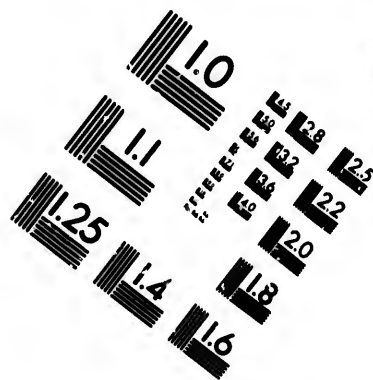


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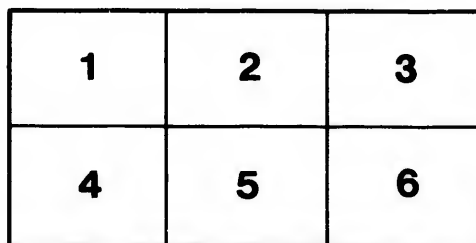
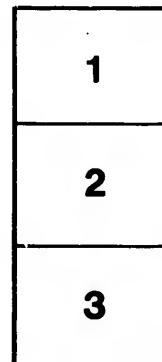
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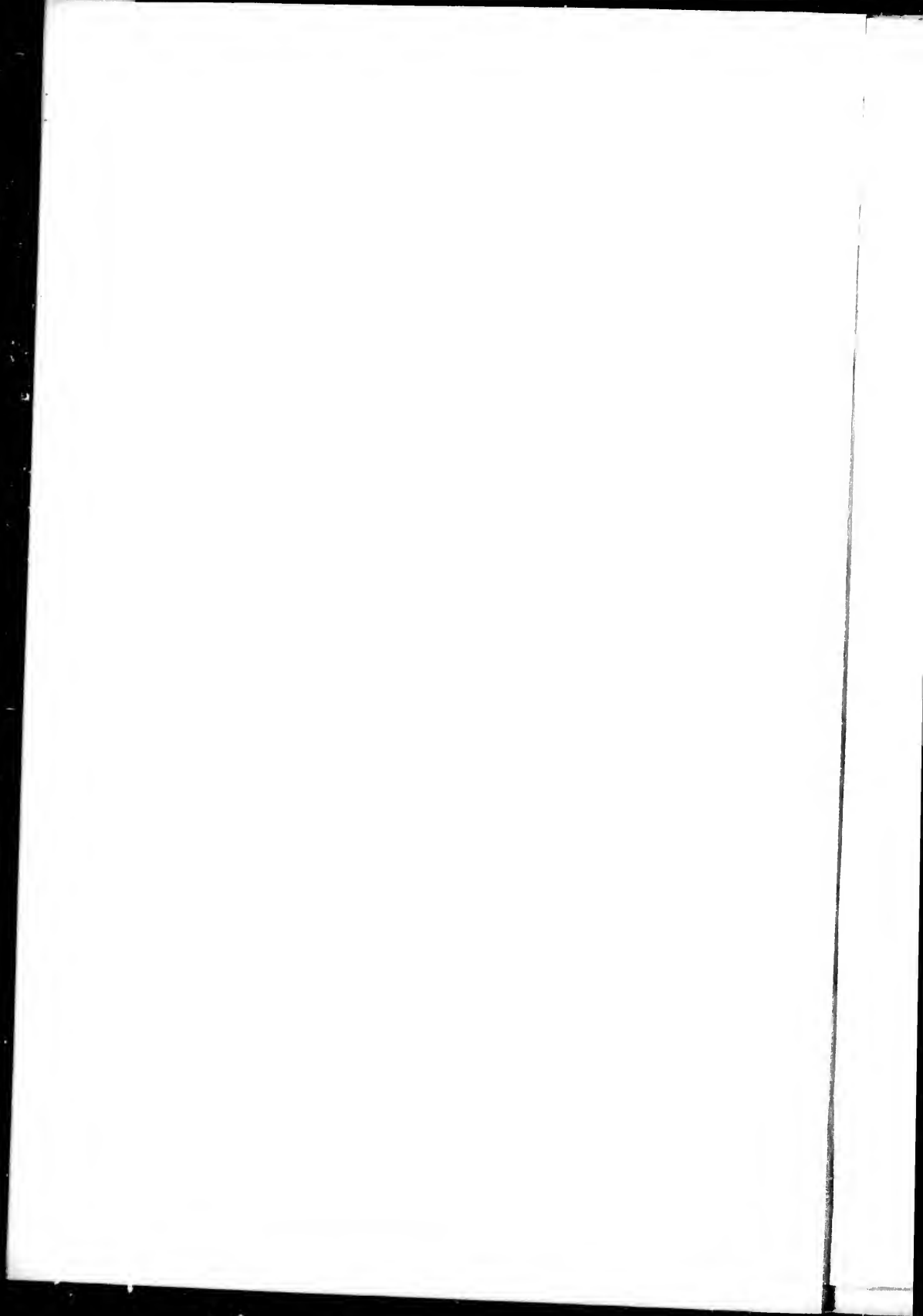
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# R E P O R T

ON THE

## Fishery Articles of Treaties

BETWEEN

GREAT BRITAIN AND THE UNITED STATES

OF AMERICA.

AND

QUESTIONS ARISING OUT OF THE SAME.

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BY MR. W. F. WHITCHER, COMMISSIONER OF FISHERIES,  
CANADA.

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With a Map of British North American Waters.



OTTAWA.

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# REPORT

ON THE

## Fishery Articles of Treaties, &c.

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### I.—THE ORIGIN OF AMERICAN CLAIMS TO PARTICIPATE IN THE COLONIAL FISHERIES.

Americans found their original claim to equal fishery rights in the Anglo-American seas on the share that New Englanders bore whilst British subjects in the conquest of these Colonies from the French ; and also upon their use of the fisheries in common with those Colonists from whom they afterwards voluntarily separated themselves. Excepting along the coast of Labrador and around the southwestern parts of the Gulf of St. Lawrence, off the Bay of Chaleur and the New Brunswick coast, they had fished freely before their separation from Great Britain. In the negotiations which preceded the peace of 1783 they drove a hard bargain for co-extensive privileges of fishery. It was of vital moment to them to secure some foothold, as a new nation, from which other acquisitions might in time be gained. Through force of strong language, and by threats to break off negotiations, but chiefly from the characteristic temper of Great Britain to give way for peace sake, the American Commissioners managed to secure much more favorable terms than in fact and justice they were entitled to.

### II.—THE FISHERY ARTICLE OF THE TREATY OF 1783.\*

The Definitive Treaty of Peace and Friendship between His Britannic Majesty and the United States of America, signed at Paris on the 3rd of September, 1783, contains the following provision :

“ ART. III.—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

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\* A Collection of Treaties between Great Britain and other Powers—By George Chalmers ; London. 1790, vol: 1.



"at any time heretofore to fish. And also that 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 coasts, bays, and creeks of all other of His Britannic Majesty's dominions in America; and that the American fishermen shall have 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."

The guarded language of this article is somewhat remarkable. It had been contended on the part of America that her citizens should enjoy common rights of fishing the same as when they were British colonists.\* And the use of the word "right" was urged very warmly by Mr. Adams.† In that part of the article which relates to fisheries "IN THE SEA," a concurrent "right" is agreed to; but in the coast and Labrador fishings simple "liberty" was acceded to.‡ This text proves how marked, how emphatic was the distinction between a recognized "right" and a conceded "liberty,"—the former being susceptible of permanence, and the latter existing at will.

### III.—THE TREATY OF 1783 AS AFFECTED BY THE WAR OF 1812.

The two-fold sense of Article III of the Treaty of 1783 has been before observed. In the first portion of the article there is a clear recognition of a continuing "right" of fishery || which "the people of the United States shall continue to enjoy"—in those parts of "the sea" which had been commonly used by Colonists to the exclusion of the French, then, in the conjunct portion is an equally plain and distinct concession of "liberty" to use certain specified waters and coasts within the jurisdictional limits of the British possessions in concurrence with His Britannic Majesty's loyal subjects.§

\* "We had fought for, had won and had enjoyed the fishing grounds as British subjects."—*Mr. Rush.*

† "Gentlemen, is there or can there be a clearer right? In former Treaties, that of Utrecht and that of Paris, France and England have claimed the right and used the word \* \* \* \* If Heaven in the creation gave a right, it is ours at least as much as yours."—*Annals of Diplomacy.*

‡ "The rights acknowledged by the treaty of 1783, were not only distinguishable from the liberties conceded by the same treaty, in the foundation on which they stand, but they were carefully distinguished in the wording of the Treaty." *Diplomatic Correspondence.*—*Lord Bathurst's despatch, 30th December, 1815.*

|| "It was therefore surely obvious that the word *right* was throughout the treaty used as applicable to what the United States were to enjoy in virtue of a recognized independence; and the word *liberty* to what they were to enjoy as concessions strictly dependent on the treaty itself."—*Diplomatic Cor. Lord Bathurst's despatch, Oct. 30, 1815.*

"The distinction between the special liberty and the general right appears to have been well understood by the American Ministers who negotiated the treaty of 1783, and to have been clearly marked by the very import of the terms which they employed."—*Mr. Russell.*

§ The word "right" here means *just claim*: The term "liberty" signified *privilege or permission granted.*—*Ed*

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At the Treaty of Peace the high contracting parties must have stood each on a separate footing. They had been at war, and there was then an inchoate national sovereignty, already recognized in the provisional articles of 1782, and afterwards completed and confirmed by the recognition of the independence of the United States.\* Their respective sea rights would, without any stipulations, be those recognized and laid down by the Law of Nations. British jurisdiction over the waters around the coasts of so much as should remain to her of colonial empire in North America would extend at least three miles—the bays, harbors &c., being defined customarily by headlands.† Within such extent she was thenceforth absolute and sole proprietor. And it accorded as well with the relative positions as with the antecedents of both nations, that America should afterwards enjoy as a right the fisheries of the open sea, and that Great Britain should extend to her sovereign neighbour the liberty of using grounds formerly common, but now made exclusive by the recent definition of respective national possessions.

