have the right to go there and fish. But what do the United States say? They hold to no such construction of the law of nations. So far from that being the case, their own shore fisheries cannot be touched by foreign fishermen, and even under the Treaty, by virtue of which your Excellency and your Honors are now sitting, our fishermen have only the right to fish on their shores from the 39th parallel of north latitude Northward, not one step—not one mile to the Southward of that parallel can they go. The strongest possible proclamation of sovereignty which one country can possibly hold out to another, is here held out by the United States with regard to their territorial waters to England, and to the world; and yet for the purpose of getting into our waters, we are told that under the law of nations, that American fishermen can come in and demand complete freedom of access to them; but when it comes to their own waters, that doctrine will not do at all. This is the *reductio ad absurdum*, with a vengeance! Who ever heard anything like it! Here is a solemn agreement which has been entered into between two countries, and yet we have complaints,—complaint after complaint—regarding the means which our men have exercised in order to keep these people from fishing in our waters, from which they are inhibited by a solemn treaty. Why, it does not seem to me to be fair—not to use any stronger term than that, and using the mildest possible

term to characterise it—to adopt this tone. All this seems to be most unfair: and here Mr. Tuck states that nothing but force will keep the American fishermen out of our waters. But there is a strong reason for the employment of this language. What is it? Why, our fisheries are all valuable, while theirs are practically useless; "and the truth is,' says Mr. Tuck, "our fishermen absolutely must have access to our thousands of miles of shore fisheries." He states:—

"They, (the American fishermen) want the shore fisheries, they want the right to erect and maintain structures on shore to cure codfish as soon as taken, thus saving cost, and making better fish for market; and believing their wishes to be easy of accomplishment, they will not consent to the endurance of former restrictions, the annoyances and trouble which they have so long felt."

Now, this is very extraordinary language for any man to use. The admission is clear, and also the conclusion which Mr. Tuck draws from it. It is this: they want our inshore fisheries free from those restrictions, the effect of which the United States fishermen have so long felt; and this is simply a declaration made on the part of American citizens that a solemn agreement entered into between their country and Great Britain is an agreement which they do not choose to keep. But of course, such views cannot be tolerated in any court.

Now, let us see what are the views as to the value of our fisheries entertained by the persons who live in Boston, the very centre of the fish trade. I will call your attention for a few moments to the first annual report of the Boston Board of Trade, of 1855, and just after the Reciprocity Treaty had come in force. It was presented at the annual meeting, which was held on the 17th January, 1855. I will only read an extract, but the whole book may go in, if necessary, and be considered as read if you please. This is the same extract which I read when I cross-examined Mr. Wonson.

"But in connection with the Reciprocity Treaty, it is to the importance of the fisheries that your Directors wish at this time particularly to call your attention; seventy per cent of the tonnage employed in the whale, cod, and mackerel fisheries in the United States belongs to Massachusetts, and Boston is the business centre.

"By colonial construction of the Convention between the United States and Great Britain of 1818, we were excluded from not less than four thousand miles of fishing ground. The valuable mackerel fishery is situated between the shore and a line drawn from the St. Croix River, Southeast to Seal Island, and extending along the Atlantic coast of Nova Scotia,—about three miles from the coast,—around Cape Breton, outside Prince Edward Island, across the entrance to the Bay of Chaleur; thence outside the Island of Anticosti to Mt. Joly on the Labrador coast, where the right of shore fishing commences. The coasts within these limits following their several indentations are not less than four thousand miles in extent, all excellent fishing grounds. Before the mackerel fishery began to be closely watched and protected, our vessels actually swarmed on the fishing ground within the spaces enclosed by the line mentioned.

"Each of these vessels made two or three full fares in the season, and some thousands of valuable cargoes were landed every year in the United States, adding largely to our wealth and prosperity.

"A sad contrast has since existed. From Gloucester only one hundred and fifty-six vessels were sent to the Bay of St. Lawrence in 1853. Of these not more than one in ten made the *second* trip, and even they did not get full fares the first trip, but went a second time in the hope of doing better. The principal persons engaged in the business in Gloucester estimated that the loss in 1853 amounted to an average of one thousand dollars on each vessel, without counting that incurred from detention, delays and damages from being driven out of the harbor and from waste of time by crews. It was agreed by all parties that if their vessels could have had free access to the fishing grounds as formerly, the difference to that district alone would have been at least four hundred thousand dollars.

"In 1853, there were forty-six vessels belonging to Beverly; thirteen of them went to the Bay in 1852, but owing to the restrictions, their voyages were wholly unsuccessful, and none of them went in 1853.

"At Salem, only two mackerel licences were granted in 1853, and at Marblehead only six.

"At Newburyport there are ninety fishing vessels; seventy of these went to the Bay for mackerel in 1853, but almost all of them, it is said, made ruinous voyages. At Boston only a dozen licenses were granted for this fishery in 1853, and very few of the one hundred vessels belonging to the towns of Dennis and Harwich, on Cape Cod—two-thirds of which are engaged in the mackerel fishery—went to the Bay for mackerel last year, because of the ill-success attending the operations of the year previous. One of their vessels of one hundred tons burden, manned by sixteen men, was six weeks in the Bay in 1853, and returned with only one barrel of mackerel.

"Unless some change had taken place beneficial to the interests of our hardy fishermen, the northern fisheries would have been wholly ruined, and in all probability have entirely ceased except on a very limited scale on our own shores. The one hundred and fifty thousand tons of shipping employed in those fisheries, would have been obliged to seek employment elsewhere, and the product of the fisheries themselves, amounting to three or four million dollars annually, would have been lost to us. The present treaty opens to us again all these valuable fisheries, and our thanks are due to the distinguished statesmen who have labored in bringing it to a successful termination; and your Directors are most happy to make mention of the services of Israel D. Andrews, Esq.,—a gentleman whom we hope to have the pleasure of meeting to-day,—who has worked most assiduously for the last four years in collecting and furnishing in his valuable reports almost all the information possessed on the subject, and without whose exertions, it is hardly too much to say, the treaty would never have been made."

Is not this conclusive? These vessels I suppose, kept away from the three mile limit, and they made ruinous voyages, and yet we have had witness after witness declaring here on the American side that the best fishing was outside of that limit, and that there was no fishing inside at all.

This is the opinion of the Boston Board of Trade on this subject. In fact we hold the key in our hands which locks and unlocks the North American fisheries of both countries; and of course it is necessary for us to take care that we are not deprived of our rights without receiving proper and adequate consideration.

Your Excellency and your Honors will recollect that the Reciprocity Treaty was not put an end to by us; but it was put an end to by the solemn act of the United States against the desire of Great Britain, and against the wishes of the Dominion of Canada.

On page 391 of the American evidence, the following question was put to Major Low, the then witness on the stand:—

"Looking up the fyles of the *Cape Ann Advertiser*, with reference to the Centennial, I notice a statement relative to to your fisheries, and to the effect their prosecution has had on Gloucester, to which I would like to call your attention, to see whether you agree with it or not."

