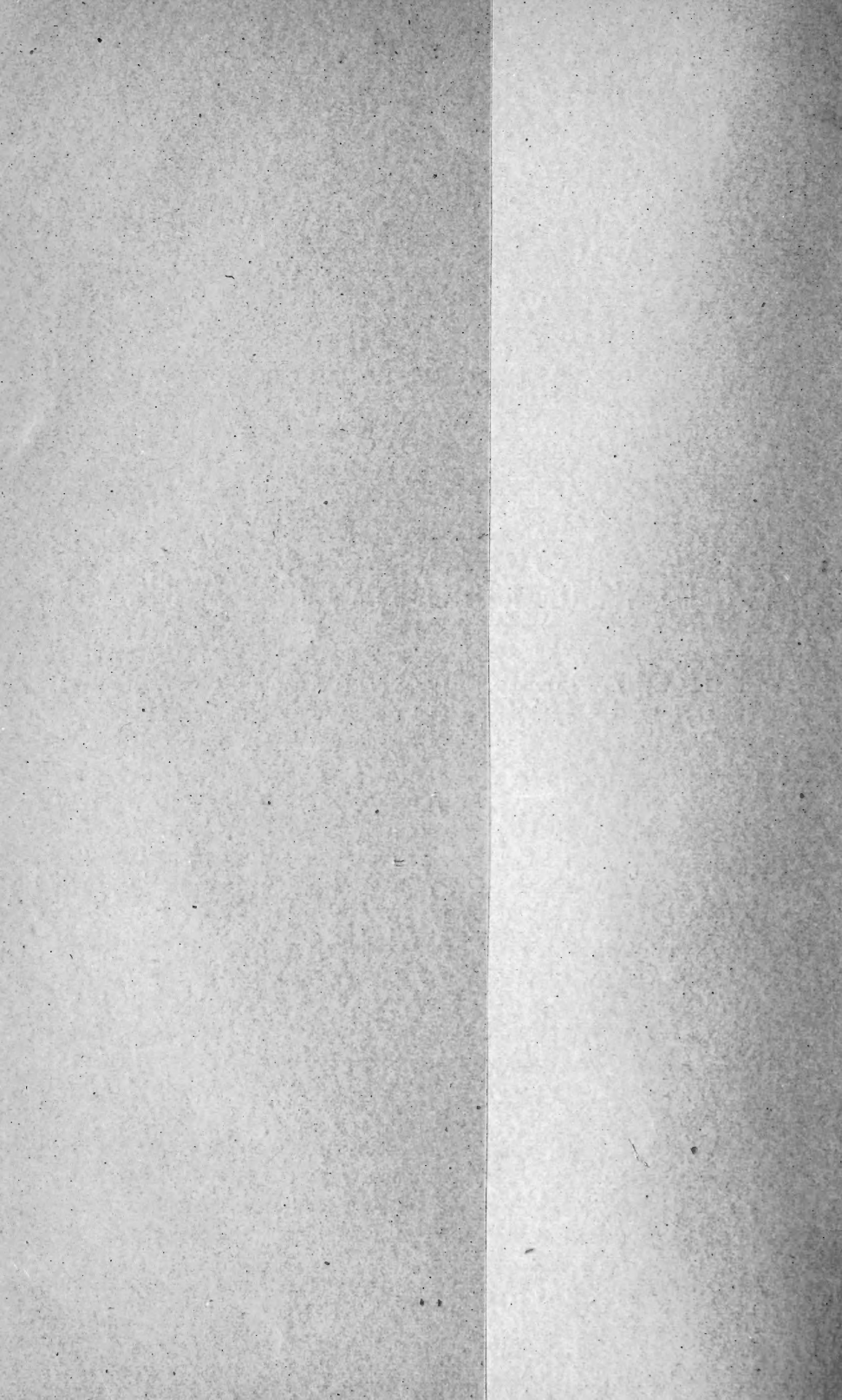


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ARGUMENT OF RICHARD H. DANA, JR.,

ON BEHALF OF THE UNITED STATES.



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

We have been fortunate, Gentlemen of the Commission, that no misfortune, no serious accident, in the long period of three months while so many gentlemen have been together, has fallen upon us. The shadow of death has not crossed our path nor that of any of ours at a distance, nor even has sickness visited us in any perilous manner. We have been sustained all the while by the extreme hospitality and kindness of the people of this city, who have done every thing to make our stay here as agreeable as possible, and to breathe away any feeling we might have had at the beginning lest there should be some antagonism which would be felt beyond the legitimate contests of the profession. The

kindest feeling and harmony prevail among us all. Your legislature of this Province has set apart for our use this beautiful hall; and while my friend and associate, Mr. Trescot, saw in the presence of the portrait of His Majesty George III., which looks down upon us from the walls, an encouragement for the settlement of the matter confided to us, because that king supposed it settled more than a hundred years ago, I confess that the presence of that figure has been to me throughout most interesting and even pathetic. It was the year he ascended the throne, that the French were finally driven from North America, and that it all became *British* America, from the southern coast of Georgia up to the North Pole, and all these islands and peninsulas which form the Gulf of St. Lawrence passed under his sceptre. And what a spectacle for him to look down upon now, after a hundred years! A quiet assembly of gentlemen, without parade, without an armed soldier at the gate, settling the vexed question of the fisheries, which in former times and under other auspices would have been cause enough for war. And settling them between whom? Between his old thirteen colonies, — now become a republic of forty millions of people, bounded by seas and zones, — and his own empire, its sceptre still held in his own line, by the daughter of his own son, more extended, and counting an immensely larger population than when he left it, showing us not only the magnitude and increase of the Republic, but the stability, the security, and the dignity of the British Crown. Yes, gentlemen of the Commission, when he ascended the throne, and before that, when his grandfather, whose portrait also adorns these walls, sat upon the throne of England, this whole region was a field of contest between France and Great Britain. It was not then British North America. Which power should hold it, with these islands and peninsulas and these fisheries adjacent to and about it, depended upon the issue of war, and of wars one after another. But Great Britain, holding certain possessions here, claimed the fisheries, and made large claims, according to the spirit of that day, covering the Banks of Newfoundland, and the other banks, and the whole deep-sea fishery out of sight of land, and also up to the very shores, within hailing distance of them, without any regard to a geographical limit of three miles, which is a very modern invention. That contest was waged, and the rights in these islands and these fisheries settled, by the united arms of Great Britain and of

New England, and largely, most largely, of Massachusetts. Why, Louisburg, on Cape Breton, held by the French, was supposed to be the most important and commanding station, and to have more influence than any other upon the destinies of this part of the country. Its reduction was ordered by the Legislature of Massachusetts. And, Mr. President, it was a force of between three and four thousand Massachusetts men, under Pepperell, and a few hundred from the other colonies, with one hundred vessels, that sailed to Louisburg, invested and took it for the British Crown, in trust for Great Britain and her colonies. Gridley, who laid out the fortifications at Bunker Hill, and Prescott, who defended them, were in the expedition against Louisburg, and the artillery was commanded by Dwight, a maternal ancestor of our friend, Judge Foster. And wherever there was war between France and England for the possession of this continent, or any part of it, or these islands and these fisheries, the militia and volunteers of Massachusetts fought side by side with the regulars of Great Britain. They fought under Wolfe at Quebec, under Amherst and Howe at Ticonderoga; and, even at the confluence of the Alleghany and Monongahela, Washington saved the remnant of Braddock's command. We followed the British arms wherever they sought the French arms. The soldiers of Massachusetts, accompanying the British regulars to the sickly sugar-islands of the West Indies, lay side by side on cots in the same fever-hospitals, and were buried in the same graves. And if any of you shall visit the Old Country again, and your footsteps lead you to Westminster Abbey, you will find there a monument to Lord Howe, who fell at Ticonderoga, erected in his honor by the Province of Massachusetts. And there let it stand! an emblem of the fraternity and unity of the olden times, and a proof that it was together, by joint arms and joint enterprise, blood and treasure, that all these Provinces, and all the rights appertaining and connected therewith, were secured to the Crown and the Colonies! Yes, gentlemen of the Commission, every one of the charters of Massachusetts gave her a right to fish in these north-western seas, and that, you will observe, was irrespective of her geographical position. None of them washed her shores, but they were the fruits of the common toil, treasure, and blood of the Colonies and of the Crown, and they were always conceded to the Colonies by the Crown. The last Massachusetts charter granted by the Crown is in these words, —

it assures to Massachusetts "the right to use and enjoy the trade of fishing on the coast of New England, and *all the seas thereto adjoining, or arms of said seas*, where they have been wont to fish." The test was the habit of the people; "where they had," in the good old Saxon English, "been *wont* to fish." It did not depend on geographical lines. They had no idea then of excluding the Colonies from three miles of the shore, and giving them a general right on the seas; but whatever right Great Britain had here, she shared with the Colonies to the last.

I may as well present here, gentlemen of the Commission, as at any other time, my view respecting this subject of the right of deep-sea fishery. The right to fish in the sea is in its nature not real, as the common law has it, nor immovable, as termed by the civil law, but personal. It is a liberty. It is a franchise, or a faculty. It is not property, pertaining to or connected with the land. It is incorporeal. It is aboriginal. The right of fishing, dropping line or net into the sea, to draw from it the means of sustenance, is as old as the human race, and the limits that have been set about it have been set about it in recent and modern times; and wherever the fisherman is excluded, a reason for excluding him should always be given. I speak of the free-swimming fish of the ocean, followed by the fishermen through the deep sea, not of the crustaceous animals or any of those that connect themselves with the soil under the sea, or adjacent to the sea, nor do I speak of any fishing which requires possession of the land or any touching or troubling the bottom of the sea. I speak of the deep-sea fishermen who sail over the high seas, pursuing the free-swimming fish of the high seas. Against them, it is a question not of admission, but of exclusion. These fish are not property. Nobody owns them. They come we know not whence, and go we know not whither. The men of science have been before us, and fishermen have been before us, and they do not agree about it. Professor Baird, in a very striking passage, gave it as his opinion that these fish retire in the winter to the deep sea, or to the deep mud beneath the sea, and are hidden there; and in the spring they invade this great continent as an army, the left wing foremost, touching the Southern States first, and last the northern parts of the British colonies. Others think they go to the South, and come back in lines and invade this country; but at all events, they are more like those birds of prey and game

which come to the North in the summer, and appear again and darken the sky as they go to the South for the winter. They are no man's property; they belong, by right of nature, to those who take them, and every man may take them who can. It is a totally distinct question whether, in taking them, he is trespassing upon private property, the land or park of any individual holder. "The final cause," as the philosophers say, of the existence of the sea fish is, that they shall be caught by man, and made an article of food by man. It is an innocent use of the high seas, that use which I have described. More than that, it is a meritorious use. The fisherman who drops his line into the sea creates a value for the use of mankind, and therefore his work is meritorious. It is, in the words of Burke, "wealth drawn from the sea;" but it is not wealth until it is drawn from the sea.

Now, these fishermen should not be excluded except from necessity, some kind of necessity; and I am willing to put at stake whatever little reputation I may have for acquaintance with the jurisprudence of nations (and the less reputation, the more important to me) to maintain this proposition, that *the deep-sea fisherman, pursuing the free-swimming fish of the ocean with his net, or his leaded line, not touching shores or troubling the bottom of the sea, is no trespasser, though he approach within three miles of a coast, by any established, recognized law of all nations.* It may possibly cross the minds of some of this tribunal, that perhaps that is not of very great importance to us here, but from the reflection I have been able to give to this case (and I have had time enough surely), it seems to me that it is. I wish it to be fully understood, what is the nature of that exclusive right for the withdrawing of which we are asked to make a money compensation? What is its nature, its history and its object? The Treaty between Great Britain and France of 1839, which provides for a right of exclusive fishery by the British on the British side of the Channel, and by the French on the French side of the Channel, each of three miles, and measures the bays by a ten-mile line, is entirely a matter of contract between the two nations. The Treaty begins by saying, not that each nation acknowledges in the other the right of exclusive fishery within three miles of the coast; nothing of the kind. It begins by saying, "It is *agreed between the two nations* that Great Britain shall have exclusive fishery within three miles of the British coast, and that the French shall have

exclusive fishery within three miles of the French coast," and then it is further agreed that the bays shall be measured by a ten-mile line. All arbitrary alike, all resting on agreement alike, without one word which indicates that the law of nations any more gives an exclusive right to these fisheries for three miles from the coasts, than it does to measure the bays by ten miles. In the time of Queen Elizabeth this matter seemed to be pretty well understood in England. Her Majesty sent a commission, an embassy, to Denmark, on the subject of adjusting the relations between the two countries, and among the instructions given the ambassadors were these:—

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

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

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

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

the free-swimming fish, wherever they might be upon the high seas.