It has been argued that, in the recognition of the sovereignty of the United States there was implied a partition of all the fishery privileges in which their people had participated when colonists and British subjects. From which they assert an absolute right (to participate in all the fisheries) as "confirmed for ever," and as not affected by the war of 1812, but merely compromised in the subsequent convention.‡ While it was most obviously nothing more than a conceded liberty to obtain during pleasure.

American Ministers, in all of their correspondence, have laid great stress on the argument that the fishing liberties they had enjoyed under the treaty of independence were merely defined by the convention of 1818,—in fact, that it was a virtual continuance of the former treaty.|| The position thus assumed is proclaimed by them to be quite unassailable.

At Ghent, in 1814, the American Commissioners went even further in asserting the principle that the treaty of 1783 is to be regarded as perpetual, and of the nature of a deed in which the fisheries are *an appurtenant of the soil conveyed or*

\* "His Britannic Majesty acknowledges the said United States, &c., &c., to be free, sovereign and independent states, that He treats with them as such," &c., &c.—*Vide Article I of the Treaty of Paris, in 1783.*

† "We treated with our great adversary for peace, and desired it; but we treated as a co-equal sovereign nation."—*Rush's Diplomatic Relations, Philadelphia, 1860.*

‡ *A compendium of the Law of Nations, by G. F. Von Martens, London, 1802.—Law of Nations by G. F. Von Martens, London, 1853.*

§ *Vide Diplomatic Correspondence of Messrs. Stevenson, Upshur, Everett and Calhoun.*

|| "Great Britain could not consider any one state at liberty to assign to a treaty made with her such a peculiarity of character as should make it as to duration, an exception to all other treaties, in order to found, on a peculiarity thus assumed, an irrevocable title to indulgences which had all the features of temporary concessions."—*Diplomatic Correspondence. Lord Bathurst's despatch, Oct. 1815.*

parted with : \* and that, therefore, no stipulation was necessary or desirable to secure the perpetuity of the appendage more than of the territory itself.† The utter fallacy of this argument is made apparent by the fact that the fisheries were then, and had always since been, appendages of British soil. It would be an extraordinary abuse of language to attempt to prove by the concession of a privilege having its origin in common usage and convenient toleration, that there was implied the acknowledgment of an acquired "right" as between separate sovereignties. And it might be styled preposterous to claim that foreigners could continue to enjoy both the *usus* and the *fructus* of waters now no longer common, but the exclusive property and the dominion of another nation whose subjects alone should use them. It is doubly important to American views that the indefeasible character of the old treaty should be sustained, because of its use as corroborative of the "practical construction"‡ which their fishermen have put upon the renouncement in the new convention, and as vantage ground in any future discussion arising out of different constructions of the existing convention.

The pretension that the fishery article of the former treaty survived the rupture of 1812, is one which very little inquiry should dissipate. Apart from the general effect of hostilities, there are other elements in the duration of such engagements, as will be seen on reference to the following authorities :

"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

\* "The point mainly discussed, as regards the Fisheries was whether the recognition of the American 'right and liberty' to fish on the Banks of Newfoundland and elsewhere, in the 3rd article of the treaty of 1783, was of a permanent character, or liable to be abrogated by war. The British doctrine was, that the treaty of 1783, not being re-enacted or confirmed by the treaty of Ghent, was annulled by the war of 1812. The United States, while they did not deny the general rule that a war put an end to previous treaties, insisted that the rule was not applicable to the treaty of 1783, which was a treaty of partition, and by which the rights of each party were laid down as primary and fundamental ; so much of territory and incidental rights being allotted to one and so much to the other."—*Editor's note, Wheaton, p. 325, Boston, 1864.*

NOTE.—This is but a specious pretension. An incidental right must be incident to something—territory or situation. Fishery in British waters formed no incident of American territory or maritime situation, after the United States became a separate nation.—*Ed.*

† "Mr. Adams suggested to his associates, and Mr. Clay embodied in a proposition to be presented to the British Commissioners, the principle that we held our rights of fishing by the same tenure as we did our independence."—*Diplomatic Correspondence, 1815 to 1818.*

"The entire instrument implied permanence, and hence all the fishing rights secured under it to the United States, were placed on the same foundation with their independence itself."—*Editor's note in Lawrence's edition of Wheaton's Law of Nations, p. 325.*

"The treaty of 1783, in relation to the fishing liberty, is abrogated by the war."—*Mr. Russell, 11th Feb'y, 1815.*

Treaties securing territory and establishing boundaries, might be in their nature perpetual. Perpetuity will be *quo ad* the acquisition of property, or territorial possessions ; but except by express agreement, there could be no common property in piscary subsisting within the jurisdictional waters of another power. Mr. Russell, one of the American negotiators of the treaty of Ghent, wrote in 1815 : "The immemorial enjoyment of a privilege within British jurisdiction, by British subjects, the inhabitants of British Colonies, could not well be considered as evidence of a title to that privilege claimed by the citizens of an independent republic, residing within the exclusive jurisdiction of that republic."

‡ *Vide Mr. Uphur's note to Mr. Everett, 30th June, 1843.*

"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."—*The Law of Nations considered as independent political communities: By Travers Twiss, D. C. L., London, 1861, p. 377. Lord Bathurst's letter of October 30th, 1815.*

"A state of war abrogates Treaties previously existing between the belligerents." *President's Message, 1847. Annual Register.*

"Treaties of boundary alone are regarded by jurists as perpetual." *Twiss' Law of Nations, London, 1861.*

"As a general rule, the obligations of Treaties are dissipated by hostility, and they are extinguished and gone for ever unless revived by a subsequent Treaty." \* \* \*

"All those duties of which the exercise is not necessarily suspended by the war, subsist in their full force."—*Commentaries on American Law: By James Kent, New York, 1848, vol. 1, p. 175.*

"Agreements, the exercise of which is inconsistent with a state of war, necessarily expire with the commencement of hostilities."—*Supreme Court of the United States, Sutton vs. Sutton, Russel and Mylnes' Reports, vol. 1, p. 663.*

"Permanent arrangements respecting national rights revive at peace, unless waived or new and repugnant stipulations be made."—*Chancellor Kent: Wheaton, p. 494.*

Even if the general rule that war ends treaties be denied, there exist here all the elements of abrogation.

First.—According to Chancellor Kent it is only as respects national "rights" that revival at peace takes place; but a mere privilege ("liberty") is not provided for.

Second.—There was no renewal at the Treaty of Ghent.† Here was an intermediate compact in which some of the stipulations of the Treaty of Paris (1783) were reproduced, and boundaries were adjusted; but although mooted in the

\* Wheaton, page 494.

† "During the negotiations at Ghent, in 1814, the British plenipotentiaries gave notice that their Government did not intend to grant to the United States gratuitously the privileges, formerly granted by Treaty to them, of fishing within the limits of the British Sovereignty, and of using the shores of the British territories for purposes connected with the British fisheries. In answer to this declaration the American plenipotentiaries stated that they were 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 them all."—*Wheaton, p. 463.*

negotiations, the fishery subject found no place in the treaty. Thus indicating the designed omission of such other particulars.\*

By article 8 of the same treaty in 1783, it had been agreed, "That the navigation of the River Mississippi, from its source to the Ocean, should for ever remain free and open to the subjects of Great Britain and the citizens of the United States." And although it was described in that instrument as a "right" secured to British subjects for ever, it was withheld, and has been ever since enjoyed exclusively by the United States, because the participatory right "*had not been renewed by the Treaty of Ghent.*"† If a definite "right" of navigation on the waters of a foreign state be annulled by war, how much more should a participant "liberty" of fishery be subject to the same contingency?‡

Third.—Fishery in common with British subjects became incompatible with hostilities. Exercise of the liberty conceded depended on friendly relations. It certainly was withdrawn by the one, as it was practically relinquished and abandoned by the other,|| when a state of war destroyed all customs and concessions of an amicable nature.

Fourth.—New and repugnant stipulations were made by the first article of the Convention of 1818. So that, if not abrogated by any other act or omission, the third article of the treaty of 1783 was indisputably ended by the repugnant article of that convention.§

\* "The Treaty of Peace concluded at Ghent, in 1814, therefore contained no stipulation on the subject; and the British Government subsequently expressed its intention to exclude the American fishing vessels from the liberty of fishing within one marine league of the shores of the British territories in North America, and from that of drying and curing their fish on the unsettled parts of those territories, and, with the consent of the inhabitants within those parts which had become settled since the peace of 1783."—*Wheaton*, p. 463.

Chancellor Kent states (vol. 1, p. 178), that the tenth article of the treaty of 1794 between Great Britain and the United States "was not impaired by the war of 1812," because it contained a stipulation to the effect that in the event of war it should not become rescinded.—*Ed.*

† "The stipulation in the Treaty of 1783, securing to British subjects a right to participate in the navigation *not having been renewed by the Treaty of Ghent* 1814, the right of navigating the Mississippi is now vested exclusively in the United States."—*Wheaton*, page 353.