Of course it has been shewn here before the Commission, and it is well known to everybody that is acquainted with the fisheries, that this paper, the *Cape Ann Advertiser*, is the great organ of the fishing interests of New England.

This article runs as follows:—

In 1841 the fishery business of Gloucester had reached its lowest ebb. Only about 7,000 barrels of mackerel were packed that year, and the whole product of the fisheries of the port was only about $300,000! In 1851 the business began to revive, the Georges and Bay Chaleur fishery began to be developed, and from that time to this year, 1875, has been steadily increasing, until at the present time Gloucester's tonnage is 10,000 tons more than Salem, Newburyport, Beverley

and Marblehead united. Nearly 400 fishing schooners are owned at and fitted from the port of Gloucester, by 39 firms, and the annual sales of fish are said to be between $3,000,000 and $4,000,000, all distributed from here by Gloucester houses.

THE COMMERCIAL WHARVES.

The wharves once covered with molasses and sugar hogsheads, are now covered with fish flakes, and the odors of the "sweets of the tropics" have given place to "the ancient and fish-like smells" of oil and dried cod; the few sailors of the Commercial Marine have been succeeded by five thousand fishermen drawn from all the Maritime quarters of the globe; and the wharves that were the wonders of our boyhood days are actually swallowed up in the splendid and capacious piers of the present day, so much have they been lengthened and widened.

THE SALT TRADE.

For many years after the decline of the Surinam trade, hardly a large vessel was ever seen at Gloucester, and many persons thought that nevermore would a majestic ship be seen entering this capacious and splendid seaport. But never in the palmiest days of Gloucester's foreign trade, were such immense vessels seen as at the present day. Ships of 1500 tons (as big as six William and Henry's) sailed into Gloucester harbor from Liverpool and Cadiz, and came into the wharves without breaking bulk, and also laid afloat at low water. More than forty ships, barques, brigs and schooners of from 400 to 1400 tons, laden with salt alone, have discharged at this port the present year, and also the same number last year. The old, venerable port never presented such a forest of masts as now can be seen; sometimes six ships and barks at a time, besides innumerable schooners.

TPE CITY OF GLOUCESTER OF 1875 AND THE TOWN OF 1825.

What a contrast is presented as a ship enters the harbor now, with what was presented in 1825. The little rusty, weather-beaten village, with two "meeting houses" and a few dwellings and wharves gathered around them; two or three thousand people with $500,000 property, was all that Gloucester then was, as near as we can ascertain. Now the central wards, without suburban districts, contain 14,000 people, with $9,000,000 valuation.

The article continues in this fashion:—

"Five Banks with nearly $2,000,000 capital in them (including Savings); and this increase has arisen, not from foreign commerce, but from the once despised and insignificant fisheries.

It will be seen by a review of the history of Gloucester, that a foreign commerce did not build the town up in population or wealth; that from 1825 to 1850, its increase had been very small; but from 1850 to 1875, it has grown from 8,000 to 17,000 inhabitants, and its valuation from $2,000,000 to $9,000,000! It is the fisheries that have mainly caused this great change; it is the success of that branch of industry that has lined Gloucester harbor with wharves, warehouses and packing establishments, from the Fort to "Oakes' Cove." It is the fisheries that have built up Rocky Neck and Eastern Point, and caused ward 3 (Gravel Hill and Prospect Street) to show nearly all the gain in population from 1870 to 1875."

This is the testimony of the organ of the Gloucester fishermen. I might consume a great deal of your time in similar quotations. I turn your attention now to this book which was quoted by my learned friends on the other side, this book of Mr. Adams upon "The Fisheries and the Mississippi." At page 204 this language is used under the head of fishing liberties and their values:—

"Of these ten thousand men, and of their wives and children, the cod fisheries, if I may be allowed the expression, were the daily bread—their property—their subsistence. To how many thousands more were the labours and the dangers of their lives subservient? Their game was not only food and raiment to themselves, but to millions of other human beings.

There is something in the very occupation of fishermen, not only beneficent in itself but noble and exalted in the qualities of which it requires the habitual exercise. In common with the cultivators of the soil, their labours contribute to the subsistence of mankind, and they have the merit of continual exposure to danger, superadded to that of unceasing toil. Industry, frugality, patience, perseverance, fortitude, intrepidity, souls inured to perpetual conflict with the elements, and bodies steeled with unremitting action, ever grappling with danger, and familiar with death: these are the properties to which the fisherman of the ocean is formed by the daily labours of his life. These are the properties for which He who knew what was in man, the Saviour of mankind, sought His first, and found His most faithful, ardent, and undaunted disciples among the fishermen of His country. In the deadliest rancours of national wars, the examples of latter ages have been frequent of exempting, by the common consent of the most exasperated enemies, fishermen from the operation of hostilities. In our treaties with Prussia, they are expressly included among the classes of men "*whose occupations are for the common subsistence and benefit of mankind;*" with a stipulation, that in the event of war between the parties, they shall be allowed to continue their employment without molestation. Nor is their devotion to their country less conspicuous than their usefulness to their kind. While the huntsman of the ocean, far from his native land, from his family, and his fireside, pursues, at the constant hazard of life, his game upon the bosom of the deep, the desire of his heart, is by the nature of his situation ever intently turned towards his home, his children, and his country. To be lost to them gives their keenest edge to his fears; to return with the fruits of his labours to them is the object of all his hopes. By no men upon earth have these qualities and dispositions been more constantly exemplified than by the fishermen of New England. From the proceeds of their "perilous and hardy industry," the value of three millions of dollars a year, for five years preceding 1808, was added to the exports of the United States. This was so much of national wealth *created* by the fishery. With what branch of the whole body of our commerce was this interest unconnected? Into what artery or vein of our political body did it not circulate wholesome blood? To what sinew of our national arm did it not impart firmness and energy? We are told that they were "*annually decreasing in number:*" Yes! they had lost their occupation by the war; and where were they during the war? They were upon the ocean and upon the lakes, fighting the battles of their country. Turn back to the records of your revolution—ask Samuel Tucker, himself one of the number; a living example of the character common to them all, what were the fishermen of New England, in the tug of war for Independence? Appeal to the heroes of *all* our naval wars—ask the vanquishers of Algiers and Tripoli,—ask the redeemers of your citizens from the chains of servitude, and of your nation from the humiliation of annual tribute to the barbarians of Africa—call on the champions of our last struggles with Britain—ask Hull and Bainbridge, ask Stewart, Porter and Macdonough, what proportion of New England fishermen were the companions of their victories, and sealed the proudest of our victories with their blood; and *then* listen if you can, to be told that the *unoffending* citizens of the West were *not at all* benefitted by the fishing privilege; and that the few fishermen in a remote quarter, were *entirely exempt from the danger.*

But we are told also that "by far the greatest part of the fish taken by our fishermen before the present war was caught in the open sea, or upon our own coasts, and cured on our own shores." This assertion is, like the rest, erroneous.