I wish particularly to impress upon your Honors, that all the North British Colonies were in possession and enjoyment of the liberty of fishing over all the north-western Atlantic, its gulfs and bays. There is no word indicating the existence of either a three-mile line of exclusion, or of an attaching the right of fishing to the geographical position of the colony. No, gentlemen, the Massachusetts fisherman who dropped his leaded line by the side of the steep coast of Labrador, or within hail of the shore of the Magdalen Islands, did it by precisely the same right that he fished in Massachusetts Bay, off Cape Cod or Cape Ann. Nobody knew any difference in the foundation or the test of such rights, in those days. It was a common heritage, not dependent upon political geography. As I have said, it was conquered by the common toil, blood and treasure, and held as a common right and possession. "Be it so," your Honors may say, "but could not Great Britain take it from her Colonies?" Well, the greatest philosopher who ever gave his life to statesmanship — Edmund Burke — said, "That is a question which can better be discussed in the schools, where alone it can be discussed with safety." He compared it with the question of the right to shear wolves. He was not disposed, perhaps, to deny the right in the abstract, but as a servant of the Crown, he could not advise the Crown to try that kind of experiment. I recollect that when, before our civil war, an ardent and enthusiastic admirer of slavery said on the floor of Congress that capital ought to own labor, and that we had made a great mistake in New England that the capitalist did not own the men who worked in the factories and the men who followed the sea, — Mr. Quincy replied by an anecdote respecting the bounty which the State of Maine gave for every wolf's head. A man was asked why he did not raise a flock of wolves for the bounty. He said he was afraid it would turn out to be "a hard flock to tend." And the wisest men in Great Britain, — and I can say this in the presence of gentlemen who are almost all British subjects now, without fear of giving offence — the wisest men of Great Britain thought it was an attempt which had better not be made. But the Act of March, 1775, urged by the obstinacy of George III. and his adherence to worn-out traditions, was passed. After a conflict with the colonies on the subject of

the stamp act, and the tea tax, that fatal Act was passed, aimed at home rule, self-government and the trade of the New England people, — or rather, I should say, in the first instance, of Massachusetts, because it was Massachusetts over which the contest was waged during the early part of our struggle, — and attempting to undo all we had been doing for one hundred and fifty years; to revolutionize our entire political system, and instead of leaving us what we had enjoyed for that time, home rule, to substitute a government at St. James's or St. Stephen's. Among other things, it attempted to deprive us of our right in the fisheries. The statute acknowledged the existence of the right, but Massachusetts was to be deprived of her right by the Act of Parliament. Then came the debate, fiercer than ever, "Can Parliament take from us this right?" Well, the claim rested upon the assumption that all the grants which the charters vested in us were held at the discretion of Parliament. But if Parliament could take away our fisheries, she could take away our landmarks, she could take Boston and Salem, which had been granted to us under the same charter that the fisheries had been granted; and when that act was passed, Burke and Fox, and Sheridan, and Barré, and others, our friends in the British Parliament, called it a simple provocation to rebellion. Burke said, "It is a great penal bill which passed sentence on the trade and sustenance of America." New England refused obedience. The other colonies assisted her, and we always treated the Act as void. Then came the war, and what was the effect of that on our title? Why, may it please you, gentlemen, I do not deny that war has an effect, but not the kind of effect which has been contended for by the British Government and by counsel. I agree that war puts at hazard, not only every right of a nation, but the existence of the nation. There are boundary lines before war, and they are good against neutrals, and good between the belligerents, unless something else happens; but the boundary lines and every thing they enclose is put at stake by the war. If one party entirely conquers the other, it has a right to decide upon the future existence of the other nation, and all its rights; and when our ancestors pledged their "lives, fortunes, and sacred honor" to maintain all their rights, including this right, against the demands of Parliament, I agree that they put this right, as they put their lives, at hazard; but, fortunately for us, the war did not turn out a conquest of any

of our rights. At the close of the war, the Treaty of 1783 was made. Now, at the time when the Treaty of 1783 was made, Great Britain did not claim to have conquered America, or to have taken from us by military force any of our rights; and the consequence was that in framing the Treaty of 1783, while we altered by common consent some of the boundary lines, none by right of conquest, it was declared that the people of the United States shall "continue to enjoy unmolested the right to take fish of every kind on the British banks, and all other banks of Newfoundland; also in the Gulf of St. Lawrence, and all other places in the sea where the inhabitants of both countries used at any time heretofore to fish." What could be stronger than that? It was an acknowledgment of a continued right possessed long before. And if any question of its construction arose, it appealed to what they had been heretofore accustomed to do; "where the inhabitants of both countries used at any time heretofore to fish."

How was it construed by British statesmen? Is there any doubt about it? I take it my brethren of the Dominion bar will consider Lord Loughborough good authority. He said these words in the House of Lords respecting the fishery clause of the Treaty: "*The fisheries were not conceded, but recognized as a right inherent in the Americans, which, though no longer British subjects, they are to continue to enjoy unmolested.*" The same thing, substantially, was said by Lord North, who had been, we are told now by his biographers, the unwilling, but certainly the subservient instrument, in the hands of his king, for trying to deprive us of this, as well as our other rights. We then did continue to enjoy them, as we had from 1620 down. We had as much right to them as the British Crown, because it was our bow and our spear that helped to conquer them. Then came the war of 1812; and we had enjoyed the fisheries freely, without geographical limit, down to that time. The war of 1812 certainly did not result in the conquest of America, either maritime or upon the land. It was fought out in a manly way between two strong people, without any very decided result; but after the war, in 1814, about the time we were making the treaty of peace at Ghent, that memorable correspondence took place between John Quincy Adams and Earl Bathurst, in which Earl Bathurst took this extraordinary position, that a war terminates all treaties. He took that position without limitation. Mr. Adams said, "Then it

puts an end to our independence." No, was Earl Bathurst's answer, — your independence does not rest upon the treaty. The treaty acknowledged your independence as a fact, and that fact continues. No treaty now can take it from you; no treaty is needed to secure it to you; but so far as it was a treaty, — I mean, so far as any right rested upon it as a treaty gift, or treaty stipulation, — the war put an end to the treaty. Mr. Adams's answer was twofold. First, he denied the position. He took the ground, which statesmen and jurists take to-day, that a war does not, *ipso facto*, terminate a treaty. It depends upon the results of the war; it depends upon the nature of the treaty; it depends upon its language and terms. Each case is *sui generis*. Whether any war — I mean the entering into war, the fact that the two nations are at war — terminates a treaty, depends upon these questions. The treaty is put at hazard, like all other things. The termination of the war may terminate all treaties by a new treaty, or by conquest; but the fact that there is war, which is the only proposition, does not terminate any treaty, necessarily. Then Mr. Adams farther says: Our right does not rest upon the treaty. The treaty of 1783 did not give us this right. We always had it. We continued to enjoy these rights without geographical limitation, and it was conceded that we did so by the Treaty of 1783; and we no more depend upon a treaty gift of 1783 for the right to these fisheries than we depend upon it for the enjoyment of our right to our territory or our independence. Of course the gentlemen of the Commission are familiar with that correspondence, and I will go no farther with it. The whole subject is followed up with a great deal of ability in that remarkable book which has been lying upon the table: I mean John Quincy Adams's book on "*The Fisheries and the Mississippi*," in connection with the Treaty of Ghent, and his reply to Mr. Jonathan Russell.

Well, in 1814 the parties could not agree, and it went on in that way until 1818; and then came a compromise, and nothing but a compromise. The introduction to the Treaty of 1818 says: "Whereas differences have arisen respecting the liberty claimed by the United States and inhabitants thereof to take, dry and cure fish in certain coasts, harbors, creeks and bays of His Majesty's dominions in America, it is agreed between the high contracting parties." It is all based upon "differences," and all

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

I shall say nothing in this discussion about the right to land on shores for the purpose of drying nets and curing fish. That was a very antique idea. It has quite passed out now, fortunately, for these Provinces are becoming well settled, and no right ever existed to land and dry fish where a private right was interfered with. There is no evidence to show that, since 1871, we have exercised that right or cared any thing about it. It was put in the Treaty to follow the language of the old treaties, for whatever it might be worth.

Your Honors will also observe, that until 1830, the mackerel fisheries were unknown. There was no fishery but the cod fishery. The cod fisheries were all the parties had in mind in making the Treaty of 1818; and to this day, as you have observed from some of the witnesses, "fishing," by the common speech of Gloucester fishermen, means, *ex vi termini*, cod fishing. Fishing is one thing, and "mackereling" is another. In Mr. Adams's pamphlet, on the 23d page, he speaks of "fishery" as synonymous with cod fishery. In 1818 the question was of the right of England to exclude. Now, for the first time, the doctrine respecting the three-mile line had begun to show itself in international law. Great Britain availed herself of it, contrary to the doctrine stated by Queen Elizabeth, — a very wise princess, certainly surrounded by very wise counsellors, — availed herself of it to set up a claim to exclude the deep-sea fishermen, though they did not touch the land or disturb the bottom of the sea, for a distance of three miles out. We denied that there was any such right by international law, certainly none by treaty. But England was a powerful nation. She fought us in 1812 and 1814 with one hand, — I acknowledge it, though it may be against the pride of American citizens, — while she was fighting nearly all Europe with the other; but she was now at peace. Both nations felt strong; both nations were taking breath after a hard conflict, and it was determined that there should be an adjustment; and there was an adjustment, and it was this. Great Britain tacitly waived all claim to exclude us from any part of the high seas. She expressly waived all right to exclude us from the coasts of Labrador, from Mount Joly, northward and eastward indefinitely, through those tumbling mountains of ice, where we formerly "pursued our gigantic game." She expressly withheld all claim to exclude us from the Magdalen Islands, and from the southern, western, and northern shores of Newfoundland; and, as to all the rest of the Bay of St. Lawrence and the coasts of Nova Scotia and New Brunswick, we agreed to submit to her claim to exclude us. So that it stood thus: that, under that Treaty, and only under that Treaty, we admitted that Great Britain might exclude us, for a distance of three miles, from fishing in all the rest of her possessions in British North America, except those where it was expressly stipulated she should not attempt to do it. So she had a right to exclude us for a distance of three miles from the shores of

Cape Breton, Prince Edward Island, Nova Scotia, a portion of Newfoundland and New Brunswick, and what has now become the Province of Quebec, while she could not exclude us from the coast of Labrador, the Magdalen Islands, and the rest of Newfoundland. There was the compromise. We got all that was then thought useful, in the times of cod fishing, with the right to dry nets and cure fish wherever private property was not involved. The Treaty of 1818 lasted until 1854, — thirty-six years. So we went on under that compromise, with a portion of our ancient rights secured and another portion suspended, and nothing more.

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

But there were great difficulties attending the exercise of this claim of exclusion — very great difficulties. There always have been, there always must be, and I pray there always shall be such, until there be free fishing as well as free trade in fish. They put upon the stand Capt. Hardinge, of Her Majesty's navy, now or formerly, who had taken an active part in superintending these fisheries and driving off the Americans. We asked him whether the maintenance of this marine police was not expensive. He said that it was expensive in the extreme, that it cost £100,000 — I believe that was the sum named. He did not know the exact amount, but his language was quite strong as to the expensiveness of excluding the Americans from these grounds, of maintaining these cruisers. But it also brought about difficulties between Great Britain and her Provinces. The Provincial authorities, on the 12th of April, 1866, after this time (but they acted throughout with the same purpose and the same spirit), undertook to say that every bay should be a British private bay which was not more than ten miles in width; following no pretence of international law, but the special treaty between Great Britain and France; and afterwards they gave out licenses for a nominal sum, as they said, for the purpose of obtaining a recognition of their right.

They did not care, they said then, how much the Americans fished within the three miles, but they wished them to pay a "nominal sum for a license," as a recognition of the right. Well, the "nominal sum" was fifty cents a ton; but by and by the Colonial Parliament thought that nothing would be a "nominal sum" unless it was a dollar a ton, and at last they considered that the best possible "nominal sum" was two dollars a ton.