‡ Americans may in their own favor wrest something from treaties beyond their true meaning; but surely they cannot, in the case of other nations object to the application of rules applied for their own aggrandizement. In a letter to the American Secretary of State, 22nd April 1822, one of the United States Commissioners acknowledges that "The British right of navigating the river, within the American territory, was precisely similar to the American liberty of fishing within the British territorial jurisdiction."—*Ed.*

|| Andrews and Sabine admit, that during the war with England the distant fishing grounds were abandoned. Mr. Russell, writing to the United States Government, 11th February 1815, says "The people of the United States had never, in fact, during that period, enjoyed the fishing privileges at that moment; being effectually prevented therefrom by the existing state of hostilities."—*Ed.*

§ The very fact of entering into the convention of 1818 entirely abandoned the ground of permanence in the treaty of 1783. If it was permanent, what need was there for later stipulations which far from augmenting really diminished the freedom accorded by the former compact. None knew and felt this predicament more than did that able, astute and patriotic man, Mr. Secretary Webster: "It was undoubtedly an oversight in the Convention of 1818, &c., &c."

"Nothing could abrogate the rights and liberties of the United States, but a renunciation by the United States themselves."—*Diplomatic Correspondence*, Mr. Adams' despatch, September 15, 1815. *Ed.*

Another argument advanced in this connection is founded on prescription, \* and relies on the authority of Vattel. That learned writer says: "But, if so far from making itself master of a fishery, "a nation has once acknowledged the common right of other nations to come and fish there, it can no longer exclude them from it; it has left that fishery in its primitive state of communion, at least with respect to those who have been accustomed to take advantage of it."

Writers, who cite this passage always conveniently forget to explain, that the context refers to acquisition by a nation of fructuary rights in the open sea, contradistinguished from the exclusive piscary sanctioned by the public law and universal practice of nations as pertaining to jurisdictional waters.†

#### IV.—POSITION OF AFFAIRS AFTER THE TREATY OF GHENT.‡

In the course of negotiations connected with this treaty, peace was repeatedly endangered by the extreme views of the Americans on the fishery question. Great Britain, adopting the rule of nations, regarded the "liberty" conceded by Art. 3 of the treaty of 1783 as having lapsed in the war just ended. || Americans claimed the same privileges as they had enjoyed before the Revolution,§ with such further freedom of new fishing grounds and inshore fisheries as they had, by practical participation, associated with the operations of their own fishermen. Their negotiators were directed to make no peace without confirming these lofty pretensions.¶ War should continue for ever rather than the United States should abandon "one iota"\*\*\* of their extraordinary claims. The British ministers firmly insisted, but were willing to accept as a partial equivalent for continuance of the liberty allowed in 1783, the free navigation of the Mississippi. This reciprocal proffer was declined. Neither would yield. Ultimately the treaty was closed without any mention of fisheries,—Americans still nursing the notion that they would fall back upon their old policy of persistence in fishing over their neigh-

\* \* \* "A free participation in the Sea fisheries, near the shores of the Colonies is regarded as the just prescriptive privilege of our fishermen;—without such participation our deep sea fisheries in that region will become valueless."—*Andrews*, page 35.

† "The use and enjoyment of navigation and fishery in the sea," &c.

"It is manifest that the use of the open sea, &c."

"No nation, therefore, has a right to take possession of the open sea, or claim the sole use of it, to the exclusion of other nations, &c. The right of navigating and fishing in the open sea being then a right common to all men," &c.—*Vattel's Droit des Gens*, L. 1, p. 287.

"Prescription appears to me to be inapplicable to the parties and to the subject, and to be defective both in fact and effect. \* \* \* The inhabitants of the colonies originally constituting the United States, even in their colonial condition, could not acquire against their sovereign any right from long usage or mere lapse of time."—*Mr Russell*, 11th Feby., 1815.

"A right to fish, or to trade, or to do any other act or thing within the exclusive jurisdiction of a foreign state, is a simple power, a right of mere ability, depending on the will of such state, and is consequently imprescriptible."—*Ibid*.

‡ Signed at Ghent, 24th December, 1814.

|| *Vide* Instructions from the British Government to the Governor of Newfoundland, 17th June, 1815; published in the appendix (A) from British state papers, vol. 2, p. 1171.

§ Mr. Adams' correspondence with Lords Bathurst & Castlereagh in September and October 1815, and in January 1816.

¶ "It was the first stumbling block and last obstacle to the conclusion of the treaty."—*Mr. Adams*.

"There shall be no peace without the fisheries."—*Mr. Monroe*.

\*\* *Mr. Jno. Quincy Adams*, 28 Nov. 1814.



bors' waters. The British Government, however, avowed their just determination to withhold the forfeited privileges.\* A convention subsequently entered into between the two powers to establish "reciprocal liberty of commerce,"† contained no reference to the fisheries, notwithstanding that early in the same year, American vessels were warned off the coast by British cruisers. Stimulated by a revival of fishing bounties with drawback allowances, and the prohibitory duties placed by Congress on all foreign caught fish, in 1816, United States fishing vessels swarmed anew over the colonial fisheries. They penetrated everywhere. Firm in the purpose of maintaining inviolate her territorial and maritime rights, Great Britain defended the fisheries of her colonial subjects. Twenty U. S. vessels were seized for trespass on the limits of her maritime jurisdiction. These prompt measures led American statesmen to see the folly of their exacting attitude in the recent peace negotiations, and overtures were made which facilitated an adjustment of disputes in the Convention of 1818.

#### V.—FISHERY ARTICLE OF THE CONVENTION OF 1818.‡

"ART. I.—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 Joli,|| on the "southern coast of Labrador, to and through the Straits of Belleisle, 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,

\* "Our citizens nevertheless proceeded as formerly, to fish off the British coasts, and to use the "unsettled shores for curing and drying fish, according to the stipulations of the former Treaty. "They were immediately warned off by the British Naval Forces, and some were captured."—*Andrews*, p. 56, *Washington*, 1851.

† Signed at London, 3rd July, 1815.

‡ Signed at London, October 20, 1818.

|| "Mount Joli, mentioned in all former remark books, has no existence; at least there is no mountain, nor even anything that deserves the name of a hill; but near the termination of the sandy cliffs which end at the south-west extremity of Natashquan Point, the sandy ridges with spruce trees rise into a slight mound, or very little higher than the rest of the country. This is Mount Joli; but so little remarkable in its appearance that we should not have noticed it, had it not been for the name."—*Admiral Bayfield*.

This mound is about 11 miles east of, or below the Grand Natashquan River. A line drawn on a course N. E. to the Island of Anticosti, strikes the centre of Prinista Bay, on the northerly side of that island, near the elevated plateau and bluff called Table Head.

"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 harbors 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 harbors, 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."\*

## VI.—THE COMMON FISHERY RIGHTS OF NATIONS IN OPEN SEAS.

In order to a full and just understanding of points involved in this fishery dispute, it is essential to consider what are the rights of fishery in the high seas common to nations; also, what are exclusive rights of fishery in the sea, as expounded by public jurists and sanctioned by universal custom, pertaining to maritime sovereignty.

"The right of fishing in the open sea or main Ocean is common to all nations, on the same principle which sanctions the common right of navigation, viz: that he who fishes in the open sea does no injury to any one, and the products of the seas are, in this respect inexhaustible and sufficient for all. It is possible indeed that one nation may possess an exclusive right of navigation and fishing against another nation, by virtue of treaty engagements, as it is competent for a nation to renounce a portion of its rights; and there have been instances of such renunciations both in ancient and modern times."—*Twiss' Law of Nations*, p. 253.

"The free use of the Ocean, for navigation and fishing, is common to all mankind."—*Kent's Commentaries*, p. 25.

## VII.—EXCLUSIVE FISHERY RIGHTS OF NATIONS IN CERTAIN WATERS.

"The right of fishing in the waters adjacent to the coasts of any nation, within its territorial limits, belongs exclusively to the subjects of the State."—*Wheaton's International Law*, p. 325.

\* A complete collection of the Treaties and Conventions between Great Britain and Foreign Powers. By Lewis Hertslet, Esq., London, 1840, p. 86.

This Convention was fulfilled by the Imperial Statute 59, Geo. III, Cap. 38: Because of its important bearing on the subject, and the general consonance of its provisions, the Act is copied in *extenso* as Appendix B.—*Ed.*

Although Great Britain was always so anxious for peace as to yield much to the importunate and clamorous demands of American negotiators on the fishery question, her policy has been ever upright and consistent. And this Act is in perfect keeping with such straight-forward policy.—*Ed.*



"Besides those, *bays, gulfs, straits*, mouths of rivers and estuaries *which are enclosed by capes and headlands* belonging to the territory of the State, a jurisdiction and right of property over certain other portions of the sea have been claimed by different nations, on the ground of immemorial use."—*Wheaton*, p. 326.

"The right of fishery in the *open sea* may be the exclusive right of a nation." *Twiss' Law of Nations*, p. 264. *Vide* Commentaries on American Law, by James Kent; Vol. 1, (6th edition,) New York, 1848. The Law of Nations: by Travers Twiss, D. C. L, London, 1861.

Early treaties between France and England, prove that a common right of fishing in the seas which divide the two kingdoms did not exist, and was therefore subject to treaty engagements. \*

"In the case of portions of the sea, a nation may have a peculiar possession of them, so as to exclude the universal or common use of them by other nations."—*Twiss' Law of Nations*, p. 252.

This dictum is peculiarly applicable to some parts of the North American seas.

In the United States, Fisheries and Oyster beds within the territorial limits of each state, are held by the highest authorities to be "the common property of the citizens of that state;" and the citizens of another state have no claim to use them, nor can the United States exercise any authority over them in their natural state.†—*Angell on Tide Waters*.