The shore fishery is carried on in vessels of less than twenty tons burthen, the proportion of which, as appears by Seybert's Statistical Annals, is about one-seventh of the whole. With regard to the comparative value of the Bank, and Labrador fisheries, I subjoin hereto, information collected from several persons, acquainted with them, as their statements will show in their minutest details."

I know of no language that can more forcibly bring home to the Commission the value of this fishery. If the eloquent language that I have quoted contained a tittle of the truth, then this fishery is the nursery of the American Naval Marine. The future maritime defenders of their country are to be found amongst the bold and fearless men who prosecute these fisheries, and amongst them alone. From the fishing vessels of America sprang those maritime defenders of her flag, who maintained with undaunted bravery the honor of their country in the last war with England, and from the same source must be drawn those who doubtless would do so again if, unfortunately another war should arise between the two countries. Yet, when we speak of such a fishery as this, we

are calmly told by Mr. Foster you must not look at these advantages at all, but like business men, you must, pencil in hand, put down the figures, and make a calculation of the values as though it were a petty matter of bargain and sale between man and man. In the name of our common humanity, in the name of the common honor of England and America, and of the Dominion for which I am counsel this day, I repudiate such a construction being placed upon this treaty.

There are some other passages in this book to which I may call your attention. At page 210 this language is used :—

"These fisheries, as most advantageously secured to the United States by the Treaty of 1783, and made at the time, I have always understood, a sine qua non of that Treaty, offer an invaluable fund of wealth and power to our country; one which has never been duly attended to, nor justly appreciated, but which, if continued and improved, was destined to grow with our growth and strengthen with our strength.

"The prosecution of these coast and bay fisheries, although it had already become extremely advantageous, had undoubtedly reached, in a very small degree, the extension and importance it was capable of attaining. The unsettled state of the commercial world for the past twenty years, and the more alluring objects of mercantile enterprise which such a state of things evolved, seemed, in point of immediate consideration and attention, to throw these fisheries into the back ground; but still, until first checked by the system of embargoes and restrictions, and finally stopped by a declaration of war, they were silently, but rapidly, progressing, and reaching an importance which, though generally unknown to our country and its statesmen, had become highly alarming to the governments and more wealthy merchants of the Provinces, and was beginning to attract the attention and jealousy of the cabinet of Great Britain towards them.

"The shores, the creeks, the inlets of the Bay of Fundy, the Bay of Chaleurs, and the Gulf of St. Lawrence, the Straits of Bellisle, and the Coast of Labrador, appear to have been designed by the God of Nature as the great ovarium of fish;—the inexhaustible repository of this species of food, not only for the supply of the American, but also of the European continent. At the proper season, to catch them in endless abundance, little more effort is needed than to bait the hook and pull the line, and occasionally even this is not necessary. In clear weather, near the shores, myriads are visible, and the strand is at times almost literally paved with them.

"All this was gradually making itself known to the enterprise and vigilance of the New England fishermen, and for a few seasons prior to the year 1808, the resort to this employment had become an object of attention, from the Thames at New London, to the Schoodic; and boats and vessels of a small as well as a larger size, were flocking to it from all the intermediate parts of the United States. In the fishing season, at the best places for catching the cod, the New England fishermen, I am told, on a Sunday, swarmed like flies upon the shores, and that in some of these years, it probably would not make an over estimate to rate the number of vessels employed in this fishery, belonging to the United States at from 1500 to 2000 sail, reckoning a vessel for each trip or voyage, and including the larger boat fishery; and the number, if the fisheries were continued, would shortly be still further and very greatly extended.

"The nursery for seamen, the consequent increase of power, the mine of wealth, the accumulation of capital, (for it has been justly observed, that he who draws a cod fish from the sea, gives a piece of silver to his country) the effect upon the trade and custom of Great Britain, and the corresponding advantages to the United States, of which the enlargement of such an in intercourse was susceptible, (for the stock of fish appears inexhaustible,) you are much better able to conceive them than I am to describe; but I with pleasure point them anew for your consideration, as on many accounts presenting one of the most interesting public objects to which it can be directed."

At page 199 the following language is used :—

"Be the opinion of Mr. Russell what it may—the portion of the fisheries to which we are entitled even within the British Territorial jurisdiction, is of great importance to this union. To New England it is among the most valuable of earthly possessions."

Now, in the course of his argument Mr. Foster put the question as if it turned distinctly upon who paid the duty, the producer or the consumer. Whether that be absolutely necessary for the purpose of determining this case in favor of Great Britain or not, is not for me to say. That is a question of political economy with which I am neither desirous, nor probably capable of dealing. But I am not afraid to let our case turn upon that question. I think I shall show you by evidence of witnesses and by figures, that in every instance in this case the duty is paid by the consumer. I am speaking more particularly of the mackerel; I shall conclusively show that in the year when the Reciprocity Treaty was in force, the price of mackerel fell off, that immediately after the Reciprocity Treaty terminated, the price of mackerel rose in the market. I shall show that immediately after that state of affairs was terminated by the Treaty of Washington the price of mackerel again fell off, and we say that these facts establish at once that the consumer must have paid the duty. Our witnesses have one and all, or nearly all testified that in their judgment the consumer paid the duty. In answer to the question put by the learned counsel associated with me and myself, "would you rather have the Americans excluded from your fisheries and pay the duty?" they have said "yes." While I am upon this subject I will remark, although I will not have time to turn attention to the document itself, that Mr. Foster, or at all events, one of the learned counsel for the United States, read in his speech a communication from the Hon. Peter Mitchell, then Minister of Marine and Fisheries, for the purpose of showing that the repeal of the Reciprocity Treaty would be ruinous to our fishermen. Now upon reference to that communication you will find that what he did put forward was this: that if the Americans would come in without either paying a license fee or giving any other compensation at all for our fisheries, and if they fished in our territorial waters where the fish were to be taken, side by side with our own fishermen, and then carried their catch into the American market free of duty, while our fishermen fishing on the same terms and with no better appliances were met there with a duty of $2.00 a barrel on mackerel and $1.00 on herring, it would necessarily be ruinous. And that proposition no doubt has a vast deal of truth in it. It is impossible, I assume, for two persons to fish upon equal terms in the same waters, and then when they go into the American market for one to be met by a duty while the other has no such duty to pay, without it operating to the disadvantage of the former. But that is a totally different case from the one we have to deal with.

Now I shall show you, as I have said, that during the period of the Reciprocity Treaty the prices were low, and that the moment that treaty was repealed or abrogated by notice from the American government the prices rose. That the moment that state of affairs was terminated by the Washington Treaty the prices fell again, and we say that is conclusive proof that the Americans have to pay the duty. There has been a consensus of testimony, American and British, upon that point.

Let us see what the American witnesses say, for I affirm, that on both sides, the witnesses agree in the statement that the consumers pay the duty. It is true that American witnesses who are themselves fishermen, or those who speak the opinion of fishermen, say that they would prefer the old state of things. Why? Because under that state of things, they could steal into our harbors, and carry off our fish for nothing, and then their British competitor was met in the market with a duty of $2 a barrel, while they were free. But I apprehend the consumer did not want that state of affairs. These witnesses admitted that it made the fish dearer, whenever the question was put to them. I have cut out the evidence referring to this point, and I will just read it :—

AMERICAN WITNESSES ON DUTIES.