But Her Majesty's Government took a very different view of that subject, and wherever there has been an attempt to exclude American fishermen from the three-mile line, there has been a burden of expense on Great Britain, a conflict between the Colonial Department at London and the Provincial authorities here, — Great Britain always taking the side of moderation, and the Provincial Parliaments the side of extreme claim and untiring persecution. Then there was a difficulty in settling the three-mile line. What is three miles? It cannot be measured out, as upon the land. It is not staked out or buoyed out. It depends upon the eye-sight and judgment of interested men, acting under every possible disadvantage. A few of the earlier witnesses called by my learned friends for the Crown undertook to say that there was no difficulty in ascertaining the three-mile line; but I happened to know better, and we called other witnesses, and at last nobody pretended that there was not great difficulty. Why, for a person upon a vessel at sea to determine the distance from shore, every thing depends upon the height of the land he is looking at. If it is very high, it will seem very much nearer than if it is low and sandy. The state of the atmosphere affects it extremely. A mountain side on the shore may appear so near in the forenoon that you feel as if you can almost touch it with your fingers' ends, while in the afternoon it is remote and shadowy, too far altogether for an expedition with an ordinary day's walk to reach it. Now, every honest mariner must admit that there is great difficulty in determining whether a vessel is or is not within three miles of the shore, when she is fishing. But there is, further, another difficulty. "Three miles from the shore," — what shore? When the shore is a straight or curved line, it is not difficult to measure it; but the moment you come to bays, gulfs, and harbors, then what is the shore? The headland question then arose, and the Provincial officials told us, — the Provinces by their acts, and the proper officers by their proclamations, and the officers of their

cutters, steam or sail, told our fishermen upon their quarter-decks, that "the shore" meant a line drawn from headland to headland, and they undertook to draw a line from the North Cape to the East Cape of Prince Edward Island, and to say that "the shore" meant that line; and then they fenced off the Straits of Northumberland; they drew another line from St. George's to the Island of Cape Breton; they drew their headland lines wherever fancy or interest led them. And not only is it true that they drew them at pleasure, but they made a most extreme use of that power. We did not suffer so much from the regular navy, but the Provincial officers, wearing for the first time in their lives shoulder-straps and put in command of a vessel, "dressed in a little brief authority, played such fantastic tricks before high heaven" as might at any moment, but that it was averted by good fortune, have plunged the two countries into war. Why, that conflict between Patillo and Bigelow amused us at the time; but I think your Honors were shocked when you thought that, as Patillo escaped, was pursued, and the shots fired by his pursuers passed through his sail, and tore away part of his mast and entered the hull, if they had shed a drop of American blood, it might be the "multitudinous seas incarnadine" in war. Why, people do not go to war solely for interest, but for honor, and every one felt relieved, drew a freer breath, when he learned that no such fatal result followed. None of us would like to take the risk of having an American vessel beyond the three miles, but supposed to be within it, or actually within it for an innocent purpose, attacked by a British cutter, or attacked because she was within three miles from a headland line, and blood shed in the encounter. Now, Great Britain felt that, and felt it more than the Provinces did, because she had not the same money interest to blind her to the greatness of the peril.

The results of the seizures were very bad. In the case of the *White Fawn*, tried before Judge Hazen of New Brunswick, he says, "This fact has not been accounted for, that so long a time has elapsed from the time of the seizure until the case was brought into court;" so that, although he discharged the ship as innocent, the crew were dispersed, and the voyage was broken up, and yet no answer was made to that pertinent inquiry of his Honor. It was a very common thing to hold vessels seized until it became immaterial to the owners, almost, whether they were finally

released or finally convicted. My learned friend Judge Foster laid before your Honors a Nova Scotia statute of 1836 (I confess I have not read it; I looked for it, but was not able to find it), in which he said there was a provision, that if, in case of capture, an American seaman, fisherman, or master, did not make true answers, he forfeited one hundred pounds; that the onus, the burden of proof, to show that the vessel was not subject to capture was upon the owner, not upon the captor; that before the owner could contest the question with the man who seized his vessel, he must file a bond of sixty pounds for costs; he could bring no suit against his captor until one month's notice, giving the captor an opportunity, as it is said, to obtain evidence, but, as a practical lawyer, I should add, giving him also an opportunity to escape and to conceal his property; finding treble costs in case the American was convicted; and also providing that the simple judicial signature, declaring, *ex parte*, that there was probable cause for the seizure, prevented any action or suit whatever.

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

Nor is that all, by any means. There was a further difficulty. No one could know what would become of us when we got into court. There was a conflict of legal decisions. One vessel might go free, when under the same circumstances another vessel might be condemned. The treaty of 1818 did not allow us to go within three miles of certain shores, except for the purposes of shelter, and getting wood or supplies, and prohibited fishing within the three miles. The Act of the 59th of George III. was the Act

intended to execute that Treaty. That Act provided, that, "if any such foreign vessel is found fishing, or preparing to fish, or to have been fishing, in British waters, within three miles of the coast, such vessel, her tackle, etc., and cargo shall be forfeited." That was the language of the Statute of George III., and of the Dominion statutes. Is it not plain enough, — it seems to me, it has seemed so to all Americans, I think, — that that statute was aimed, as the Treaty was, against fishing within three miles? • But in one Court the learned Judge who presides over it — a man of learning and ability, recognized in America and in the Provinces, therefore giving his decision the greater weight — decided two points against us. We had supposed that the statute meant "for fishing within three miles you will be condemned," and in order that it should not be required that a man should be caught in the very act of drawing up fish (which would be almost impossible), it was explained by saying, "or caught having fished or preparing to fish" — meaning such acts as heaving his vessel to, preparing his lines, throwing them out, and the like. The learned Court decided, first, that buying bait, and buying it on shore, was "preparing to fish," within the meaning of the statute. If an American skipper went into a shop, leaned over the counter, and bargained with a man who had bait to sell on shore, he was "preparing to fish," and, as he certainly was within three miles of the shore, his preparation was made within three miles; and the judge treated it as immaterial whether he intended to violate the provision of the Treaty by fishing within three miles of the shore, so long as he was preparing, within three miles, to fish anywhere in the deep sea, on the Banks of Newfoundland, or in American waters. Then came the decision of the learned Judge of New Brunswick (they were both in 1871), who said that buying bait was not the "preparing to fish" at which the statute was aimed; and further, that it was essential to prove that the fishing intended was to be within three miles of the shore. There was a conflict of decisions, and we did not know where we stood.

Another effect of this restriction was, that it brought down upon the Dominion fishermen the statute of the United States, laying a duty of two dollars a barrel upon every barrel of mackerel, and one dollar a barrel upon every barrel of herring. That statute was, — and I shall presently have the honor to cite the evidence upon that point, that I may not be supposed to rely upon asser-

tion,—that statute was, in substance, prohibitory. The result was, that it killed all the vessel fishing of these Provinces. They had no longer seamen who went to sea in ships. A shore fishery sprung up for the use of the people themselves, and was gradually somewhat extended—I mean, a boat fishery around the shores. But, as I shall cite authorities to show, as I hope that your Honors already believe, that the first effect was to draw away from these Provinces the enterprising and skilled fishermen, who had fished in their vessels and sent their catches to the American market. It drew them away to the American vessels, where they were able, as members of American crews, to take their fish into market free of duty.

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

Now, your Honors will allow me a word, and I hope you will not think it out of place,—it is an interesting subject; I do not think it is quite out of place, and I will not be long upon it,—on the nature of this right which England claimed in 1818, to exclude us from the three miles, by virtue of some supposed principle of international law. I have stated my opinion upon it; but your Honors will be pleased to observe, that on that, as upon the subject of headlands, an essential part of it, without which it can never be put in execution, there is no fixed international law. I have taken pains to study the subject; have examined it carefully since I came here, and I think I have examined most of the authorities. I do not find one who pledges

himself to the three-mile line. It is always "three miles," or "the cannon-shot." Now, "the cannon-shot" is the more scientific mode of propounding the question, because that was the length of the arm of the nation bordering upon the sea, and she could exercise her rights so far as the length of her arm could be extended. That was the cannon-shot, and that, at that time, was about three miles. It is now many more miles. We soon began to find out that it would not do to rest it upon the cannon-shot. It is best to have something certain. But international writers have arrived at no further stage than this: to say that it is "three miles or the cannon-shot." And upon the question, "How is the three-mile line to be determined?" we find every thing utterly afloat and undecided. My purpose in making these remarks is, in part, to show your Honors what a precarious position a State holds which undertakes to set up this right of exclusion, and to put it in execution. The international law makes no attempt to define what is "coast." We know well enough what a straight coast is and what a curved coast is, but the moment the jurists come to bays, harbors, gulfs and seas, they are utterly afloat,—as much so as the seaweed that is swimming up and down the channels. They make no attempt to define it, either by distance or by political or natural geography. They say at once: "It is difficult, where there are seas and bays." Names will not help us. The Bay of Bengal is not national property; it is not the king's chamber: nor is the Bay of Biscay, nor the Gulf of St. Lawrence, nor the Gulf of Mexico. An inlet of the sea may be called a "bay," and it may be two miles wide at its entrance; or it may be called a "bay," and it may take a month's passage in an old-fashioned sailing vessel to sail from one headland to the other. What is to be done about it? If there is to be a three-mile line from the coast, the natural result is, that that three-mile line should follow the bays. The result then would be, that a bay more than six miles wide was an international bay, while one six miles wide, or less, would be a territorial bay. That is the natural result. Well, nations do not seem to have been contented with this. France has made a treaty with England, saying that, as between them, any thing less than ten miles wide shall be a territorial bay.

The difficulties on that subject are inherent, and, to my mind, they are insuperable. England claimed to exclude us from fishing in the Bay of Fundy; and it was left to referees, of whom Mr.

Joshua Bates was umpire, and they decided that the Bay of Fundy was not a territorial bay of Great Britain, but a part of the high seas. This decision was put partly upon its width, but the real ground was, that one of the assumed headlands belonged to the United States, and it was necessary to pass the headland in order to get to one of the ports of the United States. For these special reasons, the Bay of Fundy, whatever its width, was held to be a public and international bay.

Then look at the Bristol Channel. That question came up in the case of *Queen v. Cunningham*, Bell's Cr. Cas. p. 72. A crime was committed by Cunningham in the Bristol Channel, more than three miles from the shore of Glamorganshire on the north side, and more than three miles from Devonshire and Somersetshire on the south side. Cunningham was indicted for a crime committed in Glamorganshire. The place where the vessel lay was high up in the Channel, somewhere about ninety miles from its mouth, and yet not as far up as the river Severn. The question was, whether that was a part of the realm of Great Britain, so that a man could be indicted for a crime committed there. Now, there is a great deal of wisdom in the decision made in that case. The Court say, substantially, that each case is a case *sui generis*. It depends upon its own circumstances. Englishmen and Welshmen had always inhabited both banks of the Bristol Channel. Though more than ten miles in width at its entrance, it still flowed up into the heart of Great Britain; houses, farms, towns, factories, churches, court-houses, jails, every thing on its banks; and it seemed a preposterous idea, and I admit it, that, in time of war, two foreign ships could sail up that Bristol Channel, and fight out their battle to their own content, on the ground that they did not go within three miles of the shore. I think it would have been preposterous to say that a foreign merchantman could have sailed up the centre of that Channel, and defied the fleets and armies of Great Britain, and all her custom-house cutters, on the ground that she was flying the American or the French flag, and the deck was a part of the soil under that flag. It was a question of political geography,—not of natural geography. It was a question of its own circumstances. It was decided to be a part of the realm of Great Britain. I do not know that anybody can object to the decision.