"In treating of fishery in the sea, a distinction must be made between what is properly called the open sea, and what may be called the territorial sea, or *Mare Clausum*, i. e. the sea which is in a certain sense the property of the nation to which the adjacent continent or island belongs, such sea being vested in the crown, or in the sovereign authority as representing the nation. With regard to the limit from the shore to which this right in the territorial sea extends, it seems to be agreed by jurists that this limit is three miles (from low water mark). And the same limit is fixed upon in the convention between Great Britain and France which regulates the use of the fisheries between their respective shores: the fishermen of each country having the exclusive right of fishing within three miles from their own shore undisturbed by those of the other country. The same limit is uniformly adopted by the Court of Admiralty in administering the law with respect to the rules of the sea in British waters."—*Vattel*, 128. *Selden*, 182. *Martens*, 161.

#### VIII.—THE TERRITORIAL AND MARITIME JURISDICTION OF NATIONS, INCLUSIVE OF SOLE RIGHTS OF FISHING.

"The maritime territory of every State extends to the ports, harbours, bays, mouths of rivers *and adjacent parts of the sea inclosed by headlands*, belonging

\* *Vide Twiss' Law of Nations*, p. 266.

† Art. 4, sec. 2, clause 1, Federal Constitution.

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"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 (i. e. the ports, harbours, bays, and mouths of rivers and adjacent parts of the sea inclosed by headlands, with three marine miles superadded) its rights of property and territorial jurisdiction are absolute, and exclude those of every other nation.*"—*Elements of International Law*, p. 320, *By Henry Wheaton, LL. D. Second annotated edition by W. B. Lawrence, Boston, 1864.*

"The sea coast does not present one straight and regular line; it is on the contrary almost always intersected by bays, capes, &c. If the maritime domain must always be measured from every one of these points of the shore, great inconveniences would result from it. It has, therefore, been agreed in practice to draw an imaginary line from one promontory to another, and to take this line, as the point of departure for the reach of the cannon."—*Hautefeuille, Droits des Nations*, p. 89.

"The exclusive territorial jurisdiction of the British Crown over the inclosed parts of the Sea along the Coasts of the Island of Great Britain, has immemorially extended to those bays called the King's Chambers; that is portions of the sea cut off by lines drawn from one promontory to another. *A similar jurisdiction is also asserted by the United States over the Delaware Bay and other Bays and Estuaries forming portions of their territory.*"—*Bynkershoek*, p. 323, of *Lawrence's Wheaton*.

"Navigable rivers which flow through a territory, and the sea coast adjoining it, and the navigable waters included in bays, and between headlands and arms of the sea, belong to the Sovereign of the adjoining territory, as being necessary to the safety of the nation, and to the undisturbed use of the neighbouring shores."—*Kent's Commentaries*, p. 25.

"The property and dominion of the sea, might belong to him who is in possession of the lands on both sides, *though it be open above as a gulf, or above and below as a strait*, provided it be not so great a part of the sea, as when compared with the lands on both sides, it cannot be supposed to be a portion of them."—*Grotius de jure belli et pacis* L. 11.

"The exclusive right of domain, and territorial jurisdiction of the British Crown, have immemorially extended to the bays or portions of the sea cut off by lines drawn from one promontory to another, along the coasts of the island of Great Britain. They are commonly called the King's Chambers. *A similar jurisdiction, or right of domain, is also asserted, by the United States over the Delaware Bay, and other bays and estuaries, as forming portions of their territory.* Other nations have claimed a right of territory over bays, gulfs, straits, mouths

\* The mean nautical mile is 2025 yards. A marine league is 6075 yards, or a fraction over 3½ statute miles.

"of rivers, and estuaries which are enclosed by capes and headlands along their respective coasts, and the principle would seem to be pretty well established as a rule of International law."—*International Law, By H. W. Halleck, A. M., San Francisco, 1861.*

"Gulfs and Channels or arms of the sea are, according to the regular course, supposed to belong to the people with whose lands they are encompassed."—*Puffendorf Law of Nature and of Nations, L IV.*

"All we have said of the parts of the sea near the coast, may be said more particularly, and with greater reason, of roads, bays, and straits, as still more capable of being possessed, and of greater importance to the safety of the country. But I speak of bays and straits of small extent, not of those great tracts of sea to which these names are sometimes given, as Hudson's Bay and the Straits of Magellan, over which the empire cannot extend, still less a right of property."—*The Law of Nations, By Mons. de Vattel, New Edition by Jos. Chitty, Esq., Annotated by C. D. Ingraham, Esq., Philadelphia, 1858.*

"According to the current of modern authority, the general territorial jurisdiction extends into the sea as far as cannon shot will reach,\* and no further, and this is generally calculated to be a marine league."—*Kent's Commentaries* p. 29.

"Considering the great extent of the line of the American coasts, we have a right to claim, for fiscal and defensive regulations, a liberal extension of maritime jurisdiction; and it would not be unreasonable, as I apprehend, to assume, for domestic purposes connected with our safety and welfare, the control of the waters on our coasts, though included within lines stretching from quite distant headlands, as, for instance, from Cape Ann to Cape Cod, and from Nantucket to Mauntauck Point, and from that point to the Capes of the Delaware, and from the South of Cape Florida to the Mississippi."—*Kent's Commentaries, pp. 29 and 30.*

"It is difficult to draw any precise or determinate conclusion, amidst the variety of opinions, as to the distance to which a state may lawfully extend its exclusive dominion over the sea adjoining its territories, and beyond those portions of the sea which are embraced by harbors, gulfs, bays, and estuaries, and over which its jurisdiction unquestionably extends. All that can be reasonably asserted is, that the dominion of the sovereign of the shore over the contiguous sea, extends as far as is requisite for his safety, and for some lawful end."—*Kent's Commentaries, p. 29.*

The preceding dicta should be borne in mind, with especial reference to the plea set up by American ministers that the limit of maritime jurisdiction claimed by Chancellor Kent is with respect to "belligerent purposes;" and that the prin-

\* "The distance that a cannon shot will reach has been increased in a remarkable degree by modern inventions; and consequently the Sovereignty over the coast may be deemed to be proportionally extended."—*Organ of the Russian Government, Le Nord, 11th June, 1861.*

ciple of drawing lines from distant headlands does not sanction such a definition of marine bounds as affecting territorial jurisdiction and piscary. Is not fishery a "lawful end," and are not the fishing pursuits of citizens "purposes connected" with our safety and welfare?"

For purely belligerent purposes Great Britain takes sixteen miles of outside sea as the limit, and the United States take much more, both estimating the distance "from a right line drawn from one headland to another."\*

# IX.—THE CONVENTION OF 1818 AS RELATING TO ACQUIRED RIGHT AND CONCURRENT LIBERTY OF UNITED STATES CITIZENS.

This convention left the "right" of Americans precisely as it had existed under the treaty of 1783, to take fish at all places "*in the sea*" common to both nations. But, while curtailing the "liberty"† formerly allowed in respect of taking fish inshore, it enhanced facilities for curing. Under the former compact they could fish in the chief places about Newfoundland, but could not use the shores; they might catch and cure fish generally on the coasts, bays, and creeks of the mainland and Magdalen Islands, provided that where settled the consent of the residents should be obtained for landing and curing‡. Under the latter agreement they could both take and cure fish on certain parts of Newfoundland, and a limited extent of Labrador, subject only to permission for drying conveniences from the settlers where the coasts should be inhabited; but the liberty of fishing and curing on the coasts, bays and creeks of Nova Scotia and that part of Labrador south-west of Mount Joly, near Natashquan River, and almost opposite to the east end of the Island of Anticosti, was altogether withheld.|| And, as if the more emphatically to mark their acquiescence in the rightful exercise of the power and authority of Great Britain to withhold so much of the liberty as had given rise to "differences" named in the preamble, the United States voluntarily§ renounced

\* Chancellor Kent, p. 30.

Mr. Jefferson, in 1793.

Mr. Madison, in 1806.

† "The liberty claimed (under the treaty of 1783) by the United States in respect to the fishery within the British jurisdiction and territory, was confined to certain geographical limits," *Wheaton*, p. 471.

‡ "In the 3rd article of the treaty of 1783, Great Britain acknowledged the *right* of the U. S. to take fish on the Banks of Newfoundland and other places from which Great Britain had no right to exclude any independent nation. But they were to have the *liberty* to cure and dry them in certain unsettled places within the British territory. If the liberties thus granted were to be as perpetual and indefeasible as the rights previously recognized, it was difficult to conceive that the American plenipotentiaries would have admitted so strange a restriction of a perpetual and indefeasible right as that with which the article concludes, which left a right so practical and so beneficial as this was admitted to be, dependent on the will of British subjects, proprietors or possessors of the soil, to prohibit its exercise altogether." *Diplomatic Cor. Lord Bathurst's Despatch*, Oct. 30, 1815.

|| "Great Britain had always considered the liberty formerly enjoyed by the United States, of fishing within British limits and using British territory as derived from the 3rd article of the treaty of 1783, and from that alone; and that the claim of any independent state to occupy, and use, at its discretion, any portion of the territory of another, without compensation or corresponding indulgence, could not rest on any other foundation than conventional stipulation." *Diplomatic Cor. Lord Bathurst's Despatch*, Oct. 30, 1815.