Page 75—F. Freeman:

Q. If you were allowed to make your choice which would you take—exclusion from the British inshore fisheries and the imposition of a duty on Colonial caught fish or the privilege of fishing inshore in British waters and no duty? A. I would rather have the duty.

Q. You say you would rather have the duty paid; you think you would make more money; you are speaking as a fisherman? A. Yes.

Q. You would have a better market for your fish? Under the present system the consumer gets his fish cheaper, does he not. *You would make the consumer pay that* $2.00 *duty. You would sell your fish* $2.00 *higher?* A. *Yes.*

MR. TRESCOT—That is political economy.

MR. THOMSON—Why did you ask him?

Mr. TRESCOT—I asked him simply which system he would prefer.

MR. THOMSON—I am asking him why.

Q. And you say the reason is that you would get so much money in your pocket at the expense of the people that eat fish. Is not that the whole story? A. Certainly.

Page 93—N. Freeman:

Q. Were you among those who opposed or favored the continuance of the Reciprocity Treaty? A. I was among those that opposed it?

Q. There were some that opposed it or rather required the duty to be maintained upon codfish? A. I was one who preferred to have the duty retained upon codfish.

Q. Upon codfish? A. Yes.

Q. Your people wished in fact to keep the duty on codfish? A. Yes.

Q. Why? Be kind enough to state why? A. Because we felt it would be better for us as a codfishing town to exclude as far as possible the fish from the Provinces. *It would give us a better chance, as we supposed, to dispose of our fish at higher rates.*

Q. And the effect of the Treaty you considered would be to reduce the price? A. We supposed that the effect of the Treaty would be to bring in codfish from these Provinces into our port, and of course necessarily it was presumed that it would reduce the price of fish.

Q. I suppose the mackerel fisheries have the same object, to keep up the price of fish? A. I presume they have.

Q. Then, of course, you think your views are correct. You think now, I presume that your opinion was correct? A. Yes.

Q. And you still continue to think that is correct, and that the effect of the provisions of the Treaty is to bring down the price of fish? A. Yes, I think that is the tendency. I am not aware whether it has brought the prices down.

Q. I mean to say you have not changed your opinion. A. No.

Q. Of course there might be other causes operating, but that is the general tendency of the Treaty? A. Yes.

Q. To make the fish cheaper for the consumer? A. We have so regarded it. Well, perhaps it would have that tendency. We have thought that it would.

Q. That is precisely what your opinion was? A. Yes.

Q. You have not altered your opinion? A. No.

Q. *Your opinion, if you will allow me to put it in my words, is that it makes fish cheaper to the consumers in the United States?* A. *My opinion is that it will have that tendency.*

Page 107—Graham:

Q. You say that you would prefer a duty on Canadian fish entering American market, to the privilege of fishing within three miles of the shore in the Bay? A. Yes, I should if I went fishing.

Q. Why? A. Because I do not think that the privilege amounts to as much as the duties to us.

Q. Why do you want the duty kept on? A. Because, in the first place, we would get more for our fish in the United States.

Q. And when the duty is abolished the price naturally comes down? A. The fish might then be a little cheaper.

Q. That is your opinion? A. I do not think that the price would come down much.

Q. Then why do you want the duty kept on? Do you not think that you gave a rather hasty answer? You say you would prefer the duty to the privilege of fishing in the Bay of St. Lawrence, within the limits? A. Yes.

Q. Why? I understood you to say, it was because this would keep the price up? A. That was a little erroneous, I think. Let me think the matter over.

Q. Why would you rather prefer the duty to the privilege mentioned? A. Because that would keep the price up, and we would then get more for our fish. I thought you had me a little.

Q. I merely want your statement on the point? A. That is my candid opinion.

Q. You now speak as a fisherman? A. Yes; if I was fishing that would be my idea.

Q. All classes of men have selfish motives? A. I want to get all I can for what I have to sell, and to buy as cheaply as possible.

Q. And in order to get a high price for your fish, you want the duties on? A. Yes.

Page 124—Friend:

Q. You thought you would get more mackerel and get a better price for them? A. If we had a duty on mackerel we would get a better price, and would get more mackerel if we fished off shore.

Page 130—Orne:

Q. You say you would prefer a duty of $2 a barrel to the liberty of fishing within the limits of the Bay? A. I do.

Q. Why? A. Because I think the mackerel which I take to market would then bring more.

Q. Would the price be then higher by $2. A. I could not say.

Q. What is your belief. A. *I believe that would be the case.*

Q. Consumers might appreciate the matter differently. A. I speak as a fishermen.

Page 147—Leighton:

Q. In regard to mackerel, leaving herring out, would you prefer a duty on mackerel? A. Yes.

Q. You speak as a fisherman? A. Yes.

Q. Why would you prefer a duty on mackerel? A. *Our mackerel would fetch that much more a barrel.* We lose that, you know.

Q. By the duty coming off? A. *Yes, the fishermen lose it. The Government does not lose it.*

Q. *And the people who eat the fish gain it?* A. *Yes.*

Q. And if you were to speak to a man whose business was consuming mackerel, you would get an opinion adverse to a duty? A. *Yes.*

Q. You would not object I suppose, to run the duty up a little higher—how would that suit the fishermen? A. I think that is about right.

Page 160—Riggs:

Q. You say you would prefer a duty being imposed on our mackerel to the right to fish inshore in British waters? A. I should.

Q. Why do you want a duty on? A. It is no benefit to us to fish inshore, that I ever saw.

Q. Why do you want it on? A. Well, we would have a better market for our fish.

Q. Would you get a higher price for them. A. We should—yes.

Q. And therefore you are speaking as a fisherman; as such you would like to get the highest price you could for your fish? A. Certainly.

Q. You think that the imposition of a duty would give you a better market? A. Yes.; if Canadians had to pay the duty, it is likely they would not fetch the fish in.

Q. What would be the result of that? A. We would have a higher price and a quicker market.

Q. You would have a higher price? A. I do not know that this would be the case or anything about it; but it would be a quicker market for us.

Page 187—Smith:

Q. *You speak as a fisherman; you want to get the most you can. How much do you think you would get?* A. *As much as the duty.*

Q. I don't know but you are right. Perhaps you would like to have a little more on. Supposing a duty of $3 was put on, I suppose it would still have the effect of raising the price of fish? A. I think it would kill us. No, let me see. I don't know anything about that. I think by keeping the English fish out, our fish would bring a better price.

Page 201—Procter:

Q. Speaking as a fisherman, would you prefer to have the duty on? A. Personally, I would rather have the duty on.

Q. Why? A. Because the duty is better for us, for it would have a tendency in years of good catches to prevent your people from increasing their business. It has that tendency.

Q. Has it any tendency to better you, as well as to injure your neighbours? A. That is what we we were looking for—for better prices.