The *Franconia* case, 2 Ex. D. 159, which attracted so much attention a short time ago, did not raise this question, but it is of some

importance for us to remember. In that case there was no question of headlands. It was a straight line of coast, and the vessel was within three miles of it. But what was the ship doing? She was beating her way down the English Channel against the sea and wind; and she made her stretches toward the English shore, coming as near as safety permitted, and then to the French shore. She was in innocent use of both coasts. She was not a trespasser, because she tacked within three miles of the British shore. It was a necessity, so long as that Channel was open to commerce. The question which arose was this: A crime having been committed on board that ship while she was within three miles of the British coast, was it committed within the body of the county? Was it committed within the realm, so that an English sheriff could arrest the man, an English grand jury indict him, an English jury convict him, under English law, he being a foreigner on board a foreign vessel, bound from one foreign port to another, while perhaps the law of his own country was entirely different from that of England? It was extraordinary to see how the common-law lawyers were put to their wits' end to make any thing out of that statement. The more thorough-bred in the common law, the less did the lawyers understand it. It was the more variously trained men upon the bench who understood it better; and at last, by a majority of one, it was most happily decided that the man had not committed an offence within a British county, and he was released. That case turned not on a question of natural geography, nor of political geography. It raised the issue: What is the nature of the authority that a neighboring nation can exercise within the three-mile limit?

This naturally leads to the question: "Does fishing go with the three-mile line?" I have had the honor to say to this tribunal, that there is no decision to that effect, though I admit that there is a great deal of loose language in that direction. I do not raise any question respecting those fish that adhere to the soil, or to the ground under the sea. But on what does that three-mile jurisdiction rest, and what is the nature of it? I suppose we can go no further than this — that it rests upon the necessities of the bordering nation, — the necessity of preserving its own peace and safety, and of executing its own laws. I do not think that there is any other test. Then the question may arise, and does, whether, in the absence of any attempt by statute or treaty to prohibit

a foreign fisherman from following with the line or the seine or net, the free-swimming fish within that belt, his doing so makes him a trespasser by any established law of nations? I am confident it does not. That, may it please the tribunal, is the nature of this three-mile exclusion, for the relinquishment of which Great Britain asks us to make pecuniary compensation. It is one of some importance to her, a cause of constant trouble, and, as I shall show you — as has been shown you already by my predecessors — of very little pecuniary value to England, in sharing it with us, or to us in obtaining our share, but a very dangerous instrument for two nations to play with.

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

This state of things lasted until the Treaty of 1854, commonly called the Reciprocity Treaty. The great feature of that Treaty, the only one we care about now, is, that it put us back into our original condition. It left us in possession of our general right. It made no attempt to exclude us from fishing anywhere within the Gulf of St. Lawrence, and it allowed no geographical limits. And from 1854 to 1866 we continued to enjoy and to use the free fishery, as we had enjoyed and used it from 1620 down to 1818.

But the Treaty of 1854 was terminated, as its provisions permitted, by notice from the United States. And why? Great Britain had obtained from us a general free trade. Large parts of the United States thought that free trade pressed hardly upon them. I have no doubt it was a selfish consideration. I think almost every witness who appeared upon the stand at last had the truthfulness to admit, that when he sustained either duties or exclusion, it was upon the selfish motive of pecuniary benefits to himself, his section, his State, or his country; and if that were the greatest offence that nations or individual politicians committed, I think we might well feel ourselves safe. We had received, in return for this advantage, a concession from Great Britain of our general right to fish, as we always had fished, without geographical exclusion. My learned friend, Judge Foster, read to you (which I had not seen before, and which was very striking) the confidential report of Consul Sherman, of Prince Edward Island, in 1864. I dare say my learned friend, the counsel from that Island, knows him. Now, that is a report of great value, because it was written while the Treaty was in existence, and before notice had been given by our government of the intention to repeal it. It was his confidential advice to his own country as to whether our interests, as he had observed them, were promoted by it; and he said, if the Reciprocity Treaty was considered as a boon to the United States, by securing to us the right to inshore fishing, it had conspicuously failed, and our hopes had not been realized. I think these are his very words. He spoke with the greatest strength to his country, writing from Prince Edward Island, which claims to furnish the most important inshore fishery of any, and declared that, so far as the United States was concerned, the benefit that came from that was illusory, and it was not worth while for us any longer to pay anything for it. And that, as your Honors have seen, and as I shall have the pleasure to present still further by-and-by, was borne out by the general state of feeling in America. The result was, that in 1866 the Reciprocity Treaty was repealed. That repeal revived, as my country admitted, the Treaty of 1818; and we again laid, of course, the duties on the British importation of mackerel and herring. We were remitted to the antiquated and most undesirable position of exclusion; but we remained in that position only five years, from 1863 until 1871, until a new Treaty could be made, and a little while longer, until it could be put into

operation. What was the result of returning to the old system of exclusion? Why, at once the cutters and the ships of war, that were watching these coasts, spread their sails; they stole out of the harbors where they had been lurking; they banked their fires; they lay in wait for the American vessels, and they pursued them from headland to headland, and from bay to bay; sometimes a British officer on the quarter-deck, — and then we were comparatively safe, — but sometimes a new-fledged Provincial, a temporary officer, and then we were any thing but safe. And they seized us and took us, not into court, but they took us into harbor, and they stripped us, and the crew left the vessel, and the cargo was landed; and at their will and pleasure the case at last might come into court. Then, if we were dismissed, we had no costs, if there was probable cause; we could not sue if we had not given a month's notice, and we were helpless. Not only did it revive the expensive and annoying and irritating and dangerous system of revenue-cutters, and marine police, up and down the coast, telegraphing and writing to one another, and burdening the Provinces with the expense of their most respectable and necessary maintenance; but it revived, also, the collisions between the Provinces and the Crown; and when the Provincial Governments undertook to lay down a ten-mile line, and say to the cutters, "Seize any American vessel found within three miles of a line drawn from headland to headland, ten miles apart," such alarm did it cause in Great Britain, that the Secretary of State did not write, but telegraphed instantly to the Provinces, that no such thing could be permitted, and that they could carry it no farther than the six-mile rule. Then attempts were made to sell licenses. Great Britain said: "Do not annoy these Americans; we are doing a very disagreeable thing; we are trying to exclude them from an uncertain three-mile line; we would rather give up all the fish in the ocean than to have any thing to do with it; but you insist upon it; do not annoy those Americans; give them a license, — just for a *nominal* fee." So they charged a nominal fee, as I have said, of fifty cents a ton, which was afterwards raised — they know why, we do not — to a dollar. We paid the fifty-cent fee, and some Americans paid the dollar fee, — and why? They have told you why. Not because they thought the right to fish within three miles was worth that sum, but it was worth that sum to escape the dangers and annoyances which beset them, whether they were in-

nocent or guilty under the law. Then at last the Provinces, as if determined that there should be no peace on that subject until we were driven out of the fisheries, raised it to an impossible sum, — two dollars a ton; and we would not pay it. What led them to raise it? What motive could there have been? They lost by it. Our vessels did not pay it. Why, this was the result, — I do not say it was the motive, — that it left our fishermen unprotected, and brought out their cutters and cruisers, and that whole tribe of harpies that line the coast, like so many wreckmen, ready to seize upon any vessel and take it into port and divide the plunder. It left us a prey to them, and unprotected. It also revived the duties, for we, of course, restored the duty of two dollars a barrel on the mackerel, and one dollar a barrel on the herring. It caused their best fishermen to return into the employment of the United States, and their boat-fishing fell off. That has been stated to your Honors before, but it cannot be too constantly borne in mind. We restored the duties, and that broke up the vessel-fishing of the Provinces; it deprived them of their best men; it caused trouble between the Old Country and the Provinces; it put us all on the trembling edge of possible international conflict. But we went on as well as we could in that state of things, until Great Britain, desirous of relieving herself from that burden, and the United States desiring to be released from those perils, and having also another great question unsettled, that is, the consequences of the captures by the *Alabama*, the two countries met together with High Commissioners, at Washington, in 1871, and then made a great treaty of peace. I call it a “treaty of peace,” because it was a treaty which precluded war, not restored peace after war, but prevented war, upon terms most honorable to both parties; and as one portion of that Treaty, — one that, though not the most important by any means, nor filling so large a place in the public eye as did the Congress at Geneva, yet fills an important place in history, and in its consequences to the people of both countries, — was the determination of this vexed and perpetual question of the rights of fishing in the bays of the north-western Atlantic; and by that Treaty, we went back again to the old condition in which we had been from 1620 down, with the exception of the period between 1818 and 1854, and the period between 1866 and 1871. That restored both sides to the only condition in which there can be peace and security; peace of mind, at least, freedom from apprehension, between the two governments. And

when those terms were made, which were terms of peace, of goodwill to men, of security for the future, and of permanent basis always, and we agreed to free trade mutually in fish and fish-oil, and free rights of fishing, as theretofore almost always held, Great Britain said, "Very well; but there should be paid to us a money compensation." The United States asked none; perhaps it did not think it a fitting thing to do. Great Britain said, "This is all very well; but there should be a compensation in money, because we are informed by the Provinces" — I do not believe that Great Britain cared any thing about it herself — "that it is of more pecuniary value to the Americans to have their right of fishing extended over that region from which they have been lately excluded, than it is to us to have secured to us free right to sell all over the United States the catchings of Her Majesty's subjects, free from any duty that the Americans might possibly put upon us." — "Very well," said the United States; "if that is your view of it, if you really think you ought to have a money compensation, we will agree to submit it to a tribunal." And to this tribunal it is submitted: First, under Article XVIII. of the Treaty of 1871, what is the money value of what the United States obtains under that article? Next, what is the money value of what Great Britain obtains under Articles XXI. and XIX.? Second, Is what the United States obtains under Article XVIII. of more pecuniary value than what Great Britain obtains under her two articles? Because I put out of sight our right to send to this market, and the right of the people of the Provinces to fish off our coasts, as I do not think either of them to be of much consequence. If you shall be of opinion, that there is no difference of value, — and of course that means no *substantial* difference in value, or that the advantage is with Great Britain, — then your deliberations are at an end; but if you shall think there is a substantial difference in value in favor of the United States, then your deliberations must go further, and you must decide what is that value, in money.

I hope, if your Honors are not already persuaded, that you will be before the close of the argument on the part of the United States, and may not be driven from that persuasion by any thing that may occur on the other side, that the United States were quite honest when they made the statement, in 1871, that in asking for the abandonment of the restrictive system in regard to the fisheries, they did not do it so much because of the commercial or

intrinsic value of the fishing within the three-mile line, as for the purpose of removing a cause of irritation; and I hope that the members of this tribunal have already felt that Great Britain, in maintaining that exclusive system, was doing injustice to herself, causing herself expense, loss, and peril; that she was causing irritation and danger to the United States; that it was maintained from a mistaken notion, though a natural one, among the Provinces themselves, and to please the people of the Dominion and of Newfoundland; and that the great value of the removal of the restriction is, that it restores peace, amity, good-will; that it extends the fishing, so that no further question shall arise in courts or out of courts, on quarter-decks or elsewhere, whatever may be the pecuniary value of the mere right of fishing by itself; and that it would be far better if the Treaty of Washington had ended with the signing of the stipulations, except so far as the Geneva Arbitration was concerned, and that this question had not been made a matter of pecuniary controversy; that either a sum of money had been accepted at the time for a perpetual right, as was offered, or that some arrangement had been made between the two countries by which there should be the mutual right of free trade in timber, in coal, and in fish, or something permanent in its character. But that is a bygone, and we are to meet the question as it comes now directly before us. I think my learned friend, Judge Foster, said all that need be said and all that can be said of much value, in taking the position that we are not here to be cast in damages. We are to pay no damages, nor are we to pay for incidental commercial privileges, nor are they to pay for any; but it is a matter of remark, certainly, that when this cause came up, we were met by a most extraordinary array of claims on the opposite side,—sounding in damages altogether, or sounding in purchase of commercial privileges which were not given to us by Article XVIII. of the Treaty. Why, if there was a British subject in Prince Edward Island who remembered that his wife and family had been frightened by some noisy, possibly drunken American fisherman, he was brought here, and testified to it, and he thought that he was to obtain damages. Undoubtedly that was his opinion. If a fisherman in his boat thought that a Yankee schooner “lee-bowed” him, as they call it, he was brought here to testify to it, and that was to be a cause of damage and to be paid for, and ultimately, I suppose, to reach the pockets of those who in their

boats had been "lee-bowed," for that would seem to be poetic justice. Then we had the advantage of being able to buy our bait here, which we had always done, about which no treaty had ever said a word; and they had the great advantage, too, of selling us their bait. They went out fishing for themselves, they brought in the bait, they sold it to us; and when our vessels came down after bait or for frozen herring, they boarded the vessels in their eagerness to be able to sell them; and so great was their need of doing something in that season of the year when those mighty merchants of Newfoundland and those mighty middle-men of Newfoundland, planters, had nothing for them to do, that they made a bargain to furnish us frozen herring and our fishing bait at so much a barrel, went out and got it for us, and brought it on board. Then there was the right of procuring supplies, and of curing and transshipping our fish,—purely commercial rights, not named in any treaty bearing on fisheries.