§ "We inserted the clause of renunciation. The British plenipotentiaries did not desire it." *Negotiations of American Minister, 1818. Rush's Productions*, p. 290.

for ever any freedom before "enjoyed or claimed," to take, dry or cure fish on or within three marine miles of any other portions of the coasts, bays, creeks or harbors of British America.\*

In so far as the British claim is concerned, this formal renunciation appears to have been quite unnecessary. Mr. Webster refers to it as being "an oversight in the convention of 1818, to make so large a concession to England."†

The American negotiators were accused of having given up "fishing rights of long existence and great magnitude."

It is difficult to perceive in what sense the United States can be said to have made a "concession" to Great Britain. Without any such clause, Americans, as foreigners, would be excluded from those waters and coasts within imperial and provincial jurisdiction. Three miles, at least, they were bound to keep off, whether they chose to renounce a "claim" to do otherwise or not. They might dispute the basis of exclusion, and pervert the ruling and practice of nations to a narrower significance than themselves or any other powers have assigned to the limits of maritime states; but that (and through an oversight) there was any *concession* to Great Britain, is simply impossible.

The only question, therefore, that can arise out of the terms of this convention is, as to the general definition of marine limits applied to bays of a spacious character or peculiar configuration.

#### X—DEFINITION OF BAYS AND INDENTS OF SEA COASTS, WITH RESPECT TO MARITIME CONTROL AND EXCLUSIVE RIGHTS OF FISHERY.

Authorities cited at pages 11 to 15 clearly establish the *faucis terræ* to be bases of the bounds of national jurisdiction. These citations also prove the European principle to have been adopted (and even freely applied) by American publicists. As between the federal and state Governments of the American union, local and common rights of usufructuary privileges in the coast waters are governed by a very free extension of old world principles.

\* "When the U. S., by the treaty of 1818, solemnly renounced for ever the right to fish within three miles of the coasts, bays, creeks or harbors of certain portions of North America, the stipulation was neither extraordinary nor extravagant. It is matter of common history that sea girt-nations claim peculiar rights within a league of their shores; and equally plain that according to the maxims of international law, this claim is defined by lines drawn not only between the formation of bays, but from the headlands of indentations of the coasts." *Memorial to Her Majesty, Sept. 2nd 1852.*

† "It would appear that by a strict and rigid construction of this article, fishing vessels of the United States are precluded from entering into the bays or harbors of the British provinces, except for the purposes of shelter, repairing damages, and obtaining wood and water. A bay, as is usually understood, is an arm or recess of the sea entering from the ocean between capes or headlands; and the term is applied equally to small and large tracts of water thus situated. It is common to speak of Hudson's Bay, or the Bay of Biscay, although they are very large tracts of water.

"The British authorities insist that England has a right to draw a line from headland to headland, and to capture all American fishermen who may follow their pursuits inside of that line. It was undoubtedly an oversight in the Convention of 1818, to make so large a concession to England, since the United States had usually considered that those vast inlets or recesses of the ocean ought to be open to American fishermen, as freely as the sea itself, to within three marine miles of the shore." *Mr. Secretary Webster, 6th July, 1852.*

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The federal authority has no power to regulate rights of piscary on the coasts of any state, nor to cede by treaty, or otherwise, the privileges of using fisheries to a foreign power. The local jurisdiction goes still further: each state defines piscarial rights as belonging to its inhabitants. Within certain limits all fishery privileges are held for the exclusive benefit of citizens of the state. The limits which constitute state piscary are the same as laid down by the Law of Nations.\* And three marine miles in cases of bays and arms of the sea, and even oyster beds outside, are measured from headland to headland.† It would be surprising, therefore, if a sovereign power might not apply to foreigners a definition which respective states composing a confederacy maintain in relation to their own federal government.

It is contended in all American state papers on the fishery question, that the Bay of Fundy, in New Brunswick and Nova Scotia, and the Bay of Chaleur, in Canada and New Brunswick, are of such exceptional character as to render them part of the common sea, and in respect of fisheries, not susceptible of definition as jurisdictional waters.

These two bays may be taken as criteria.

Mr. Lawrence, in his annotated edition of Wheaton's International Law (p. 326), presses into service the words ("small bays") used by Hautefeuille in defining maritime rights. Upon referring to this standard authority, the language is found to bear no such interpretation as accords with the American view that the Bays of Fundy and Chaleur are not bays definable by headland lines. The French author's words are: "This mode adopted by almost all nations, is only applicable to *small bays*‡ and not to Gulfs|| of a great extent, as the *Gulf of Gascony*, or the *Gulf of Lyons*, which are in reality great parts of the completely open sea, and of "which it is impossible to deny the complete assimilation with the great Ocean."§

\* Wheaton, page 320.

† Schulle's *Aquatic Rights*.

Chancellor Kent.

Angell on *Tide Waters*.

Watt's *American State Papers*.

Attorney General of the United States, 14th May, 1793.

Award of Joint Commission under the *Reciprocity Treaty*, 1854.

‡ "An arm extending into the land not of any definite form, but smaller than a Gulf and larger than a Creek. The name, however, is not used with much precision, and is often applied to large tracts of water, around which the land forms a curve, as Hudson's Bay. Nor is the name restricted to tracts of water with a narrow entrance, but used for any recess or inlet between capes or headlands, as the Bay of Biscay." *Webster's Dictionary*, word *Bay*.

|| "A recess in the Ocean from the general line of the shore into the land, or a tract of water extending from the Ocean, or a Sea, into the land between two points or promontories; a large Bay, as the Gulf of Mexico, the Gulf of Venice, the Gulf of Finland. A Gulf and Bay differ only in extent. We apply bay to a large or small recess of the sea, as the Bay of Biscay, the Bay of Fundy; but Gulf is applied only to a large extent of water." *Webster's Dictionary*, word *Gulf*.

"A Bay, as is usually understood, is an arm or recess of the sea, entering from the Ocean between capes or headlands; and the term is applied equally to small and large tracts of water thus situated. It is common to speak of Hudson's Bay, or the Bay of Biscay, although they are very large tracts of water." *Mr. Secretary Webster*.

"A Gulf and a Bay differ only in extent, we apply Bays to a large or small recess of the sea, as the Bay of Biscay, the Bay of Fundy; but Gulf is applied only to a large extent of water." *Imperial Dictionary*, word *Bay*.

‡ *Droits des Nations Neutres*, 2me. édition. tom. 1, p. 59.

These examples are rather favorable to our view than against it. No one can compare the Bays of Fundy and Chaleur with the Gulfs of Gascony and Lyons, without being convinced that they are comparatively "small bays," forming no part of open sea. In fact, the Bay of Chaleur is a bay within a gulf—the Gulf of St. Lawrence intervening between its entrance and the open sea;\* and both of them are closed on three sides by land (British soil) quite inside of the great Ocean.

The width of the Bay of Fundy enters largely into American arguments. Mr. Everett, in his despatch of 25th May, 1844, speaks of the distance across the mouth as sixty miles, and argues therefrom against the claim to embrace its waters within British jurisdiction. Under article 3 of the treaty of Ghent,† Commissioners were appointed to determine the provincial boundaries in that part of the Bay of Fundy. Their decision placed the boundary along the midchannel, inside of Campo Bello, between Grand Manan Island and the coast of Maine. It would, therefore, be outside of this island and from furthest land that measurement should be made. From the light on Gannet Rock to that on Bryce's Island is about 30 miles; but if measured to Beatson's Ledges, the distance is somewhat less. Wheaton, on Rights of Property, page 321, says: "the term 'coasts' 'includes the natural appendages of the territory which rise out of the water, 'altho' those islands are not of sufficient firmness to be inhabited or fortified.'‡

Then, as regards the Bay of Chaleur,|| its full width does not exceed 15 miles, merely double the width of the mouth of the Potomac River, according to Brooke's United States Gazetteer; and its greatest depth is less than 80 miles. If it was possible to doubt the right of control over these bays on the ground of their spacious character, a reference to the relative sizes of the United States' bays must settle the doubt. Delaware Bay, which Chancellor Kent considers to be

\* Campeachy Bay, in the Gulf of Mexico, might as justly be reckoned part of the North Atlantic. So also is Panama Bay cut off from the sea by the Gulf of Panama. But the difference in position and degree can be readily understood, which, while it renders the Bay of Bengal for example, distinguishable from the Indian Sea, assimilates the Bay of Tehuantepec to the Pacific Ocean. The "Scheldts" of Zetland form no part of the North Sea. The Gulfs of Finland and Riga are different only in degree from the Gulf of Bothnia. Over the first named, Russia exercises exclusive sway, although both are much more susceptible of being regarded as part of the Baltic Sea, than the Bay of Fundy as part of the Atlantic Ocean. The Northern Pacific is a "great ocean" (Art. 1, Convention between United States and Russia, 5th April 1824), yet Russia claims and exercises exclusive jurisdiction there notwithstanding American and British remonstrances. She has quite recently turned the American whalers out of the Southern Pacific.—*Ed.*

† "And whereas the several Islands in the Bay of Passamaquoddy, which is part of the Bay of Fundy, and the Island of Grand Manan in the said Bay of Fundy, are claimed by the United States, &c."—Article 3, Treaty of Ghent.

‡ "Whether they were composed of earth or solid rock, would not vary the right of dominion, for the right of dominion does not depend upon the texture of the soil."—*Robinson's Amer. Rep.*, vol. 5, p. 385.