Q. Has it a tendency to increase prices to your fishermen? A. It would.

Q. So, if it increases the price of the fish, it strikes me the consumer must pay the increased price? A. I am not clear that the duty has anything to do with it; it is the catch.

Page 207—Procter:

Q. And did not the duty on Canadian caught fish replace the bounty? A. Yes, and the reduction of the duty on salt was granted as an offsett for the removal of the duty.

Page 208—Procter:

Q. And that came later? A. Yes, two or three years after the ratification of the Treaty.

Q. When it was proposed to take the duty off you remonstrated, thinking that this would reduce the price of fish, and this was the general feeling among fishermen and of the inhabitants of the coast of New England? A. Yes.

Page 312—Warren:

Q. Now with regard to the right of carrying our fish free into the United States, I suppose you think that is of no advantage to your fishermen, that provision of the Treaty? A. I have no idea it is any advantage to our side of the house.

Q. It is a disadvantage, isn't it? A. Yes, it is against us.

Q. Be kind enough to explain how? A. All these things seem to me to be regulated by supply and demand. If there is 100,000 barrels of mackerel hove into our market on top of what we produce the tendency is to depreciate prices.

Q. If this provision of the Treaty increases the supply of mackerel in the United States market it will bring down the price of fish? A. State that again.

Question repeated. A. I think it would have that tendency.

Q. That is the reason you think it is no advantage to your fishermen to have the privilege of fishing inside? A. No, putting both questions of the Treaty together, it is no advantage, because the supply is increased and the prices are depreciated.

Q. You will admit this, that it is an advantage to the consumers by bringing down the price? You admit that? A. Yes.

Q. Then in point of fact it gives you cheap fish? A. The tendency is to cheapen them.

Q. For the people of the United States. A. Yes.

Page 326—Lakeman:

Q. The American fishermen want the duty back on fish, I suppose? A. I do not know about that, I am sure; but they naturally would wish to have it back again, I suppose, in order to exclude our fish from their market.

Q. I suppose that the consumer got his fish cheaper, owing to the removal of the duty, and the admission of your fish into the American market? A. The consumer would then get his fish cheaper—the more fish that are put on the market the cheaper the consumer gets them.

Q. Is not the result of the treaty, which admits your fish into the American market, on equal terms with the American fish, to make the price of fish lower in that market? A. It has that tendency evidently.

Q. Therefore the consumer gets his fish for less money? A. Evidently he does. When herring are abundant the price is lower.

Q. It further follows that although a certain class of fishermen may lose something by this free admission of British fish into the American market the American public gain by it? A. By getting their fish at a lower price? Of course it makes the price of fish lower in that market. That is clear.

Q. Then the consumer gets the fish cheaper? He evidently does,—the larger the quantity that is put upon the market the less the price will be.

Page 389—Sylvanus Smith:

Q. Supposing the mackerel caught in colonial waters were excluded, would it, or would it not, have any effect upon the price you get for your fish? Supposing one-fourth of the quantity consumed in the States was excluded, would it have any effect on the price of the other three-fourths? A. I think some, not much. I think it would stimulate our home production.

Q. In what way would it stimulate it? By raising the price is it not? A. Well, to a small extent.

Q. Well, then the effect of the British mackerel coming in is that the consumer is able to buy it cheaper than he otherwise would. A. Well up to a certain point. The effect would be very small. There is not a large enough quantity. It is our home catch that affects it.

Page 429—Myrick:

Q. What would be the effect upon the business of your firm of putting back the former duty of $2 a barrel upon mackerel sent from P. E. Island to the States? I would like you to explain your views in this regard, particularly? A. Well, I suppose, since we have got our business established there, and our buildings and facilities for carrying on the fishery, it would be difficult for us to abandon it altogether, but we would then turn our attention more particularly to codfishing, until at any rate, the mackerel season got well advanced and the mackerel became fat, and if any would bring a high price it would be those taken in the latter part of the season. We might catch some of them, but we would not undertake to catch poor mackerel to compete with those caught on the American shore.

Q. Explain why not? A. Well, No. 3 mackerel, which are poor mackerel, generally bring a good deal less price than fat mackerel, and men do not catch any more poor mackerel than they do fat ones; the cost of catching them, and of barreling and shipping them is the same, while the fat mackerel bring a better price. We would carry on the codfishing business irrespective of the American market; we would catch, cure and ship codfish to other markets—to the West India markets, and we might make a fair business at that; but as to catching mackerel exclusively under such circumstances, it would not do to depend on it at all.

Page 430—Myrick:

Q. What is it that fixes the price of mackerel in the United States market? A. *Oh, well, of course it is the supply and demand, as is the case with everything else.* When there is a large catch of mackerel on the American shore, prices rule low; this is a very sensitive market. If a fleet of 500, 600, or 800 vessels are fishing for mackerel, and those interested get reports of the fleet doing anything, the market falls at once—and this is the case, particularly when prices are any way inflated.

Page 488—Isaac Hall:

Q. You told Mr. Foster that if a duty was re-imposed you would consider very seriously whether you would continue in the business? A. Yes.

Q. You made that statement on the assumption that you paid the duty? A. Yes.

Q. I think it has been explained very clearly that the price of fish depends almost altogether on the catch,—this is the case to a large extent? A. To a *large extent—yes.* If there is a large catch of mackerel prices rule low, and if there is a small catch they rule high.

Q. If the evidence given here on the part of British witnesses is correct, two-thirds of the fish taken by American vessels in the Gulf, I may say, are caught inshore; and assuming that two-thirds of their whole catch in the Gulf is taken inside of the three mile limit, could the American fleet, if they were excluded from fishing within this limit, prosecute the Gulf fishery for the other third—would this pay them? A. I think it would be a difficult business to do so, if that proportion is correct.

Q. *If the price goes up, who pays the enhanced price: is it not the consumer?* A. *Yes.*

Q. And if the catch is large, the price goes down:—so it would depend in some measure on whether the catch on the American or on our own shore was large, as to who would pay this duty? A. Yes; and on the quality of the mackerel.

These are quotations that I make from the American evidence. I do not quote from our own, as Mr. Dana admitted there was such a consensus of evidence on that point, that he almost insinuated that it was too uniform to be depended upon.

I now propose to deal at length with two questions of vital importance in this enquiry, viz. :—

1st. In favor of which country is the balance of advantages arising from reciprocal freedom of trade gained by the Treaty of Washington? and

2d. Upon whom is the incidence of duties levied upon fish exported by Canada into the United States, the producer or the consumer?

I again (if I may do so without giving offence to my learned friends on the other side,) express my obligations to Mr. Hall for the valuable assistance he has afforded in preparing my argument on these points.

ARTICLE XXI of the Treaty of Washington is as follows :—"It is agreed that for the term of years mentioned in Article XXXIII of this Treaty, fish and fish oil of all kinds (except fish of the inland lakes and of the rivers falling into them, and except fish preserved in oil), being the products of the fisheries of the United States or of the Dominion of Canada, or of Prince Edward Island, shall be admitted into each country respectively, free of duty."