Those were privileges for which the Americans were also to pay something. I have no doubt that those ideas gained great currency among the people of these Provinces. They supposed it to be so, and hence a great deal of the interest which they took in the subject; hence the millions that were talked about. You might have made their entire claim, of fourteen millions, a point of departure, if you had opened that subject, and made up an award on the right to buy bait, on the right to buy frozen herring, on the right to buy supplies, on the right to trans-ship and to trade, not considering that these are mutual rights, for the benefit of both parties, and as to which it is almost impossible to determine which party gains the most. Then a great deal of anxiety was created through the Provinces, undoubtedly, by the cry that we were ruining their fisheries by the kind of seines that we were using—purse-seines; we were destroying the fish, and the ocean would be uninhabitable by fish, would be a desert of water. We were told that we were poisoning their fish by throwing gurry overboard, and for all that there were to be damages. Now, these inflammatory harangues, made by politicians, or published in the Dominion newspapers, or circulated by those persons who went about through the Dominion obtaining affidavits of witnesses, produced their effect; and the effect was a multitude of witnesses who swore to those things, who evidently came here to swear to them, and took more interest in them, and were better informed upon them, than upon

any of the important questions which were to be determined. When we came to evidence to be relied upon, the evidence of men who kept books, whose interest it was to keep books, and who kept the best possible books, men who had statistics to make up upon authority and responsibility, men whose capital and interest and every thing were invested in the trade, then we brought forward witnesses to whom all persons looking for light upon this question would be likely to resort. And I have no doubt, that as fast as it became known through these Provinces that no damages would be given for "lee-bowling," for poisoning fish, for purse-seines (which it appeared we could not use), nor for the right to buy bait and supplies, and to trans-ship; and that it was to come down to the simple question of, on the one hand, participating with them in the fisheries of this region to the full extent, instead of to a limited extent; and they be relieved from all duties on their fish and fish-oil on the other, with the consequent stimulation of their boat-fishing, and vessel building and fishing, — they all began to look at it in a totally different aspect. I am not able to produce it at this moment, but I will produce before the argument closes, a memorial addressed to the Province of Nova Scotia, requesting them to bring things back to the old condition, that the fishing shall be left in common, — without any idea that free trade was to be granted as an equivalent.

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

After the sound sense and humor of my learned friend, Mr. Trescot, on the subject of the light-houses, I suppose I should be inexcusable if I touched upon them again. I see that the counsel on the other side already feel the humor of the thing, and I suppose they rather regret that the subject was ever opened, because

it shows to what straits they were driven to make up a case against the United States, to balance the overpowering advantage to them derived from the freedom of trade. Why, they come together, the wise men, and they say among themselves, "Free trade is a boon to us in our mackerel and in our herring; it is stimulating our fisheries; it is recalling our sons from afar, and employing them at home in our own industries; it is building up boat-fishing; it is extending the size of our boats, and building up vessel-fishing; the profits on our trade are now all that we have a right to make, with no discount whatever: how can we meet that case of advantage? What can we say they ought to pay us, that shall be any thing like a set-off for what we ourselves have received? The right to fish within three miles? Why, the Americans had the whole Gulf of St. Lawrence, and all its bays; they had all its banks, shoals, ledges, eddies; they had Labrador and the Magdalen Islands; they had the north, west, and south parts of Newfoundland; they had every thing except the three-mile line of the Island, and the western shore of Nova Scotia and New Brunswick. And what do they get? Not the value of the fish; not what the fish sold for in the American market; not the profit which the American dealer made on his fish, — that is the result of his capital, industry and labor. What do the Americans get? The value of the fish as it lies writhing on the deck? No; for that is the result of the capital that sends the ship and fits it out, of the industry and the skill of the fishermen. What do they get? They get only the liberty of trying to catch the fish, which are eluding them with all their skill in the water of the ocean, — the right to follow them occasionally, if they desire to do so, in their big vessels, within the limits of three miles. But it will not do to go to such a tribunal as this with such a case as that. The free-swimming fish in the seas, going we do not know how far off, and showing themselves here to-day and there to-morrow, schooling up on the face of the sea, and then going out of sight in the mud, having no habitat, and being nobody's property, — the right to try to catch them nearer the shore than heretofore, that is not capable of being assessed so as to be of much pecuniary value; we must have something else." So they started the theory of adding to this, compensation that ought to be made for right to buy the bait; for a right to refit; for a right to get supplies; for a right to trade; to unload cargoes of fish at Canso and send them to the United States, and for all the damage

that fishermen might do anywhere by their mode of fishing; for the injury done by throwing overboard the gurry, and for collisions between boats and vessels that might occur in the waters of the Island bend; and, adding those all together, they might make a claim that what they lost in damages, and what they gave to us in facilities of trade, added to what we got by Article XVIII., might make up something to set off against what they knew they were receiving in dollars and cents from us by the remission of duties. They felt that we had on our side a certainty; they had on their side altogether an uncertainty, and a mere speculation; that we remitted from our treasury and put back into their pockets exactly two dollars a barrel on every barrel of mackerel sent into port, and one dollar on every barrel of herring; that was to be computed and estimated; so that the British fisherman, when he landed his fish on the wharf in Boston, landed it on the same terms that the American landed his, while heretofore he had landed it handicapped by two dollars a barrel, which he must first pay. Our charge is substantial; ours can be put into the columns of an account; theirs is speculative and uncertain, and unless it could be backed up with some certainties of damages and of trade, they felt that it fell beneath them.

It will be my duty hereafter to press upon your Honors a little further the consideration of the utterly uncertain estimate that can be put upon the mere franchise or liberty of attempting to catch the free-swimming fish within certain limits of the ocean. Now, first, with your Honors' leave, I will take up the consideration of the money value of the removal of this geographical restriction, for that is what it is. The ancient freedom is restored; the recent and occasional restriction as to three miles is removed, and the colonists say that that has been of pecuniary value to us. Whether it is a loss to them or not is utterly immaterial, in this consideration. They cannot ask you to give them damages for any loss to them. It is only the value to us. It is like a person buying an article in a shop, and a third person appointed to determine what is the value of that article to the purchaser. It is quite immaterial how great a mistake the man may have made in selling it to him, or what damage the want of it may have brought upon his family or himself. If I have bought an umbrella across the counter, and we leave it to a third man to determine the value of the umbrella to me, it is totally immaterial whether the man has sold

the only one he had, and his family have suffered for the want of it. That is a homely illustration, but it is perfectly apt. The question is, What is the value to the citizens of the United States, in money, of the removal of this geographic restriction? Not what damage this may have been to the Provinces, by reason of the Treaty which Her Majesty's Government saw fit to make with us.

What, then, is the money value of the removal of the restriction? On the subject of Newfoundland, — which I desire to treat with great respect, because of the size of the Island and its numerous bays, and because of my respect and affection for the gentleman who represents the semi-sovereignty before this tribunal, — there is an article in the *Revue des Deux Mondes* of November, 1874, on the value of Newfoundland and its fisheries to France, of extreme interest, from which I would like to quote largely. It seems to me to be exhaustive. It gives the whole history and present condition of these fisheries, and among other things, it shows that in attempting to grant us a right there, Great Britain made us overlap very much the rights of the French; and that if we should undertake to carry into effect some of the rights given us by the Treaty of 1871, we might have the Republic, or Monarchy, or Empire, or whatever it may be, on the other side of the water, to settle the question with, as well as this tribunal. I suppose this tribunal is satisfied that we do not catch cod within three miles of Newfoundland; that we do not catch even our bait there, but that we buy it. Finding that we had proved a complete case, that we bought our bait there, the very keen argument was made by the counsel on the other side, that though we bought our bait, we must be held to have caught it. "*Qui facit per alium, facit per se,*" says the counsel; and so, if you buy a thing of a man and he sends a boy out to get it, the boy is your messenger, not his; and you have not bought it of him, but of the person to whom he sends for it! This, again, is a homely illustration, but it is perfectly plain. When a fisherman comes and says, "I will sell my fish at so much a pound," and has not got them, but goes off and catches them, and I pay him that price, I buy the fish of him, do I not? What is it but a mere illusion, a mere deception, a mere fallacy, to say, that because I knew that he had not the fish on hand at the time and is going off to get it, though I agree to buy it of him at a fixed rate, and I am not going to pay him

for his services, but for the fish when delivered, I am fishing through him and not buying of him? It is very hard to argue a perfectly clear case, one that has but one side to it. Nothing but stress of law, or stress of facts, or stress of politics, could possibly have caused so much intelligence to be perverted upon this subject into an attempt to show that we were the catchers of the Newfoundland bait.

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

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

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

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

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

“Q. How about the pollock? A. The pollock is caught more off-shore than in.

“Q. Then the codfish? A. The codfish is caught almost exclusively off-shore, except, as I tell you, in the early spring or late in the fall there is a school of small codfish that strikes within the limits, and the people there catch them more or less.”

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

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

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

“Q. And codfish, we all know, are taken chiefly outside of the limits; it is a deep-sea fishery as a rule? A. Yes.”

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

“Q. What is the fishery at *Grand Manan* and the *Bay of Fundy* generally? A. Codfish, pollock, hake, haddock, and herring.

“Q. Are any of those fisheries entirely off-shore fisheries? A. Codfish is an off-shore fishery. Hake are taken off-shore.”

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

“Q. And your codfish have not been taken within—how far from land? A. From fifteen to twenty-five miles off Seal Island, and in that vicinity.”

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

“Q. Well, cod are often caught in-shore, but would you not say cod was a deep-sea fishery? A. Yes.

“Q. And halibut is the same? A. Yes.”

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

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

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

* Bay Mackerel.....	\$77,995 22
* Shore do.	271,333 54
Codfish, &c.....	702,873 10
	<hr/>
	\$1,052,201 86

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

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

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

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

* Bay mackerel, meaning such as are caught in the Gulf of St. Lawrence; and Shore mackerel, those caught off the coasts of the United States.

“Q. In making this statement, you refer to an experience of twenty-one years?

A. Yes.

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

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

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

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

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

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

The bait of the codfish need not be caught within the three-mile line. That, I think, we have pretty well established. I referred just now to their argument, that we caught whatever we bought, but that I certainly may pass by. We may buy it when we wish it, but we need not have it. Your Honors recollect the testimony of our witnesses from Provincetown, as well as those from Gloucester, who said that they believed it was more for the interest of all concerned that the cod fishery should be carried on with bait kept in ice as long as it can be, and salted bait — with fish, and bait, and liver, and every thing else that can be carried out and kept there, and what birds and fish can be caught on the Banks, — and the vessels stick to their business. The testimony was uniform; there was not one who failed to join in the expression of opinion, that that course was far better for the mercantile purposes of our community, than that our fishermen should run inshore and buy the bait. But if they did go inshore and buy the bait, it would be a question entirely beyond your Honors' consideration. We have a right to buy it where we please, even here, and we certainly need not catch it. Among the curious grounds set forth to swell the English claim against us, to make it meet, if possible, the obvious money claim we had against Great Britain, if it was seen fit to enforce it, — we now put it in only as a set-off, — appears in the testimony that our fishing-vessels, going into Newfoundland, employed the men there to fish, and that it had a very deleterious moral effect upon the habits of the Newfoundland fishermen; that they had been, up to the time the Americans appeared there to buy their bait, an industrious people, in a certain sense; they had fished a certain part of the year under contracts, which it seems they could not get rid of, with a class of

owners who held them in a kind of blissful bondage; but that when the Americans appeared, they led them to break these contracts; sometimes tempted them to fall off from their agreements, and put money into their pockets; they paid them for work; they gave them labor at a time when they ought to have been lying idle,—when it was better for them to lie idle! Oh, it steadied them, improved them, raised their moral tone, to be idle, and tended to preserve those desirable relations that existed between them and the merchants of St. John's! A great deal was said about that; but at last there came upon the stand a witness, whose name, if I recollect, was Macdonnell (page 313 of the British testimony), a British witness. I did not know that he would not be fully as well filled with these feudal opinions as the others had been. He said the people at Fortune Bay were well off. I asked him:—

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

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

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

“Q. That is their market? A. Yes.

