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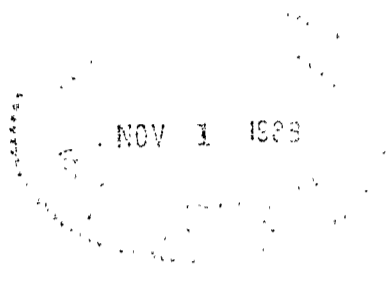
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UNITED STATES' FISHERY RIGHTS ON
COASTS OF BRITISH NORTH AMERICA.

*United States' Fishery Rights on Coasts of
British North America.*

Hertslet's Treaties,
vol. ii, pp. 392,
393.

1. UNDER the 1st Article of a Convention between Great Britain and the United States, dated London, the 20th of October, 1818, the right was conceded to the inhabitants of the United States for ever to take fish, and, with certain modifications, to dry and cure fish, off and on part of the coasts of Newfoundland and Labrador; and the United States withdrew their claim for ever to take, dry, and cure fish "on or within three marine miles of any of the coasts, bays, creeks, or harbours of His Britannic Majesty's dominions in America not included within the above-mentioned limits."

Hertslet, vol. iv,
p. 491.

2. The Act 59 Geo. III, cap. 38, sec. 2, saving Treaty rights, and especially rights under the above-mentioned Convention, prohibited persons on board foreign vessels, or vessels not navigated according to the laws of the United Kingdom, from fishing "within three marine miles of any coasts, bays, creeks, or harbours whatever in any part of His Majesty's dominions in America," under penalty of forfeiture of the ship and everything on board. This enactment was of course conclusive, but the New Brunswick local Act 16 Vict., cap. 69, contains the following provision:—

"If the vessel or boat shall be foreign, and not navigated according to the laws of Great Britain and Ireland, and shall be found fishing, or to have been fishing, or preparing to fish within three marine miles of such coasts or harbours (*i. e.*, the coasts and harbours of New Brunswick), such vessel or boat and the cargo shall be forfeited;" and in the Revised Statutes of Nova Scotia (Title XXV,

cap. 94, sec. 3) occurs a precisely similar provision.*

3. In 1841 the United States, through their Minister in London, Mr. Stevenson, complained that the colonial authorities claimed to exclude their fishermen from fishing, not only within their bays, but also within three miles of a line drawn from headland to headland of such bays. They also brought under review an assertion of the Legislature of Nova Scotia that the use of the Strait of Canso between the Continent and Cape Breton by the citizens and vessels of the United States was a violation of the Convention of 1818. On the other hand, Mr. Stevenson, on behalf of the United States, urged the right to fish in any situation not within three miles of land, and the right to navigate the Strait of Canso as having been exercised in common with other nations from 1783, the union of Nova Scotia and Cape Breton and Treaty stipulation notwithstanding. It was alleged by the Government of Nova Scotia, not only that United States' vessels passed through the Strait of Canso, but that their crews both fished there and, by dropping bait, lured the fish away. The Law

* In 1841, Mr. Stevenson, the United States' Minister in London, observed of the Local Act 6 William IV, cap. 8, which the Revised Statutes follow in the matters noticed by him, "Some of the provisions of her code (the code of Nova Scotia) are of the most extraordinary character. Amongst these there is one which declares that any foreign vessel preparing to fish within three miles of the coast of any of Her Majesty's dominions in America shall, together with her cargo, be forfeited; that in all cases of seizure the owner or claimant of the vessel, &c., shall be held to prove his innocence or pay treble costs; that he shall be forced to try his action within three months, and give one month's notice, at least, to the seizing officer, containing everything intended to be proved against him, before any suit can be instituted; and also prove that the notice has been given. The seizing officer, moreover, is almost wholly irresponsible, inasmuch as he is liable to no prosecution if the judge certifies that there was probable cause; and the plaintiff, if successful in his suit, is only to be entitled to twopence damages, without costs, and the defendant fined not more than one shilling. In short, some of these rules and regulations are violations of well-established principles of the common law of England, and of the principles of the just laws of all civilized nations, and would seem to have been designed to enable Her Majesty's authorities to seize and confiscate with impunity American vessels, and embezzle indiscriminately the property of American citizens employed in the fisheries on the coasts of the British Provinces."

Officers of the day adopted the view of the Colonial Governments as to the limits within which foreign fishermen were prohibited from following their business. They acknowledged, indeed, that the Convention of 1818 did not take away the right to navigate the Strait of Canso, but they held that, independently of Treaty, no foreign country had that right, and that the Convention of 1818 did not concede it to the United States. A copy of the material part of the Law Officers' opinion is appended to this Memorandum. At a later date, in 1845, the Imperial Government, whilst insisting that the Bay of Fundy was a close bay under the Convention of 1818, nevertheless, as an act of grace and for the avoidance of disagreement, conceded to United States' fishermen the right to fish in any part of the Bay of Fundy, provided they did not approach within three miles of the entrance of any bay on the coast of Nova Scotia or New Brunswick Proper, except for the purposes sanctioned by the Convention of 1818, namely, shelter, repairs, or supplies of wood or water.

4. In the same year the idea was entertained of accepting as bays, in the sense of the Convention of 1818, those bays only of which the entrance was not more than six miles wide. The idea was abandoned; but, by a correspondence which took place in 1850, Mr. Perley appears to have been disposed to interpret the Convention with a latitude as to bays upon which the Home Government was not prepared to act.*

5. Under these circumstances it was usual to issue to Admirals assuming the command on the North American and West Indian station instructions, of which the following extract from the instructions to Admiral Fanshawe may be taken as an example:—

“And as various complaints have been made from the authorities in Canada on the subject of the encroachments of American fishermen in the River and Gulf of St. Lawrence on the limits prescribed

* Mr. Perley proposed to exclude United States' fishermen from fishing within three miles of a line drawn from the northern extremity of Cape Breton to the eastern extremity of Prince Edward Island, thence to the northern extremity, thence to the north-east point of New Brunswick, thence across the Bay of Chaleur to the east point of Canada, thence to the east point of Anticosti, and thence to Mount Ioli on the Coast of Labrador.