ARTICLE XXII.—"Inasmuch as it is asserted by the Government of Her Britannic Majesty that the privileges accorded to the citizens of the United States under Article XVIII of this Treaty are of greater value than those accorded by Articles XIX and XXI of this Treaty to the subjects of Her Britannic Majesty, and this assertion is not admitted by the Government of the United States, it is further agreed that Commissioners shall be appointed to determine having regard to the privileges accorded by the United States to the subjects of Her Britannic Majesty, as stated in Articles XIX and XXI of this Treaty, the amount of any compensation which, in their opinion, ought to be paid by the Government of the United States to the Government of Her Britannic Majesty in return for the privileges accorded to the citizens of the United States under Article XVIII of this Treaty; and that any sum of money which the said Commissioners may so award shall be paid by the United States Government in a gross sum within twelve months after such award shall have been given."

The advantages which might be expected to flow from the reciprocal freedom of markets, provided for by Article XXI, might be of two kinds—

1. Increased trade.
2. Increased profits upon the volume of trade already existing.

The latter, however, could only obtain upon the supposition that the duties previously levied had been a burden upon the foreign producer.

In reference to the first of these questions it is contended—

1st. That the increase of consumption in the United States of British caught fish, has not been equal to the increase of consumption in Canada of the products of the United States fisheries.

2nd. That a considerable portion of the products of British American fisheries exported to the United States for many years past, has been re-exported to foreign countries where they have entered into competition with other foreign exports of Her Majesty's British American subjects; and it must be borne in mind that these fish have not paid any duty.

These propositions will be dealt with seriatim.

By reference to Statement No. 8, to be found on page 435 of the British evidence it will be found that for the seven years following the abrogation of the Reciprocity Treaty (*when duties were payable upon importations*) the imports of fish and fish oil from the United States into the Dominion of Canada and Prince Edward Island were as follows :—

1867	$172,366
1868	170,156
1869	99,563
1870	99,409
1871	123,331
1872	123,670
1873	279,049

the average annual value being $152,506.

During the years 1874, 1875, 1876, 1877, *when no duties were payable,* they have, under the operation of the Treaty, been as follows :—

1874	$728,921
1875	727,587
1876	679,657
1877	750,382

the annual average having been increased to $721,637.

The increase therefore of United States exportation of fish and fish oil annually to Canada has been $569,131, of which $179,030 consisted of fresh fish, leaving $390,101 as the increase upon articles previously subjected to duty. As against this gain to the United States the British producers have gained an increased market in the United States of only $340,589, as will be seen by the following figures to be found in the same statement.

During the seven years immediately preceding the Washington Treaty, *when duties were payable,* the United States imported the fish products of Canada and Prince Edward Island as follows, viz. :—

1867	$1,108,779
1868	1,103,859
1869	1,208,805
1870	1,129,665
1871	1,087,341
1872	933,041
1873	1,393,389

the annual average being $1,137,839.

Since the Treaty has been in full operation the annual average has increased to $1,505,888, the imports having been as follows :—

1874	$1,612,295
1875	1,637,712
1876	1,455,629
1877	1,317,917

the increase in the annual average being $368,049, of which increase $27,460 was due to fresh fish, leaving $340,589 as the increase upon articles previously subjected to duty. From these figures it is clear then that as respects the advantages arising from an increased market the United States and not Canada has been the greatest gainer. It may be remarked, before leaving this part of the subject, that although the statistics put in by the Government of the United States, as to the total imports into the United States from Canada, approximate very closely to those put in by Her Majesty's Government in respect of the exports from Canada to the United States; there is an important discrepancy between the exports from the United States to Canada, as put in evidence in Table XIV of Appendix O, and the imports into Canada from the United States as put in evidence by Her Majesty's Government.

This has already been referred to during the course of the evidence, but the attention of the Commissioners is now again directed to the explicit admissions of Mr. Young, the Chief of the Bureau of Statistics at Washington, in his reports of 1874, '75 and '76. With regard to this subject, for example, he says, at page XV of his report for 1876: "During the year ended 30th June, 1876, the total value of domestic merchandize and produce exported to Canada, and which was omitted in the returns of the United States Custom officers on the Canadian border, as appears from the official statements furnished by the Commissioner of Customs of the Dominion, amounted to $10,507,563, as against $15,596,524 in the preceding year, and $11,424,566 in 1874."

2. I beg now to call the attention of your Excellency and your Honors to the fact that a considerable proportion of the products of the British-American fisheries, exported to the United States for many years past, has been re-exported to other foreign countries, where they may be fairly presumed to have entered into competition with the direct foreign exports of Her Majesty's British-American subjects.

This will clearly appear, by a reference to statement No. 11, to be found on page 437 of the British Evidence, which shows that the exports of dried and smoked, pickled and other cured fish (exclusive of California) to all other foreign countries, from 1850 to 1876, averaged annually (at a gold valuation), as follows, viz:—

1850 to 1854	$755,165, Non-reciprocal years.
1860 to 1866	1,001,984, Reciprocal years.
1866 to 1873	1,196,554, Non-reciprocal years.
1873 to 1876	1,640,426, Reciprocal years.

Now, comparing these exports from the United States to all foreign countries, with the imports from Canads into the United States, it would appear that they are largely inter-dependent. The imports referred to are as follows:—

1850 to 1854	$ 792,419
1856 to 1866	1,377,727
1866 to 1873	1,137,839
1873 to 1877	1,505,888

With regard to this matter, I call attention to the following assertion made at page 9 of the "Answer" of the United States, viz.: "But while the result (of the Washington Treaty) to them (Canadians) has been one of steady development and increasing wealth, the United States codfishery even has declined in amount and value." If, then, the domestic production of the United States has decreased, and the exports to foreign countries have increased in about the same ratio as have the importations from Canada, is it not evident that the increased imports have been made *mainly* with a view to the supply of foreign markets—or what is equivalent—to supply the hiatus in the markets of the United States due to the exportation of a greater quantity of their own fish products than the yield of their fisheries warranted, in view of their own requirements for home consumption? It would seem from an examination of the statistics that the increased importations from Canada during those years in which no duties were levied on Canadian fish were largely due to an increased foreign trade, and it is contended that Her Majesty's subjects gained no substantial pecuniary advantage from supplying those foreign markets by indirect rather than direct trade. On the other hand, the tendency of this class of trade is to throw the foreign carrying trade hitherto conducted by subjects of Her Majesty more and more into the hands of the shipowners and brokers of the United States.

A close examination of Canadian exports confirms this view. Of the entire exports, those to the United States and to other foreign countries compare as follows:—

Years.	Percentage sent to the United States.	Percentage sent to other Foreign Countries.
1850-54	31½	68½
1856-66	34 7-10	65 3-10
1866-73	28½	71 ½
1873-76	31 1-10	68 9-10

If any further reasoning is required in support of this very evident contention, the following extract from page 529 of the United States census report for 1860 may be useful: "By the Warehousing Act of 1846, foreign fish were allowed to be imported and entered in bond, and thence exported without payment of duty; but under the Reciprocity Act, Colonial fish are admitted free of duty. These acts have caused our principal fish distributing cities, such as Boston, New York, and Philadelphia, to become exporters of large quantities of foreign fish."