The little mud banks off the mouth of the Mississippi, are decided to be "shores of American territory."—*Wheaton*, p. 321.

|| "The magnificent Bay of Chaleur is the largest in the Gulf St. Lawrence, being 25 miles wide on a S. W.  $\frac{1}{4}$  S. line across its entrance, from Cape Despair to Miscou Island; but the entrance is more generally considered to be at Point Maquereau, from which the North-point of Miscou Island bears S. S. E. 14  $\frac{1}{2}$  miles. The depth of the bay from Miscou to the entrance of the Restigouche River, is about 75 miles, and its circumference, reckoning from Cape Despair round to Miscou, is 185 miles."—*Adml. Bayfield*.



wholly within the "territorial jurisdiction" \* of the United States, is 20 miles wide at the entrance, 30 miles across inside the mouth, and 70 miles long. Each of the States of New Jersey and Delaware exercises exclusive state authority to the centre of the bay, and for three nautical miles seawards from Capes May and Henlopen.†

Chesapeake Bay is narrower, being about 12 miles wide at the entrance, but it expands into the largest arm of the sea in the Union, being 270 miles in length. It is famous for its extensive and lucrative fisheries, which are not only closed to foreigners, but are exclusively controlled by the citizens of the bordering states; and the state rule of Maryland extends for three marine miles outside of Capes Charles and Henry and the islands and bars along the coast.‡

Massachusetts Bay|| is defined by lines drawn between the headlands of Cape Cod and Cape Ann, distant over 50 marine miles apart. Cape Cod Bay, within this limit, is itself about 20 miles wide from the Point to Plymouth Harbor. Let any unprejudiced person compare, on a chart, the situation of Massachusetts Bay with that of Fundy or Chaleur, and declare which is most plainly distinguishable from the open sea.

## XL.—CONSTRUCTION OF THE CONVENTION OF 1818.

There remains but one point in this dispute to be now examined: whether the generally accepted definition of bays, &c., as embraced within territorial control, or a special limitation of customary bounds be applicable to the fishery article of the Convention of 1818.§

Mr. Secretary Webster, 6th July, 1852, says; "It would appear by a *strict* and *rigid construction* of this article, fishing vessels of the United States are precluded from entering into the bays or harbors of the British Provinces, except for the purposes of shelter, repairing damages and obtaining wood and water." Mr. (now Secretary) Seward, 14th August, 1852, describes this construction as forced and unjust. Mr. Secretary Marcy, 6th July 1853, also pro-

\* *Kent's Commentaries.*

† *Angell on Tide Waters.*

Why should not Nova Scotia and New Brunswick on either side of the Bay of Fundy, and Canada and New Brunswick on either side of the Bay of Chaleur, be entitled to similar jurisdiction?—*Ed.*

‡ *Angell on Wrecks. Wildman's Int. Law.*

|| "Massachusetts Bay, which gives its name to the State, extends between Cape Ann, which projects sea-ward about 18 miles on the North, and Cape Cod on the South. It is about 70 miles in length and comprises Boston Bay and Cape Cod Bay. On the southern coast is Buzzard Bay, about 30 miles in length, and comprising a large number of fine and secure harbors."—*United States Gazetteer.*

§ "Discussions as to the interpretation of the provisions respecting the fisheries in the treaty of 1818, go back as far as 1823; and Mr. Forsyth, in instructing Mr. Stephenson, Minister at London, February 20th 1841, states as the point of difference, that the provincial authorities assume a right to exclude American vessels from all their bays, including the Bays of Fundy and Chaleur, and to prohibit their approach within three miles of a line drawn from headland to headland, while the American fishermen believe they have a right to take fish anywhere within 3 miles of land."—*Mr. Lawrence, (Wheaton, p. 325).*

"No United States fisherman has under the Convention (1818), the right to fish within 3 miles of the entrance of such bays as are designated by a line drawn from headland to headland at their entrance."—*Lord Aberdeen's despatch to Mr. Everett, 10th March, 1845.*



nounces it strained. American ministers have argued elaborately against such a construction as being never contemplated, as inconsistent with the object and intent and not justified by the phraseology of the convention. They claim an equitable construction, "since the United States had usually considered that those vast 'inlets or recesses of the ocean ought to be open to American fishermen as freely 'as the sea itself to within three marine miles of the shore.'"

It is laid down in Vattel, \* that, "in the interpretation of Treaties, compacts and promises, we ought not to deviate from the common use of the language, 'unless we have very strong reasons for it.'"

The terms in which a common liberty to fish is couched, describe the coasts, bays, &c., as in the clause of renunciation. Those excepted coasts, bays, &c., were not to be used "on or within three marine miles." That such distance was not to be reckoned from the *ripa* is clear enough, because it was precisely on account of United States fishermen having fished within the entrances of the bays of Fundy and Chaleur, † and other large indents, that the "differences" referred to in the preamble had arisen. All of the preceding negotiations had aimed at the same liberty. If anything less than the reservation of principal bays, &c., ‡ had been meant, there was no necessity for specifying these indentations,—a general designation of "coasts" would have been sufficient. In this word might seem to be comprehended all that Americans claimed but were denied in 1814, and again claimed (but failing to secure renounced) in 1818.||

The Imperial Statute of the 14th June, 1819, confirming the convention of the previous year, was a public Act on the part of Great Britain quite in accord with the sense of the Convention,|| But so long as its provisions were not rigorously enforced, United States fishermen raised no question. And it was only when the Provinces employed vessels to guard their own waters that United States fishermen found any inconvenience from the convention, and American statesmen discovered the British construction of it to be strict and rigid.

## XII.—ARE AMERICANS ENTITLED UNDER THE CONVENTION OF 1818 TO FISH AT AND LAND ON THE MAGDALEN ISLANDS?

Under the third article of the treaty of 1783, United States fishermen had liberty to dry and cure (but not to catch) fish in the unsettled bays, harbors and creeks of Magdalen Islands; but so soon as any of those places should become

\* Book 2, Cap. 17, sec. 271.

† The idea of Americans being entitled to fish in the Bay of Chaleur, where for forty years before they ever visited it, the fisheries were preoccupied, is most preposterous.—*Ed.*

‡ There is nothing in the Convention to justify any distinction between "outer" and "inner" bays, between "large indents" and "small inlets." By the first part of the article certain coasts, bays, &c., are made common to the subjects of both nations; and in the second part, United States citizens are excluded from certain coasts and bays. In both the word bays means the same. No qualification of the term is anywhere expressed or implied.—*Ed.*

|| "When we evidently see what is the sense that agrees with the intention of the contracting parties, it is not allowable to wrest their words to a contrary meaning."—*Vattel, lib. II, p. 284.*

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settled, the consent of the inhabitants, proprietors or possessors of the ground must first be obtained before curing or drying fish at such settlements. The first article of the convention of 1818 did not renew this liberty, but conveyed an express privilege of fishing only *on the shores* of Magdalen Islands.

Herring and mackerel are fished for here close inshore, the former mainly with seines.

Americans contend that by previous use under the treaty of 1783, and because these beaches are necessary to enjoyment of the liberty conveyed, they are entitled to use the seine grounds at different parts of the Islands for hauling and drying their nets. They claim this privilege as implied in the specific freedom described, without which the principal liberty would be nugatory.

In "Angell on Tide waters," \* an American authority, in defining "shore," "high water mark," &c., it is laid down, that, in legal construction at both common and civil law, "the sea shore is that space of land which is alternately covered and left dry, by the rising and falling of the tide. In other words, it is the space which is between the high and low water marks, variously denominated 'shore,' 'strand,' and 'beach.'" The Supreme Court of the United States has always upheld the same definition: "The sea shore must be understood to be the margin of the sea, in its usual and ordinary state; and when the sea is full, the margin is high water mark. The sea shore is therefore the ground between the ordinary high water mark and low water mark."†

If Americans are restricted to this definition of the word "shores" used in the convention, it is tantamount to a denial of fishery at the Magdalen Islands. Fishermen must use the land and sand bars above high water mark. And to deny United States citizens all access whatsoever even to these beaches would be perfectly consistent and just. In order to establish that the distinction made between these and other fishing grounds, meant precisely what the words of the convention express, it is sufficient to refer to the facts.‡

The liberty to take, dry, and cure fish at Magdalen Islands, enjoyed by virtue of the treaty of 1783, was subject to restriction in its extent and duration by the progress of settlement. In 1763, there were about 70 settlers in possession of the soil and carrying on the shore fisheries. The Islands were surveyed and deeded in 1798, at which time the settlements had increased to about 600 inhabitants. These settlers were located around the chief fishing stations, and had thus pre-occupied most of the available shores and upland. At the time of the convention,

\* *A treatise on the right of property in Tide waters and in the soil and shores thereof* by Jos. K. Angell, Boston, 1867. *Vide* Chap. III.