*A. issued not long before
the Reciprocity Treaty*

by the Convention of 1818 for the regulation of the fisheries; and as by a letter of the 13th February, 1836, from Lord Palmerston, it is stated that it does not appear that the Government of the United States has any adequate means of preventing the encroachments of the American fishermen above referred to, it is his Lordship's opinion that the only way in which the British rights of fishery can be effectually maintained is by the presence of a British sloop of war; you will, therefore, during the fishery season, and from time to time, as it may appear to you to be necessary, send a vessel of war accordingly to the Gulf of St. Lawrence, with instructions to the commander to enforce the stipulations of the 1st Article of the Convention of 1818. It may be added that the American Government has shown every disposition, and has instructed their collectors to enjoin the masters, owners, and others engaged in the fishery, to observe strictly the limits assigned for taking, drying, and curing fish, under the Convention of 1818."

6. In this state of things the Treaty between Great Britain and the United States, known as the Reciprocity Treaty, was signed at Washington on the 5th of June, 1854. By the 1st Article the fishing rights enjoyed by the United States in respect to Newfoundland and Labrador under the Convention of 1818, were extended with modifications not now material to Canada, Nova Scotia, New Brunswick, and Prince Edward Island. It was agreed that the Reciprocity Treaty should take effect from the passage of certain necessary laws by the Imperial Parliament and the British Provincial Legislatures concerned, and should then continue in force ten years, and further until the expiration of twelve months from notice of termination by either of the Contracting Parties.

Hertslet, vol. ix,
pp. 993 *et seq.*

7. The Imperial Act 18 Vict. cap. 3, giving effect to the Reciprocity Treaty, contained the following provision:—

Hertslet, vol. x.
p. 654.

"I. All Acts of Parliament and Laws which operate to prevent the provisions of the said Treaty from taking full effect shall, so far as they so operate, be suspended and of no effect during the continuance of the said Treaty."

8. The United States last year gave notice that the Reciprocity Treaty would expire on the 17th of

March, 1866. In November 1865 the Executive Council of Nova Scotia expressed the hope that a portion of the North American squadron might be detailed for the protection of the Nova Scotia fisheries upon the expiration of the Treaty.

Negotiations for a renewal of the Treaty having proved fruitless, Mr. Cardwell in a despatch dated the 3rd instant, intimated to the Governor-General that Her Majesty's Government were not disinclined to allow the United States to exercise during the year 1866 the fishing rights acquired under the Reciprocity Treaty, on the distinct understanding that unless some satisfactory arrangement is come to in the course of the year this privilege will cease. Mr. Cardwell adverted to the immediate withdrawal of such fishing rights as a possible means of obtaining a new Treaty from the United States, but remarked that whilst the advantage of such a new Treaty would belong to the Colonies, the cost of maintaining a naval force to protect the fisheries would fall upon the Imperial Government.* Mr. Cardwell then proceeded to instruct the Governor-General to ascertain the views of his Ministry, but not to consider himself at liberty to pledge Her Majesty's Government to an absolute deference to their wishes.

9. On the 5th instant, however, a despatch was received from Lord Monck inclosing a copy of a proclamation which he had issued in view of the approaching termination of the Reciprocity Treaty, and which, after reciting the facts of the conclusion of the Treaty in 1854, and the notice of termination, thus proceeds:—

“ And whereas under the said Treaty many persons, citizens of the United States of America, have invested moneys and fitted out ships for the purpose of carrying on the (in-shore) fisheries within the territory of Canada under the said Treaty :

“ And whereas they may be unaware that their right to carry on such in-shore fisheries will end on the said 17th day of March :

“ We therefore, in Our great desire to prevent injury or loss to Our loving subjects, or to the citizens of a State with which we are happily in

* *i. e.*, in case of a breach with the United States. The principle that the Colonies should maintain ordinary preventive cruizers was long ago insisted upon by the Imperial Government, and recognised by the Colonies.

amity, do in this Our Royal Proclamation caution and warn all persons not subjects of Our realm that after the said 17th day of March next no vessels owned and manned in the United States of America can pursue the in-shore fisheries without rendering themselves liable to the confiscation of their vessels, and such other penalties, pecuniary and personal, as are by law imposed."

Colonial Office, March 8, 1866.

APPENDIX.

Appendix.

Extract from an Opinion of Sir J. Dodson and Sir T. Wilde, dated Doctors' Commons, August 30, 1841.

“First Query.—In obedience to your Lordship’s commands we have taken these papers into consideration, and have the honour 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 the terms of the Convention, as explained and elucidated by the observations which will occur in answering the other specific queries.

“Second and Third 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, of the coast, or of the entrance of the bays, and not from the interior of such 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 bay, 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, excluding the interior of the bays and the indents of the coast.

“Fourth Query.—By the Convention of 1818 it is agreed that American citizens should have the liberty of fishing in the Gulf of St. 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 Gut 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 dominions 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 fishery 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 vessels navigating the passage would constitute a fishing within the negative terms of the Convention.

“Fifth 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 ‘shore’ 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.

*“Sixth 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 can be attached to the enjoyment of the liberty.

*“Seventh Query.—*The rights of fishery 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.”

(5)