Although therefore, the export trade of Canada has progressively increased from year to year, it is plain that the removal of fiscal obstructions on the part of the United States, has had the effect, more or less, of turning a certain proportion of our foreign trade, with other foreign countries, into American channels. In other words, a larger proportion of the West Indian and South American fish trade of Canada has been done through United States merchants, whenever tariff restrictions have been removed.

Now, the able Counsel and Agent of the United States has chosen as the basis upon which to determine the question of remissions of duty, the year 1874.

It is contended that it would be manifestly unfair to take as a basis upon which to estimate such remissions, those years during which it is alleged the exportations from Canada to the United States have (*mainly in consequence of such remissions*) considerably increased.

The United States imports from Canada and Prince Edward Island of fish and fish-oil from 1867 to 1873, during which period duties were imposed upon such importations, were as follows:—

1867	$1,108,779
1868	1,103,859
1869	1,208,805
1870	1,129,665
1871	1,087,341
1872	933,041
1873	1,393,389

The average annual value of the above-mentioned importation was $1,137,840, and the largest in any one year, $1,393,389, in 1873.

The commerce and navigation returns of the United States give the importation from Canada in that year at $1,400,562 ; or, including Newfoundland, at $1,685,489, as follows :—

Description.	Imported.		Rate of Duty.	Amount of Duty which would have been collected if entered for consumption.
	Quantity.	Values.		
Fish (fresh)	8,627,724 lbs.	$278,707	Free.	
Herring	53,039 bbls.	179,377	$1.00 per bbl.	$53,039
Mackerel	89,698 bbls.	605,778	$2.00 "	179,396
Sardines, &c., preserved in oil		3,527	50 per cent.	1,763
All others not elsewhere specified		552,032	13½ "	74,524
Oil, whale and fish	127,315 gals.	66,068	20 "	13,213
Total		$1,685,489		$321,935

Now, by reference to the U. S. Commerce and Navigation Returns for 1873 (page 311) it will be seen that th re-exports of foreign fish were as follows :—

	Barrels.	Amount.	Rate.	Duty.
Herring	19,928	$ 81,775	$1.00 per brl.	$19,928
Mackerel	36,146	178,328	2.00 "	72,292
All other		213,534	13½ per cent.	28,827
Oil (page 319)		25,601	20 "	5,120
Total				$126,167

This sum, therefore, representing duties which never were collected must be deducted from the aggregate duties accrued as shown by the figures just previously given, viz $321,935

Deduct.

Duties on re-exports	$126,167	
Estimated duties on fish products not covered by Washington Treaty, estimated at	10,000	
		136,167
Thus leaving a sum of		$185,768

in regard to which it remains to be decided whether or not its remission has inured to the benefit of the Canadian producer.

The United States contend, at page 31 of the Answer, that the remission of duties to Canadian fishermen during the four years which have already elapsed under the operation of the Treaty has amounted to about $400,000 annually, which proposition it was explicitly stated would be conclusively proved in evidence which would be laid before the Commission. This extraordinary assertion which, it has been contended, has been contravened by the whole tenor of the evidence whether adduced on behalf of the United States or of Great Britain, was followed up by the laying down of the following principle, viz :—

" Where a tax or duty is imposed upon a small portion of the producers of any commodity, from which the " great body of its producers are exempt, such tax or duty necessarily remains a burden upon the producers of the " smaller quantity, diminishing their profits, which cannot be added to the price, and so distributed among the pur- " chasers and consumers."

It is contended in reply that this principle is true only in those cases in which the ability on the part of the majority of producers to supply the commodity thus taxed, is fully equal to the demand.

The question whether the consumer or producer pays any imposts levied upon the importation of certain commodities, does not depend upon whether the body of foreign producers is large or small relatively to the body of domestic producers, with whose products theirs are to come into competition, but simply upon the question whether or not the existing home production is equal to the demand. If it be not equal, and a quantity equal to one-third or one-fourth of that produced at home be really required, prices must go up until the foreign producer can be tempted to supply the remainder, and the consumer will pay the increased price not only upon the fraction imported, but upon the greater quantity produced within the importing country as well. And the tendency of all the evidence in this case, British and American, has been a most explicit and direct confirmation of this principle.

The British evidence to which I shall immediately call your attention, proves beyond a doubt that when duties were imposed upon mackerel of $2 per barrel, British exporters to the United States realized a sufficient increase of price to enable them to pay those duties and still receive a net amount equal to the average price received before those duties were imposed, as well as after they were removed.

Upon a careful examination of the United States testimony, it will, I submit, appear that during these years when duties were imposed upon British-caught fish, the price of mackerel when landed by United States vessels from their fishing voyages in the Bay, was to the full extent of the duty in excess of the price they commanded after the duty was repealed, or before it was imposed.

It is impossible to conceive a clearer proof that the consumer and not the producer had to bear the burden of the duty, and not only that, but an equivalent burden upon every barrel of mackerel caught and landed by the United States mackerel vessels during the existence of that duty.

In the evidence adduced on behalf of Her Majesty's Government this point has been established beyond possibility of refutation. The average prices obtained by the following firms, viz. : A. H. Crowe, Lawson & Harrington. and Young, Hart & Co., in gold, at Halifax, after payment of duties and all other charges are given by the various witnesses as follows, the sales being made in all cases to United States buyers.

British evidence.

1861—1866 (during Reciprocity.)

P. 424, A. H. Crowe,	No. 1	$13.12	No. 2,	$8.75	No. 3, $6.65
P. 419, Lawson & Harrington,	No. 1	12.78	"	7.98	" 6.73
P. 425, Young, Hart & Co.,	No. 1	12.66	"	8.54	" 6.04
Average prices,		$12.85	"	8 42	" 6.47

1866—1873 (dutiable period.)

P. 424, A. H. Crowe,	No. 1	$13.05	No. 2,	$9.43	No. 3, $6.55
P. 419, Lawson & Harrington,	No. 1	13.30	"	9.83	" 6.63
P. 425, Young, Hart & Co.,	No. 1	14.46	"	10.62	" 6.28
Average prices,		$13.60	"	9.96	" 6.49

1873—1877 (during Washington Treaty.)

P. 424, A. H. Crowe,	No 1	$12.37	No. 2,	$10.00	No. 3, $8.00
P. 419, Lawson & Harrington,	No. 1	12.25	"	8.62	" 7.46
P. 425, Young, Hart & Co,	No. 1	12.81	"	9.39	" 7.18
Average prices,		$12.47	"	9,33	" 7.55

It will be observed, then, that the Halifax merchants had to submit to no decline in price from 1866 to 1873.