† *3. Mass. R. 435. 1. Pick (Mass) R. 180.*

‡ Attempts have been made to show that in adopting the term "coasts" where liberty to take, dry and cure fish was granted, and the words "on the shores of the Magdalen Islands" to convey the privilege of merely taking fish, there was a specific use of terms applicable to the different nature and requirements of the respective fishings. And that here it was intended the principal liberty should draw after it the incidental use of means (such as landing) necessary to its enjoyment. Such is not the case. It is quite clear that, if the term "coasts" had not been used in describing the privilege conceded at these Islands, Americans would have been precluded from fishing in the bays and along the shores.—*Ed.*

in 1818, the population consisted of some 1300 souls. Every inch of the best fishing ground was at this date in the use and occupation of British subjects. Moreover, these settlers were the tenants of a grantee of the Crown, who held the Islands by peculiar title. The grant of 24th April, 1798, to Isaac Coffin, conveyed "*the beaches and shores* of the said premises," and "in the sea in the vicinity of the said premises so granted, to fish for, catch, take and destroy all fish of the sea, whatsoever, and all sea animals of whatsoever description, &c." The terms of such grant, even without existing settlement, must have early precluded Americans from using the shores. They never made any agreement with the inhabitants, proprietors, or possessors of the soil under the treaty of 1788, and it is well known that the defenceless position of the settlers was such that there was no choice between tacit permission and forcible usage. If there could be any doubt as regards the supervention of conditions which justified exclusion, the reservation made by the Letters Patent on behalf of "good and faithful subjects" of Great Britain, "employed in fishing in the vicinity of the said premises," to be permitted free ingress and egress, must prove that a private property was constituted over which foreigners could no longer exercise any common privilege. It therefore quite accords with the actual circumstances that the conditional liberty allowed under the former treaty should be withdrawn in form, as already it was in fact; and the privilege to take fish around the shores was given by the convention without any possibility of an incidental addition altogether inconsistent with the tenor of the instrument and subversive of proprietary rights.\*

The conclusion that Americans cannot claim to land on or fish from the shores of the Magdalen Islands, is fortified by high legal authority.† Notwithstanding the exclusion which these facts would sustain, Americans have been always suffered to enjoy the fisheries at Magdalen Islands. Their vessels to the number of from 150 to 200 every season frequent the bays and harbors, and hundreds of their fishermen fish from the Islands. This indicates the neighborly conduct of Canadians towards them. But there is a still stronger evidence of the extreme liberality of Canada. Even under the treaty of 1854, United States citizens could have been refused the use of these Islands,‡ on the several grounds of private

\* "The subjects of each state shall not be disturbed in their fishing." *Hoggard's Adm. Rep. vol. III, pp. 275, 290.*—*Wheaton, p. 321, Ed. note.*

† Opinion of Law Officers of the Crown, 30th August, 1841. *At Appendices C and D.*

‡ "With permission to land upon the coasts and shores of those Colonies, and the Islands thereof 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 the British fishermen in the peaceable use of any part of the said coast in their occupancy for the same purpose."—*Article I. Reciprocity Treaty, 1854.*

"Depredations by foreign fishermen on the coasts of that isolated group (Magdalen Islands) are of common occurrence. \* \* \* While I was at Amherst harbor a very serious affray took place on shore among American fishermen. Pistols were fired. The peaceable inhabitants were in dismay, and dared not go out of their houses. \* \* \* Among the large numbers of strange fishermen resorting there must always be found lawless characters, to whom violence is a favorite pastime. The masters on board whose vessels they are have no control over them. \* \* \* Our quiet fishermen and settlers suffer frequent injury and insult, their houses are sometimes invaded, and their fishing often impeded."—*Extracts from report of P. Fortin, Esq.*

propriatorship, pre-occupation, and there being no liberty of *landing to fish* provided for. Strictly speaking, they might also under the convention of 1818, be in future refused access to the now settled parts of Labrador, where their best fares in that region are taken.

## APPENDIX A.

Instructions from the British Government to the Governor of Newfoundland, relative to the Privileges enjoyed by Citizens of the United States to fish within British Jurisdiction. London 17th June, 1815.

DOWNING STREET, 17th June, 1815.

SIR,

As the Treaty of Peace lately concluded with the United States contains no provisions with respect to the Fisheries, which the Subjects of the United States enjoyed under the III Article of the Peace of 1783, His Majesty's Government consider it not unnecessary, that you should be informed as to the extent to which those privileges are affected, by the omission of any stipulation in the present Treaty, and of the line of conduct which it is in consequence advisable for you to adopt.

You cannot but be aware, that the III Article of the Treaty of Peace of 1783, contained two distinct stipulations, the one recognizing the Rights which the United States had to take Fish upon the high seas, and the other granting to the United States the privilege of Fishing within the British Jurisdiction, and of using under certain conditions, the Shores and Territory of His Majesty for purposes connected with the Fishery: of these, the former being considered permanent, cannot be altered or affected by any change of the relative situation of the two Countries, but the other being a privilege derived from the Treaty of 1783 alone, was, as to its duration, necessarily limited to the duration of the Treaty itself. On the declaration of War by the American Government and the consequent abrogation of the then existing Treaties, the United States forfeited with respect to the Fisheries, those privileges which are purely Conventional, and (as they have not been renewed by stipulation in the present Treaty) the subjects of the

United States can have no pretence to any Right to fish within the British Jurisdiction, or to use the British Territory for purposes connected with the Fishery.

Such being the view taken of the question of the Fisheries, as far as relates to the United States, I am commanded by His Royal Highness the Prince Regent, to instruct you to abstain most carefully from any interference with the Fishery, in which the Subjects of the United States may be engaged either on the Grand Bank of Newfoundland, in the Gulf of St. Lawrence, or other places in the Sea. At the same time you will prevent them, except under the circumstances hereinafter mentioned, from using the British Territory for purposes connected with the Fishery, and will exclude their fishing vessels from the Bays, Harbours, Rivers, Creeks and Inlets of all His Majesty's Possessions. In case, however, it should have happened that the Fishermen of the United States, through ignorance of the circumstances which affect this question, should previous to your arrival, have already commenced a Fishery similar to that carried on by them previous to the late War, and should have occupied the British Harbours, and formed Establishments on the British Territory, which could not be suddenly abandoned without very considerable loss; His Royal Highness the Prince Regent, [willing to give every indulgence to the Citizens of the United States which is compatible with His Majesty's Rights, has commanded me to instruct you to abstain from molesting such Fishermen, or impeding the progress of their Fishing during the present year, unless they should, by attempts to carry on a contraband trade, render themselves unworthy of protection or indulgence: you will, however, not fail to communicate to them the tenor of the Instructions which you have received, and the view which His Majesty's Government take of the question of the Fishery, and you will above all be careful to explain to them, that they are not in any future season to expect a continuance of the same indulgence.

Vice Admiral Sir RICHARD G. KEATS.

I have, &c.,

BATHURST.

## APPENDIX B.

### IMPERIAL ACT 59 GEO. III, CAP. 38.

An Act to enable His Majesty to make Regulations with respect to the taking and curing Fish on certain parts of the coasts of Newfoundland, Labrador, and His Majesty's other possessions in North America, according to a Convention made between His Majesty and the United States of America. (14th June, 1819.)

**W**HEREAS a Convention between His Majesty and the United States of America, was made and signed at *London*, on the Twentieth day of *Octo-*

ber one thousand eight hundred and eighteen; and by the first article of the said Convention, reciting that Differences had arisen respecting the Liberty claimed by the United States for the Inhabitants thereof to take, dry and cure Fish in certain Coasts, Bays, Harbors and Creeks of His *Britannic Majesty's* Dominions in *America*, it is agreed 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 Coasts of *Newfoundland*, from the said *Cape Ray* to the *Quirpon* Islands, on the shores of the *Magdalen* Islands, and also on the Coasts, Bays, Harbours and Creeks from *Mount Joly* on the Southern Coasts of Labrador, to and through the straits of Belleisle, and thence Northwardly indefinitely along the Coast, without prejudice, however, to any of the exclusive rights of the Hudson's Bay Company; and it was also by the said Article of the said Convention agreed, that the American Fishermen should 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 above described, and of the Coast of Labrador, but that so soon as the same, or any portion thereof, should be settled, it should 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 whereas it is expedient that His Majesty should be enabled to carry into execution so much of the said Convention as is above recited, and to make Regulations for that purpose;

Be it therefore enacted by the King's Most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, That from and after the passing of this Act, it shall and may be lawful for His Majesty by and with the advice of His Majesty's Privy Council, by any Order or Orders in Council, to be from time to time made for that purpose, to make such Regulations, and to give such directions, orders and instructions to the Governor of Newfoundland, or to any officer or officers on that station, or to any other person or persons whomsoever as shall or may be from time to time deemed proper and necessary for the carrying into effect the purposes of the said Convention, with relation to the taking, drying and curing of Fish by Inhabitants of the United States of America, in common with British Subjects, within the Limits set forth in the said Article of the said Convention, and hereinbefore recited; Any Act or Acts of Parliament, or any Law, Custom or Usage to the contrary in anywise notwithstanding.

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, and shall and may be seized, taken, sued for, prosecuted, recovered and condemned by such and the like Ways, Means and Methods and in the same Courts, as Ships, Vessels or Boats may be forfeited, seized, prosecuted and condemned for any offence against any Laws relating to the Revenue of Customs, or the Laws of Trade and Navigation, under any Act or Acts of the Parliament of Great Britain or of the United Kingdom of Great Britain and Ireland; Provided that nothing in this Act contained shall apply, or be constructed to apply to the Ships or Subjects of any Prince, Power or State in Amity with His Majesty, who are entitled by Treaty with His Majesty to any privilege of taking, drying or curing Fish on the Coasts, Bays, Creeks or Harbours, or within the limits in this Act described.

III. Provided always, and be it enacted, That it shall and may be lawful for any Fisherman of the said United States to enter into any such Bays or Harbours of His Britannic Majesty's Dominions in America, as are last mentioned, for the purpose of shelter and repairing Damages therein, and of purchasing Wood and of obtaining Water, and for no other purpose whatever; subject nevertheless to such Restrictions as may be necessary to prevent such Fishermen of the said United States from taking, drying or curing Fish in the said Bays or Harbours, or in any other manner whatever abusing the said Privileges by the said Treaty and this Act reserved to them, and as shall for that Purpose be imposed by any Order or Orders to be from time to time made by His Majesty in Council under the Authority of this Act, and by any Regulations which shall be issued by the Governor or Person exercising the office of Governor in any such Parts of His Majesty's Dominions in America, under or in pursuance of any such Order in Council as aforesaid.