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

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

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

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

“Q. They are saving people? A. Yes.

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

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

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

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

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

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

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

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

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

“Q. Have you any doubt that some method like that will be put into immedi-

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

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

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

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

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

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

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

on the various banks, ledges, and shoals that are to be found ; and it is there, as I shall have the honor to point out to the Court more particularly hereafter, that they have always been caught in the largest quantities, and the best of them, by American fishermen.

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

Capt. Maddocks, of Gloucester, on page 135 of the American evidence, testifies as follows : —

“ From my experience, my judgment leads me to think that our vessels would get full as many, if not more, by staying outside of the three-mile range altogether. By going inshore *they may sometimes get a spurt of mackerel*, but they are then liable to go farther, into the harbors, and lose a good deal of time ; whereas, if they would fish farther off they would save a good deal of time. I think that for ten or twenty years back they might have caught, well, somewhere from a tenth to a fifteenth part of the mackerel within the three-mile range. I don't know but they have. I don't think any thing more than a tenth part, certainly.”

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

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

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

Capt. Ezra Turner, of Gloucester, page 226, testifies : —

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

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

The Commissioners will recollect the testimony of Mr. Myrick, an American merchant, who had established himself on Prince Edward Island. The inshore fishery, he said, is not suited to American vessels. Our vessels are large ; they are built at a distance ; they are manned by sixteen or seventeen men ; they cost a great deal ; they require large catches, and dealing with fish in large quantities, they deal at wholesale altogether, and not at

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

We need not catch our mackerel bait, any more than our cod bait, within the three-mile limit. On the contrary, the best mackerel bait in the world is the menhaden, which we bring from New England. All admit that. The British witnesses say they would use it, were it not that it is too costly. They have to buy it from American vessels; and they betake themselves to an inferior kind

of bait when they cannot afford to buy the best bait from us. And another result is that the Americans have shown for many years that what are called the shore mackerel.—that is, those that are caught off the coast of Massachusetts and several other of the New England States, are really better than the Bay mackerel. The evidence of that is the market prices they bring. It is not a matter of opinion. We have not called as witnesses persons who have only tasted them, and might have prejudices or peculiar tastes, but we have shown the market value.

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

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

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

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

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

“ 1869.	194 vessels in Gulf, average catch 100 barrels	. . .	40,546 barrels.
“	151 “ off shore “ “ 222 “	. . .	33,552 “

Mackerel caught by boats and some Eastern vessels		
packed in Gloucester	▲	19,028 barrels.
<hr/>		
Mackerel inspected in Gloucester		93,123 “
<hr/>		
1875. 53 vessels in Gulf, average catch 191 barrels		11,078 barrels.
“ 117 “ Am. shore “ “ 409 “		47,853 “
<hr/>		
		58,921 “

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

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

We have introduced a large number of witnesses from Gloucester, and I think I take nothing to myself in saying that the greater part of them, those who profess to be engaged in the trade or business at all, were men of eminent respectability, and commended themselves to the respect of the tribunal before which they testified. You were struck, no doubt, with the carefulness of their book-keeping, and the philosophical system which they devised, by means of which each man could ascertain whether he was making or losing in different branches of his business; and as the skipper was often part owner, and usually many dealers managed for other persons, it became their duty to ascertain what was the gain or loss of each branch of their business. They brought forward and laid before you their statistics. They surprised a good many, and I know that the counsel on the other side manifested their surprise with some directness; but, may it please the Court, when the matter came to be examined into, it assumed a different aspect. We made the counsel on the other side this offer. We said to them, “ There is time enough, there are weeks, if you wish it, before you are obliged to put in your rebuttal; we will give you all the time you wish; send anybody to Gloucester

you please, to examine the books of any merchants in Gloucester engaged in the 'fishing business, and ascertain for yourselves the state of the bay and shore fishing as it appears there." You say that bay fishing is as profitable as the shore fishing; that it has made a great and wealthy city of Gloucester, and you assume that it is owing to their having had, for the greater part of the time, a right to fish inshore. It would seem to follow from this reasoning, that whenever we lost the right to fish inshore, Gloucester must have receded in its importance, and come up again with the renewal of the privilege of inshore fishing. Nothing of that sort appears, in the slightest degree. "But," they say, "the Bay fishing must be of great importance, because of the prosperity of Gloucester." Now, the people of Gloucester have no disposition to deny their prosperity, but it is of a different kind from what has been represented. Gloucester is a place altogether *sui generis*. I never saw a place like it. I think very few of your Honors failed to form an opinion that it was a place well deserving of study and consideration. There is not a rich idle man, apparently, in the town of Gloucester. The business of Gloucester cannot be carried on, as mercantile business often is, by men who invest their capital in the business, and leave it in the hands of other people to manage. It cannot be carried on as much of the mercantile business of the world is carried on, in a leisurely way, by those who have arrived at something like wealth, who visit their counting-rooms at ten o'clock in the morning, and stay a few hours, then go away to the club, return to their counting-rooms for a short time, and then drive out in the enticing drives in the vicinity, and their day's work is over. It cannot be carried on as my friends in New Bedford used to carry on the whale fishery, where the gentlemen were at their counting-rooms a few months in the year, and when the off season came, they were at Washington, Saratoga, or wherever else they saw fit to go. And yet they were prosperous. No; the Gloucester tradesmen are hard-working men, and they gain their wealth and prosperity on the terms of being hard-working men. The Gloucester merchants, if you see fit to call them so,—they are not particular about their title, but are content to be "fish-dealers,"—are men who go to their counting-rooms early and stay late. If they go up to Boston on business, they take a very early train, breakfast before daylight, and return in season to do a day's work, though

Boston is thirty and more miles distant; and when their vessels come in, they are down upon the wharves, they stand by the large barges, and they cull the mackerel with their own hands; they count them out with their own hands; they turn them with their own hands into the barrels, and cooper them, and scuttle the barrels, and put in the brine and pickle the fish, and roll them into the proper places; and when they have a moment's leisure, they will go to their counting-rooms and carry on their correspondence, by telegraph and otherwise, with all parts of the United States, and learn the value of these mackerel. They are ready to sell them to the buyers, who are another class of persons, or they are ready to keep and sell them in the larger market of Boston. By their patient industry, by their simple hard day's works, they have made Gloucester an important place; but they have not added much to the mackerel fishery of the United States. Gloucester has grown at the expense of every other fishing town in New England. We have laid before your Honors, through Mr. Low, I think it was, or through Mr. Babson, the statistics of the entire falling off of all the fishing towns in New England. Where are Plymouth and Barnstable, where Marblehead, which was known the world over as a fishing town? There are no more fishing vessels there. The people have all gone into the business of making shoes and other domestic manufactures. So with Beverly, so with Manchester, so with Newburyport, and so with the entire State of Maine, with the exception of a very few vessels on the coast. Two or three of the last witnesses gave us a most melancholy account of the entire falling off of fishing in Castine, Bucksport, and all up and down Penobscot bay and river, so that there is hardly any fishing left. When they were fishing towns, people employed their industry in it. Their harbors were enlivened by the coming and going of fishing schooners, and now there is an occasional weekly steamer or an occasional vessel there owned, but doing all its business in Boston and New York. But the fishing business of all the towns of New England, except the cod fishery of Provincetown and of the towns near, has concentrated in Gloucester. It seems to be a law that certain kinds of business, though carried on sparsely at periods, must be eventually concentrated. When they are concentrated, they cannot be profitably carried on anywhere else. The result is, that the mackerel fishery and cod fishery, with the exception of the remote points of

Cape Cod, have concentrated in Gloucester. There is the capital; there is the skill; there are the marine railways; there is that fishing insurance company, which they have devised from their own skill and experience, by which they insure themselves cheaper than any people in the world ever did insure themselves against marine risks; so much so, that merchants of Gloucester have told us that if they had to pay the rates that are paid in stock companies, the fishing business could not be carried on by merchants who own their ships; the difference would be enough to turn the scale. Now it appears to be the fact, — I will not trouble your Honors by going over the testimony to which every Gloucester man swore, — it turns out to be the fact, that the prosperity of Gloucester, while it has additional resources in its granite, and as a sea-bathing place, has been owing mostly to the prudence and sagacity, the frugality and laboriousness, of the men brought up as fishermen, who turn themselves into fish-dealers in middle life, and carry their experience into it; and it is only on those terms that Gloucester has become what it is. An attempt was made at Salem, under the best auspices, to carry on this business, with the best Gloucester fishermen and most experienced men concerned in it, by a joint stock company; but in the matter of deep-sea fishing, “the Everlasting” seems to have “fixed his canon” against its prosperity, except upon the terms of frugality and laboriousness. It never has succeeded otherwise, and scarce on those terms, except it be with the aid of bounties from the governments.

Now, we say that the whole Bay fishing for mackerel is made prosperous simply on those terms; that it is no treaty gift that has created it, but it is the skill and industry of the fishermen, the capital invested by the owners, and the patient, constant labor and skill of the owners in dealing with their fish, after they are thrown upon their hands on the wharf and they have paid their fishermen, that has given to it any value in the market. I do not think it is worth while to speculate upon the question whether fish in the water have any money value. I can conceive that fish in a pond and that fish that cling to the shore, that have a habitat, a domicile, like shell-fish, have an actual value. They are sure to be found. It is nothing more than the application of mechanical means that brings them into your hands. But certainly it is true, that the value of the free-swimming fish of the

ocean, pursued by the deep-sea fishermen, with line or with net, must be rather metaphysical than actual. To pursue them requires an investment of capital; it requires risk and large insurance; it requires skill, and it requires patient labor; and when the fish is landed upon the deck, his value there, which is to be counted in cents rather than in dollars, is the result of all these things combined; and if any man can tell me what proportion of those cents or dollars which that fish is worth on the deck of the vessel is owing to the fact that the fishermen had a right to try for him, I think he will have solved a problem little short of squaring the circle, and his name ought to go down to posterity. No political economist can do it. I will not say that the fish in the deep sea is worth *nothing*; but, at all events, the right to attempt to catch it is but a liberty, and the result depends upon the man.

If there can be no other fishery than the one which you have the privilege of resorting to, then it may be of great value to you to have that privilege. If there be but one moor where he can shoot, the person who is shooting for money, to sell the game that he takes, may be willing to pay a high price for the privilege. But, recollect that the fishing for the free-swimming fish is over the whole ocean. The power of extending it a little nearer shore may be of some value,—I do not say that it is not,—but it strikes my mind as an absurd exaggeration, and as an utter fallacy, to attempt to reason from the market value of the fish there caught, to the money value of the privilege so extended. The fish are worth, I will say, \$12.00 a barrel; but what does that represent, when the American merchants, Hall and Myrick, both tell us that the value on the wharf at Prince Edward Island is about \$3.75 a barrel? Well, suppose the mackerel to be worth \$3.75 a barrel on the wharf in Prince Edward Island, what does that represent? Is that a thing which the United States is to pay Great Britain for? Has Great Britain sold us a barrel of pickled mackerel on the wharf? Has anybody done it? I think not. That represents the result of capital and of many branches of labor. Then, if you ask, “What is the worth to Mr. Hall or Mr. Myrick of the mackerel on the deck of the vessel?” I say, it is next to nothing. The fish will perish if he is not taken care of. Skill is to be used upon him, then; what costs money is to be used upon him, ice and pickle, and he is to be preserved. All this to the end that he may eventually, after a great deal of labor,

skill, and capital, be sent to the market. But, recollect that the vessel from whose deck he was caught cost \$8,000. Recollect, that the men who maintain that crew and feed them, and enable them to clothe themselves and follow that pursuit, are paying out large sums of money. Recollect, that the fisherman who catches the fish has, as the result of many years' labor, which may be called an investment, learned how to catch him; and it is by the combination of all these causes, that at last the fish is landed. Now, in my judgment, it is purely fallacious to attempt to draw any inference from the market value of the fish to the right to extend your pursuit of those animals nearer the coast than before, or to the market value of any right to fish over a certain portion of the ocean, when all other oceans are open to you, and all other fisheries.

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

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

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

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

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

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

On page 468, Professor Baird testifies as follows: —

“Q. Have you any statistics respecting the Lake fishery for the years 1876 and 1877? A. I have only partial statistics for 1877. I published the statistics in

detail in my report for 1872, and I am now having statistics for 1877 collected, and will have them, I suppose, by the end of the season.