The evidence adduced on behalf of the United States proves the prices at which mackerel caught by United States vessels in the Bay of St. Lawrence during these same periods were valued, on settling with the crews (exclusive of the cost and profits of packing, which would have increased the prices by $2.00 per barrel), to have been as follows:—

Year.	*J. O. Proctor.* as per page 208a U. S. Evidence.	*Sylvanus Smith.* page 330, U. S. Evidence.	*Geo. Steele.* page 402, U. S. Evidence.
1857	7.80	——	——
1858	12.00	——	10.98
1859	12.30	——	12.85
1860	11.90	——	10.87
1861	5.20	——	5.77
1862	7.60	——	7.62
1863	10.96	——	10.84
1864	11.13	——	12.21
1865	14.20	——	12.93
	9)93.09		8)84.07
	Average $10.34		Average $10.51
1866	15.74	——	15.35
1867	12.22	——	14.12
1868	18.45	16.00	18.85
1869	17.80	16.00	17.31
1870	11.90	13.00	——
1871	——	8.00	——
1872	9.86	14.00	8.22
	6)85.97	5)67.00	5)73.85
	Average $14.33	$13.40	$14.77
1873	9.85	9.25	10.46
1874	5.52	6.00	6.25
1875	14.46	11.33	14.18
1876	11.05	10.20	11.60
	4)40.88	4)36.75	4)42.49
	Average $10.22	$9.19	$10.62

These prices produce the following result:—

	1857 to '65 During operation of Reciprocity Treaty.	1866–'73 Dutiable period.	1873 to '76. During Washington Treaty.
J. O. Proctor	$10.34	$14.33	$10.22
S. Smith	Nil.	13.40	9.19
Geo. Steele	10.51	14.77	10.62
Average price in U. S. Currency	$10.42	$14.17	$10.01
Approximate Gold prices*	$9.17	$11.33	$9.00

* Average price of Currency 1857 to '65, 88c.; 1866 to '73, 80c.; 1873 to '76, 90c.

From these prices, it is abundantly clear that the consuming classes in the United States were compelled to pay at least two dollars (gold) per barrel more for all the mackerel brought in by United States vessels during the existence of the duty.

What stronger evidence can be required than these facts (perhaps the only facts with reference to which the testimony of witnesses on both sides are fully and absolutely in accord) to satisfy an impartial mind as to the real incidence of taxation, upon the article in question; and inasmuch as the mackerel is the only fish the market for the best qualities of which is limited to the United States, it is not deemed necessary to continue the enquiry with reference to other fish products to which the markets of the world are open, and whose prices therefore can in no way be influenced by the United States.

Now, if your Honors please, there is but one other subject to which I will call the attention of this Commission, before I close, and that is to the offer made by the American Commissioners at the time this Treaty of Washington was being negotiated. I refer to the offer to remit the duty on coal, lumber, and salt. The circumstances are stated at length in the Reply of Great Britain to the Answer of the United States, and therefore, I need not refer particularly to the figures. The sum was $17,800,000, as far as I can recollect. Now, if it is true, as contended by the United States in their "Answer," that the remission of duties means a boon to the persons in whose favor they are remitted, and that those persons are the producers, then it is clear that *this is a fair estimate put by the American High Commissioners themselves, upon the fishing privileges that they were then endeavoring to obtain from the British Government.* Whether that is a correct principle or not, is not what I am here to contend. My argument is that that was the view of the United States, as a country, believing in the proposition that the producer, and not the consumer, pays the duty.

In their own Answer they put the remission of duties which they say inures to our benefit at $400,000 a year. While we do not admit the correctness of their view of that remission, either in principle or amount, their answer is an admission of their estimate of the value of the concessions afforded to them. If the concessions were worth as much as that, then the award of this Commission must of necessity be in favor of Great Britain for a large amount. But it may be said "you have got the value of this because we have remitted these duties." We have shown by evidence and argument conclusively that the producer does not pay one dollar of these duties, that fish from the Halifax market was sent there during the period when the duties were paid, and that the fish merchant here received back in his own counting house for the fish sold in Boston, as much money as when there was no duty paid at all. The remission of duty, therefore, is a benefit to citizens of the United States and not to us.

I have, in order to close this argument to-day, passed over a number of subjects which I at one time intended to call to the attention of the Commission. But the time is pressing. We are all to a considerable extent worn out with the labors of the Commission. Yesterday I asked the Commission to open at an earlier hour to-day in order that I might finish my remarks without further adjournment, and I am happy to be able to redeem my promise.

I have now brought my argument on behalf of Great Britain to a close. To the shortcomings and defects of that argument I am painfully alive. But the cause I have advocated is so righteous in itself, has been supported and sustained by evidence so trustworthy and conclusive, and is to be decided by a tribunal so able and impartial as that which I have the honour to address, that I entertain no fears of the result.

Although I rejoice that a responsibility which for many months has pressed with no ordinary weight upon my learned colleagues and myself, is well nigh ended, yet I cannot but feel a pang of regret that the days of my pleasant intercourse with the gentlemen engaged in and connected with this most important enquiry, are drawing to a close.

For the kind consideration, and unfailing urbanity extended to my colleagues and myself, I tender to your Excellency and your Honors my most sincere acknowledgment and thanks.

What shall I say to my brethren of the United States? To their uniform courtesy, tact and kindly feeling, we chiefly owe it, that this protracted enquiry has almost reached its termination without unpleasant difference or dissension of any kind.

To the cause of the United States, which both my patriotism and my professional duty constrain me to regard as utterly untenable, the ability, ingenuity and eloquence of Judge Foster, Mr. Dana and Mr. Trescot, have done more than justice. They have shown themselves no unworthy members of a profession which in their own country has been adorned and illustrated on the Bench and at the bar by the profound learning of a Marshall, a Kent, and a Story, and by the brilliant eloquence of a Webster and a Choate. From my learned, able and accomplished brethren of the United States, I shall part when this Commission shall have closed its labours with unfeigned regret.

A few words more and I have done. To the judgment of this tribunal, should it prove adverse to my anticipations, Great Britain and Canada will bow without a murmur. Should, however, the decision be otherwise, it is gratifying to know that we have the assurance of her counsel, that America will accept the award in the same spirit with which England accepted the Geneva judgment, and like England pay it without unnecessary delay. This is as it should be. It is a spirit which reflects honour upon both countries. The spectacle presented by the Treaty of Washington, and the arbitrations under it, is one at which the world must gaze with wonder and admiration. While nearly every other nation of the world settles its difficulties with other powers by the dreadful arbitrament of the sword,—England and America, two of the most powerful nations upon the earth, whose peaceful flags of commerce float side by side in every quarter of the habitable globe, whose ships of war salute each other almost daily in every clime and on every sea, refer their differences to the peaceful arbitrament of Christian men, sitting without show or parade of any kind in open court.

On the day that the Treaty of Washington was signed by the high contracting parties, an epoch in the history of civilization was reached. On that day the heaviest blow ever struck by human agency fell upon that great anvil of the Almighty, upon which in His own way, and at His appointed time, the sword and the spear shall be transformed into the plough-share and the reaping-hook.