IV. And be it further enacted, that if any Person or Persons, upon Requisition made by the Governor of Newfoundland, or the Person exercising the Office of Governor, or by any Governor or Person exercising the Office of Governor in any other Parts of His Majesty's Dominions in America as aforesaid, or by any Officer or Officers acting under such Governor or Person exercising the Office of

Governor, in the execution of any Orders or Instructions from His Majesty in Council, shall refuse to depart from such Bays or Harbours; or if any Person or Persons shall refuse or neglect to conform to any Regulations or Directions which shall be made or given for the execution of any of the purposes of this Act; every such Person so refusing or otherwise offending against this Act shall forfeit the sum of two hundred pounds, to be recovered in the Superior Court of Judicature of the Island of Newfoundland, or in the Superior Court of Judicature of the Colony or settlement within or near to which such offence shall be committed, or by Bill, Plaint or Information in any of His Majesty's Courts of Record at Westminster; one moiety of such penalty to belong to His Majesty, His Heirs and Successors, and the other moiety to such Person or Persons as shall sue or prosecute for the same;—Provided always that any such suit or Prosecution, if the same be committed in Newfoundland, or in any other Colony or Settlement, shall be commenced within Three Calendar Months; and, if commenced in any of His Majesty's Courts at Westminster, within Twelve Calendar Months from the time of the Commission of such Offence.

## APPENDIX C.

Questions proposed by the House of Assembly of Nova Scotia, for consideration of Her Majesty's Legal Advisers; 8th June, 1841 :—

I. Whether the Treaty of 1783 was annulled by the War of 1812, and whether citizens of the United States possess any right of fishery in the Waters of the lower provinces other than ceded to them by the convention of 1818; and if so, what right?

II. Have American citizens the right, under that convention to enter any of the Bays of this Province to take fish, if, after they have so entered, they prosecute the fishery more than three marine miles from the shores of such bays; or should the prescribed distance of three marine miles be measured from the headlands, at the entrance of such bays, so as to exclude them?

III. Is the distance of three marine miles to be computed from the indents of the coasts of British America, or from the extreme headlands, and what is to be considered a headland?

IV. Have American vessels, fitted out for a fishery, a right to pass through the Gut of Canso, which they cannot do without coming within the prescribed



limits, or to anchor there, or to fish there; and is casting bait to lure fish in the track of the vessel fishing, within the meaning of the convention?

V. Have American citizens a right to land on the Magdalen Islands, and conduct the fishery from the shores thereof, by using nets and seines; or what right of fishery do they possess on the shores of those islands, and what is meant by the term shore?

VI. Have American fishermen the right to enter the bays and harbours of this Province for the purpose of purchasing wood or obtaining water having provided neither of these articles at the commencement of their voyages, in their own country; or have they the right only of entering such bays and harbours in cases of distress, or to purchase wood and obtain water, after the usual stock of those articles for the voyage of such fishing craft has been exhausted or destroyed?

VII. Under existing Treaties, what rights of fishery are ceded to the citizens of the United States of America, and what reserved for the exclusive enjoyment of British subjects?

## APPENDIX D.

Opinion of the Queen's Advocate General, and Her Majesty's Attorney General of England, upon a case submitted by the Assembly of Nova Scotia, as to the construction of the Convention of 1818, relative to the fisheries:—

DOCTORS' COMMONS, 30th Aug., 1841.

MY LORD,—We are honored with Your Lordship's commands, signified in Mr. Backhouse's letter of the 26th March, stating that he was directed to transmit to us the accompanying letter from the Colonial Office, enclosing the copy of a Despatch from the Lieutenant Governor of Nova Scotia, enclosing an Address to Her Majesty from the House of Assembly of that Province, complaining of the continued encroachments of American Fishermen on the fishing grounds of Nova Scotia, and the adjoining Colonies, and praying that Her Majesty would establish, by an Order in Council, general regulations for the protection of the Fisheries, according to the code annexed to the Address.

Mr. Backhouse is pleased to request that we would take these papers into consideration, and report to Your Lordship our opinion, whether there is anything in the proposed regulations which would be inconsistent with the stipulations of

the Convention of the 20th October 1818, Between Great Britain and the United States of America.

We are also honored with Mr. Backhouse's letter of the 19th April, stating that he was directed to transmit to us a further letter from the Colonial Office, dated the 16th instant, enclosing the copy of a Despatch from the Lieutenant Governor of Nova Scotia, covering a copy of an Address from the Legislative Council of that Province, objecting to one of the above mentioned regulations proposed by the House of Assembly, in the session of 1838, and to request that we would take these matters into consideration, in addition to those referred to in his letter of the 26th March last, and that we would report to your Lordship, at our earliest convenience, our opinion thereon.

We are also honored with Mr. Backhouse's letter of the 8th June, stating that he was directed to transmit to us the accompanying letter from the Colonial Office, together with the copy of a despatch from the Lieutenant Governor of Nova Scotia, enclosing a copy of a Report of the House of Assembly, on the subject of the fisheries of that Province, and also enclosing a case for opinion, as to what rights have been ceded to the citizens of the United States of America, and as to what rights have been exclusively reserved to Her Majesty's subjects, and to request that we would take the papers into consideration, and report to Your Lordship our opinion on the several questions stated in the case above mentioned.

We are also honored with Mr. Backhouse's letter of the 5th ult., stating that he was directed to transmit to us a correspondence, as marked in the margin, which has passed between the Foreign Office and Mr. Stephenson, the American Minister at this Court, and the Colonial Department, on the subject of a remonstrance addressed by Mr. Stephenson, against the proceedings of the authorities in Nova Scotia, towards American fishing vessels, encroaching on the fisheries of that coast, and to request that we would take these papers into consideration, and to report to your Lordship our opinion thereupon.

1st Query.—In obedience to Your Lordship's commands, we have taken these papers into consideration, and have the honor to report, that we are of opinion, that the Treaty of 1783 was annulled by the war of 1812; and we are also of opinion that the rights of fishery of the citizens of the United States must now be considered as defined and regulated by the Convention of 1818; and with respect to the general question 'if so, what right' we can only refer to terms of the Convention, as explained and elucidated by the observations which will occur in answering the other specific queries.

2nd and 3rd Queries.—Except within certain defined limits, to which the query put to us does not apply, we are of opinion, that by the terms of the Convention, American citizens are excluded from any right of fishing within three miles of the coast of British America, and that the prescribed distance of three

miles is to be measured from the headlands, or extreme points of land next the sea, or the coast, or of the entrance of bays, or indents of the coast, and consequently that no right exists, on the part of American citizens, to enter the bays of Nova Scotia there to take fish, although the fishing being within the bays, may be at a greater distance than three miles from the shore of the bay, as we are of opinion that the term 'headland' is used in the Treaty to express the part of the land we have before mentioned, including the interiors of the bays, and the indents of the coast.

4th Query.—By the Convention of 1818, it is agreed that American citizens should have the liberty of fishing in the Gulf of Saint Lawrence, and within certain defined limits, in common with British subjects; and such Convention, does not contain any words negating the right to navigate the Passage or Strait of Canso, and therefore it may be conceded, that such right of navigation is not taken away by that Convention: but we have now attentively considered the course of Navigation to the Gulf by Cape Breton and likewise the capacity and situation of the passage of Canso, and of the British Possessions on either side; and we are of opinion that independently of Treaty, no Foreign country has the right to use or navigate the passage of Canso; and attending to the terms of the Convention, relating to the liberty of fishing to be enjoyed by the American citizens, we are also of opinion, that that Convention did not, either expressly or by necessary implication, concede any such right of using or navigating the passage in question. We are also of opinion that casting bait, to lure fish in the track of any American vessel navigating the passage, would constitute a fishing, within the negative terms of the Convention.

5th Query.—With reference to the claim of a right to land on the Magdalen Islands, and to fish from the shores thereof, it must be observed, that by the Convention, the liberty of drying and curing fish (purposes which could only be accomplished by landing) in any of the unsettled bays, &c., of the southern part of Newfoundland, and of the Coast of Labrador, is specifically provided for; but such liberty is distinctly negated in any settled bays, &c., and it must therefore be inferred, 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, and would necessarily have been accompanied with a description of the inland extent of the shore, over which such liberty was to be exercised, and whether in settled or unsettled parts, but neither of these important particulars are provided for, even by implication, and that, among other considerations, leads us to the conclusion, that American citizens have no right to land, or conduct the fishery, from the shores of the Magdalen Islands. The word "shores" does not appear to have been used in the Convention in any other than the general or ordinary sense of the word, and must be construed with reference to the liberty to be exercised upon it, and would, therefore, comprise the

land covered with water, as far as could be available for the due enjoyment of the liberty granted.

6th Query.—By the Convention, the liberty of entering the Bays and Harbours of Nova Scotia for the purpose of purchasing wood and obtaining water is conceded in general terms, unrestricted by any condition expressed or implied, limiting the enjoyment to vessels duly provided with those articles at the commencement of their voyage; and we are of opinion that no such condition could be attached to the enjoyment of the liberty.

7th Query.—The rights of fishing ceded to the citizens of the United States, and those reserved for the exclusive enjoyment of British subjects, depend altogether upon the Convention of 1818, the only existing treaty on this subject between the two countries, and the material points arising thereon have been specifically answered in our replies to the preceding queries.

We have &c.,

(Signed,)

J. DODSON,  
THOS. WILDE.

Viscount PALMERSTON, K. B., &c., &c.

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