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

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

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

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

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

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

Then there are other fresh fish that are taking the place of the salt mackerel. The question is not between British mackerel and American mackerel, but it is between mackerel and every thing else that can be eaten: because, if mackerel rise in market price, and in the cost of catching, people will betake themselves to other articles of food. There is no necessity for their eating mackerel. The mackerel lives in the market only upon the terms that it can be cheaply furnished. This tribunal will recollect that interesting witness, Mr. Ashby, from Noank, Conn.; how enthusiastic he was over the large halibut that he caught; how his eyes gleamed, and his countenance lightened, when he told your Honors the weight of that halibut, the sensation produced in Fulton Market when he brought him there, and the very homely, but really lucid way in which he described the superior manner by which they were able to preserve those fish in ice, and the way they were brought into market; and how the whole horizon was dotted with vessels fishing for halibut, and other fresh fish, with which to supply the great and increasing demand in the New York market. There is also

the testimony of Professor Baird, who speaks of various kinds of fish. It is not worth while to enumerate them all, but he speaks especially of a fish known as "mullet" on the Southern coast. So long as slavery existed, it is undoubtedly true that there was very little enterprise in this direction. It suffered like every thing else but cotton, rice and sugar, staples which could be cultivated easily by slave labor. Almost every other form of agriculture, almost all kinds of maritime labor, ceased. The truth was, the slaves could not be trusted in boats. The boats would be likely to head off from South Carolina or Virginia, and not be seen again. The vessels that went to the ports of the slave States were Northern vessels, owned and manned by Northern people. Southern people could not carry on commerce with their slaves, nor fishing with their slaves. Slavery being now abolished, the fisheries of the Southern States are to be developed. The negro will fish for himself. He will have no motive for running away from his own profits. The result has been that this mullet has come into very considerable importance. Professor Baird has his statistics concerning it, and he has certainly a very strong opinion that that fish is in danger of excluding salted mackerel from the Southern markets (indeed, it is almost excluded now), and that it will work its way up to the Northern markets. Some of the Southern people think very highly of it, as the best kind of fish, think it has not its superior in the ocean; but, supposing that to be local exaggeration and patriotic enthusiasm, yet certainly it is a useful and valuable fish, and the demand for it is rapidly increasing. Professor Baird says, on page 460, that one million barrels of mullet could be furnished annually, from the south shore of Chesapeake Bay to the south end of Florida, if they were called for.

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

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

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

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

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

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

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

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

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

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

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

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

Then the improved methods of preserving fish are astonishing. I think the evidence on that point was principally from Professor Baird, who has described to us the various methods by which fish, as well as bait, may be preserved. He told us that for months,

during the hottest part of the Exhibition season at Philadelphia, during our Centennial year, fish were kept by these improved chemical methods of drying, and methods of freezing, so that after months, the Commissioners ate the fish, and found them very good eating. There was no objection whatever to them, although, of course, they were not quite as good as when they were entirely fresh. So that all science seems to be working in favor of distribution, instead of limitation, of what is valuable for human consumption; and the longer we live, and the more science advances, the less can any one nation say to the fishermen of another, Thus far, and no farther! We turn upon such an attempt at once, and say, "Very well; if you choose to establish your line of exclusion, do it. If you choose to throw all open, do so. We prefer the latter as the generous, the more peaceful and safe method for both parties. If you prefer the former, take the expense of it, take the risk of it, take the ignominy of it! If you give it up, and it costs you any thing to do so, we will pay you what it is worth to us."

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

We did not bring the bankrupt fish dealers from Gloucester, the men who have lost by attempting to carry on these bay fisheries, as we might have done. We did not bring those who had found all fishing unprofitable, and had moved away from Gloucester, and tried their hand upon other kinds of business. We brought, on the other hand, the most prosperous men in Gloucester. We brought those men who had made the most out of the fisheries, the men who had grown richest upon them, and we exhibited their books; and as we could not bring up all the account-books of Gloucester to this tribunal, we besought the other side to go down, or send down a commission, and examine them for themselves. We did not ask them to examine the books of the men who had become insolvent in the business, but the books of those

who had been prosperous in the business; and after that, I certainly think we have a right to say, that we have turned Gloucester inside out before this tribunal, with the result of showing that the bay fishing has gradually and steadily diminished, that the inshore fishery is unprofitable, that the bay fishery has been made a means of support only to the most skilful, and by those laborious and frugal methods which I have before described to this tribunal.

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

SATURDAY, Nov. 10, 1877.

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

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

I have no instructions from my country, gentlemen of the Commission, and no expectation from its Government, that I will attempt to depreciate the value of any thing that we receive. We are not to go away like the buyer in the Scripture, saying, "It is nought; it is nought;" but we have referred to a commission, which will stand neutral and impartial, to determine for us; and no proclamation of opinion, however loud, will have any effect upon that Commission. My country stands ready to pay any thing that this Commission may say it ought to pay, as I have no doubt Great Britain stands content, if you shall be obliged to say,

what we think in our own judgment you should say, that you cannot see in this extension, along the fringes of a great garment, of our right to fish over portions of this region, any thing which equals the money value that the British Dominion and Provinces certainly receive from an obligation on our part to lay no duties whatever upon their importations of fish and fish-oil. But while we are not here to depreciate any thing, it is our duty to see to it that no extravagant demands shall pass unchallenged, to meet evidence with evidence, and argument with argument, fairly, before a tribunal competent and able. We do not mean that our side shall suffer at all from too great depreciation of the evidence and arguments of the counsel for the Crown, as we feel quite sure that the cause of the Crown has suffered from the extravagant demands with which its case has been opened, and the extravagant and promiscuous kind of evidence, of all sorts of damages, losses, and injuries which it saw fit to gather and bring before this tribunal, from the fisherman who thought that his wife had been frightened and his poultry-yard robbed by a few American fishermen out upon a lark, to the Minister of Marine and Fisheries of the Dominion, with his innumerable light-houses and buoys and improved harbors. We are to meet argument with argument, evidence with evidence, upon the single question submitted; and that is, as I have had the honor to state before, "Is there a money value in this extension of our right, or rather this withdrawal of the claim of exclusion, on the part of Great Britain, greater than the value which Great Britain certainly receives from our guaranty that we will lay no duties whatever upon her fish and fish-oil?"

Now, may it please your Excellency, the question is not whether two dollars a barrel on mackerel and one dollar a barrel on herring is prohibitory, because we had a right, before making this Treaty, to lay duties that should be prohibitory, if those were not. If two dollars were not, we could lay as much as we pleased; so that it would be an imperfect consideration of this case, it has been all along an imperfect consideration of this case, to ask the question whether two dollars a barrel is prohibitory, whether two dollars a barrel on mackerel or one dollar a barrel on herring can be overcome by any commercial method or enterprise of the Dominion and the Provinces. The question has been between the right to be secured against laying duties indefinitely, on the part of the United States, on the one hand, and this extension of the right of fishing a

little nearer to the shores, on the other. We could, if we saw fit, make a kind of self-adjusting tariff, that whenever fish rose above a certain price, then the Dominion fish might be admitted, and otherwise not; or we could hold it in our hands, and legislate from day to day as we saw fit. Before leaving this question of the money value of the withdrawal of the claim of exclusion from a portion of this coast by Great Britain, I must take the liberty to repeat to this Court, that I may be sure that it does not escape their fullest attention, that the right to exclude us, independent of the Treaty of 1818, we do not, and never have acknowledged; and by the Treaty of 1818, we arranged it as a compromise on a disputed question. That claim to exclude is contested, difficult of interpretation, expensive, and dangerous. The geographical limit is not easily determined; in respect to bays and harbors, it is entirely undetermined, and apparently must remain so, each case being a case a good deal *sui generis*; and the meaning and extent of the power and authority which goes with that geographical extension beyond the shore, whatever it may be, is all the more uncertain and undetermined. Under the Treaty of 1818, my country certainly did agree that she would not fish nor assert the claim to the right of fishing within three miles of a certain portion of this great bay. Great Britain, by the Treaty of 1871, has withdrawn all claims to exclude us from that portion; and we agreed that if there is any pecuniary value in that beyond the pecuniary value of what we yield, we stand ready to make the requisite compensation. It is extremely difficult, certainly to my mind, and I cannot but think, from conversation and reading, that it must be to others, to determine the pecuniary value of a mere faculty, as we may call it, a faculty according to the Roman law, a liberty, perhaps, of endeavoring to catch the free-swimming fish of the ocean. What is its pecuniary value? How is it to be assessed and determined? Why, it is not to be assessed or determined by the amount of fish actually caught. That may be very small, or may be very large. The market value may be raised or decreased by accident; a war may so cut us off from making use of the privilege, that we should take nothing. It does not follow, therefore, that we are to pay nothing. Some cause, some accident, some mistake of judgment, may send a very large fleet here, at a very great expense of men and money; we may make a very large catch, more than we can dispose of, but the pecuniary value of that catch is no test

of the value of the liberty of trying to catch the fish. Then, what is the test? Is the use made a test? Although, at first glance, it might seem that that was scarcely a test, yet I think that, on the whole, in the long run, if you have a sufficient period of time to form a fair judgment, if your judgment is based upon the use made by persons who are acting for their own interests in a large market, then you may form some judgment from the use actually made. This case has been likened by the counsel for the Crown to one where an individual has hired a farm, and on the farm there is a house or dwelling, and he has not used it. Of course he has to pay for it, whether he uses it or not. It is at his disposal; it belongs there; it is fixed there, and he may enter it when he pleases, and it is of no account whether he does use it or does not. But if the question was, whether a certain region of a city and the buildings thereon were of real value or not, and it was brought up as an argument against them, that they were not wholesome and not habitable, certainly the fact that in the market, for a long period of years, purchasers or tenants could not be found, would be a very strong argument against their value.

Now, with reference to these fisheries, what is the value of the mere faculty or liberty of going over these fishing grounds, and throwing overboard our costly bait, and embarking our industry, capital, and skill, in the attempt to catch the fish? We venture to say, that we have had many years of experience, and that there have been long periods of time when those fisheries have been opened to us, and they have been closed for short periods of time; that from 1871 down to the present time we have also had a fair test; and when we show, by undisputed testimony, that the citizens of the United States, during long periods of time, and as a result of long experience, have come to the conclusion that they are not of sufficient value to warrant them, as merchants and as men acting for their own interests, to make much use of them, I submit that we have brought before the tribunal a perfectly fair argument, and a very valuable test; because it is not what one man will do with one house; it is not what one ship-master or one ship-owner may fancy about the inshore or the outshore fisheries; but it is a question of what a large number of men, acting for their own interests, in a very large market, full of competition, will do. If, on inquiring into the state of that market, and the conduct of such men, who cannot be governed by any peculiar and special motive bearing

upon this case, we have produced a fair and influential consideration, we claim that that is entitled to its fair weight. You might well say, perhaps, of a few fishermen of Gloucester, that so deep was their hostility to the British Provinces, that they would be willing to abstain from using these fisheries, just for the purpose of reducing the amount that this tribunal might find itself called upon to adjudge. But, if there should be one such man, so endowed with disinterested malice, I am quite certain that this tribunal will not believe so of the entire fishing community of buyers and sellers, fishermen and merchants, acting for a series of years, in view of their own interests. If, therefore, we have shown, as we certainly have, that the use of this Bay fishery, as an entirety, the whole of it, deep-sea and inshore alike, has steadily diminished in market value, that our ship-owners are withdrawing their vessels from it, that fewer and fewer are sent here every year, and that they have said, man after man, that they do not value the extension of the territorial privilege, where that extension is always inshore, bringing them into more dangerous and less profitable regions, — that being the case, we ask your Honors to consider all this as fair proof of the slight value which is actually put, by business men, acting in their own interests, upon what has been conceded to us.

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

within that little fringe of this great garment, what do you show me at all by which I can estimate its value? And that is the whole of it. Furthermore, if you take, instead of that, the value of the mackerel as it stands upon the wharf at Prince Edward Island, soon after it is caught, \$3.75, that represents, again, the interest on the cost of the ship, and all the outfit and all the labor, and all the skill, and all the risk. Eliminate them, and what have you left? You have nothing left but the right or liberty to do something within certain limits; and that right is one, any attempt to exclude us from which is very dangerous, uncertain, and precarious. I do not know what to liken it to. It certainly is not to be compared at all to a lease, because the lessor furnishes every thing that the lease requires. Now, if in company with this privilege, Great Britain had furnished the fish, so that we should not have to employ vessels, or men, or skill, or labor, or industry, furnished them to us on the wharf at Prince Edward Island, then there might be some analogy between that and a lease. What is it like? Is it like the value of a privilege to practise law? Not quite, because there always will be lawsuits, but it is not sure that there always will be mackerel. Suitors, irritated men, may be meshed within the seine which the privileged lawyer may cast out; but it does not follow that the mackerel can be. On the contrary, they are so shrewd and so sharp that our fishermen tell us that they cannot use a seine within their sight; that they will escape from it. But the lawyer is so confident in the eagerness of the client for a lawsuit, that, instead of concealing himself, and taking him unawares, he advertises himself and has a sign on his place of business. Suppose we were to compare it to the case of a lawyer who had a general license to practise law in all parts of a great city, but not a monopoly; everybody else had the same right; but he was excluded from taking part in cases which should arise in a certain suburb of that city, — not the best, not the richest, not the most business-like, — and which had lawyers of its own, living there, accustomed to the people, who asserted a right to conduct all the lawsuits that might arise in that district. What would it be worth to a lawyer who had the whole city for the field of labor, plenty to do, to have his right extended into that suburb? What would it be worth if that suburb was an indefinable one, not bounded by streets, but by some moral description, about which there would be an eternal dispute, and about which the lawyer

might be in constant trouble with the policeman? What would be its value? Who can tell? Or, a physician or merchant. Suppose a merchant is asked to pay for a license to buy and sell, to keep a retailer's shop; everybody else has the same right that he has, and half the people are doing it without any license; but he is asked to pay for a license. What is it worth to him? Why, not much, at best. But suppose that the license was confined to the right to deal in Newfoundland herring. While everybody else could deal with other fish, his license extended his trade to Newfoundland herring alone. Why, his answer would be, "There are plenty of herring from other places that I can deal with. There is a large catch in the Gulf; there is a large catch on the Labrador shore; and what is it worth to me, with my hands full of business, to be able to extend it a little farther, and include the dealing with this particular kind of fish?"

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

Then, beyond that, I suppose you must make some kind of estimate, for I am not going to argue that the faculty is of no value. I suppose the right to extend our fisheries so far is of some value. I can find no fair test of it. But recollect, Mr. President and gentlemen, as I say again, that it is but a faculty, which would be utterly useless in the hands of some people. Why, it has been found utterly useless in the hands of the inhabitants of this Dominion. What did they do with it before they took to their day

and night boat fishing? What has become of their fishing vessels? Gone! The whole inshore and outshore fishery became of no value to them, until they substituted this boat fishing, which we cannot enter into. Then, having before you this very abstract right or faculty, obliged to disconnect from it every thing except this, — that it is an extension of the field over which we had a right to work, — you can get nothing, I think, upon which you can cast a valuation. Nor is it strictly analogous to a field for labor, because a field for labor is a specific thing. When you buy it, you know what it will produce; and if you sow certain seed, you will get certain results; and then, having deducted the value of your labor, and skill, and industry, and capital, and allowed yourself interest, the residue, if any, is profit. That depends upon the nature of the soil with which you have been dealing. But nothing of that sort can be predicated of the free-swimming fish. They are here to-day and there to-morrow; they have no habitat; they are nobody's property, and nobody can grant them.

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

get rid of a nuisance, of irritation, of dangers of war, of honest mistakes, and opportunities for pretended mistakes,—what we were willing to pay for all that, is no proof of the price at which we set the mere liberty of being there peacefully and in the exercise of a right.

The people of the United States can never look upon this exclusion, under the Treaty of 1818, as any thing more than a voluntary surrender, on their part, for a treaty purpose, over a certain limited region, of what they believed to be their right,—their right by virtue, as I had the honor to say to this tribunal yesterday, of the grants in the charters of Massachusetts and the other New England Provinces, of an unlimited right to fish over all this region,—a right which we won by our own blood and valor, the whole privilege being contested between the French and English, all of which might have become French. I do not think I am going too far in saying, had it not been for the prowess and determination of New England. I reminded your Honors yesterday of instances in which we had contributed to force out the French from this country, to make it British, to make the seas British seas, and the fisheries British fisheries, in trust for the Crown and for ourselves. I may add one case, more interesting and bearing directly upon this Province, and that is, the final expulsion of the French, which was carried out at Grand Pré and its neighborhood; and whatever of reproach may be cast upon those who did it, by the harp of the poet or the pen of the philanthropist, I cannot but remember that that reproach must be borne mainly by my own Massachusetts. For it was Massachusetts troops and Massachusetts ships, under a Massachusetts commander, that forced those people away from their shores. But the historian will not forget that, whatever may have been the right or the wrong of that proceeding, its result was, that it put an end forever to the machinations of the French with the Indians against the peace and the security of this Province and the Province of Cape Breton, and left them and their appurtenances wholly and entirely British.

Your Honors will be glad to know that I am now going to take up the last point of importance in our case; and that is, the value of the free trade which this Treaty has given to all the people of the Provinces. Recollect what that value is. It is true that in 1871, when we made this Treaty, our duties were two dollars a barrel on mackerel and one dollar a barrel on herring; but our

right was to make these duties whatever we pleased, — absolute exclusion, if two dollars and one dollar did not exclude. We had a right to legislate with a simple view to our own interests in that matter ; and neither the Crown nor the Dominion could be heard on the floor of Congress. But we have bound our hands ; we have pledged ourselves that we will put no duties on any of their fish of any kind, fresh or cured, salted or otherwise, or their fish-oil. They may, so long as the Treaty lasts, be imported into any part of the United States without any incumbrance or duty whatever. Now, that the United States is the chief market for the mackerel of these Provinces, I suppose it cannot be necessary for me to refer to any evidence to remind your Honors. We have had before us the merchants who deal most largely in Prince Edward Island, Mr. Hall and Mr. Myrick, and we have had two or three or more merchants of Halifax, who did not come here for the purpose of testifying against their own country, and in favor of the United States ; and from all this evidence it appears conclusively that, with the exception of some inferior mackerel, ill-pressed or ill-cured, and not much the worse for heat, that may be sent to the West Indies to be consumed by slaves, the entire product goes to the United States. There is no market for it in Canada proper ; and the merchants here, the dealers in fish, lie awaiting the telegraphic signal from Boston or New York to send there whatever of best mackerel there is, now that they are free from duty. I therefore think I may safely pass over the testimony introduced to prove that the United States is the great market. Some statistics were prepared to show that a duty of two dollars a barrel was prohibitory. In my view, it is quite immaterial. I cannot see how it is material, because, having the power to lay any duties we pleased, we have agreed to lay none, and the benefit to Great Britain, to these Provinces, and to this Dominion, is the obtaining of a pledge not to put on any duty, high or low, from a people who had the right to exclude the fish utterly, or to make their utter exclusion or their admission dependent upon our sense of our own interests from day to day. Why, until recently, the corn-laws of England were based upon this principle, that they should exclude all foreign *corn*, as it is called in old mother English, all foreign wheat, so long as England could supply the market, and whenever England failed to fully supply the market, then the foreign corn was gradually let in, according as the market price

rose. We might do that ; we might do what we pleased ; but we have tied our hands, and agreed to do nothing.

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

Mr. Isaac C. Hall (page 485) says :—

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

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

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

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

Now, how was it, with this plain fact in view, that the learned counsel for the Crown were able to produce so many witnesses, and to consume so much time, in showing that they did not, after all, lose much by two dollars a barrel duty? Why, my learned friends who have preceded me have exposed that very happily. I fear if I were to say any thing, I should only detract from the force of their argument ; but I think it is fair to say, that it will rest on our minds after we have adjourned and separated as a most extraordinary proceeding, that so many men were found in various parts of the Island, and from some parts of the mainland, who came up here and said that the fact that they paid a duty of two dollars on a barrel of mackerel before they sold it in the

States, which is their only market, did not make any difference to them. They said it did not make *any* difference. They did not say it made little difference, but they said it did not make *any*. Now, if they had said, "We can catch the fish so much cheaper, because this is our home; we can catch them so much cheaper, because we catch them in cheap vessels and with cheap materials, close by where we live, that we can afford to undersell, to some extent, the American fishermen; and therefore the two dollars a barrel is not all to be counted to our debit," that would be intelligible. But these fishermen suddenly, by the magic wand of my learned friend, the Premier of the Island, and my learned friend who represents — I do not know in how high a position — the Province of New Brunswick, were all turned into political economists. "Well, my friend," says the learned counsel for Prince Edward Island, with that enticing smile which would have drawn an affirmative answer from the flintiest heart, — "My dear friend, about this two dollars a barrel duty: does not that affect your profit in selling in Boston?" — "No," says the ready witness. "And why not?" — "Why, *because the consumer pays the duty.*" Then the next witness, under perhaps the sterner — but still equally effective — discipline of the counsel from New Brunswick, has the question put to him, and he says, "No;" and when he is asked how this phenomenon is to be accounted for, he says, too, that "*the consumer pays the duty;*" until, at last, it became almost tedious to hear man after man, having learned by heart this *cantalina*, — "the consumer pays the duty," — perfectly satisfied in their own minds that they had spoken the exact truth, say that it did not make any difference. What school of politicians, what course of public lectures, what course of political speaking, what course of newspaper writing, may have led to that general belief, or at least expectation, of those fishermen who came here as political economists, of course it is not for me to say. But I have observed one thing, that even with my limited knowledge of political economy, and under even my cross-examination, not one of those witnesses could explain what he meant by the phrase, "the consumer pays the duty;" nor could he answer one question that went to test the truth of the maxim. "Suppose the duty had been five dollars a barrel, would it have been true that the consumer paid the duty, and that it would not disturb you at all?" Well, they did not know but that, in that case, it

might be a little different. "But the principle would be the same?" No, they didn't know how that would be. "Will the demand continue, at that price?" That they did not know, but they assumed it would. The truth was, as the Court must have seen, that they were simple, honest men, who had a certain phrase which they had learned by heart, which they used without any evil intent, which they supposed to be true, and which, to their minds, cleared the matter all up. They seemed to think there was a certain law, — they did not know what, — a law of nations, a law of political economy, by which it came to pass, that, whenever they brought a barrel of mackerel to Boston to sell, the purchaser went kindly to the custom-house and paid the duties, and then, having paid the duties, was prepared to deal with the owners of the fish on the same terms as if he had not done so, buy the fish, and pay them just what he would pay an American; and by some law, some inexorable law, the duties were paid by this man; and the duties having been paid by him, the owners might go into the market to sell as low as anybody else. I think the question was not put, but it might have been put to them: "Suppose the duty, instead of being laid by the United States, had been laid by the Provinces. Suppose the Dominion, for some reason or other, had laid a tax of two dollars a barrel on the exportation of fish to the United States," — where would this political economist from Gaspe and from Shediac have been then? Why, certainly he would have had to pay his two dollars a barrel before his fish left the Provinces, and he would have landed in Boston with his barrel of mackerel, so far as the duties went, two dollars behind the American fisherman.

I suppose it to be the case, that the British subject can catch his fish and get them to Boston cheaper than the American can. We have better vessels, we pay higher wages, we must have larger, stronger vessels, to come here and go back, to and fro; we cannot fish in boats; they can catch cheaper; and, therefore, it is true that in fair, open competition, they have an advantage. I give them that credit on this calculation, and I hope your Honors will remember it when you come to consider what they have gained by the right to introduce their fish on free and equal terms with us. They are persons who can catch cheaper and bring cheaper than our own people. However, without reasoning the matter out finely, we must come to this result: that if the American can

supply the market at the rate of twelve dollars a barrel, and make a reasonable profit, and the Canadian can furnish his fish at the rate of eleven dollars and make a reasonable profit, and has two dollars duty to pay, he is one dollar behind, and so on. This is an illustration. It must ordinarily be so. And the only time when it can be otherwise is when the American supply fails, and fish become very scarce. I am sure that when I began the investigation of this case, I should have thought that it was in the main true, that as fish became scarce on the American coast, and from the American fishermen in the Bay everywhere, the British fishermen coming in there could, perhaps, afford to pay the duty and still sell. But such is not the result. The figures have shown it. That has been proved. The difficulty is, that mackerel is not a necessity. It is not British mackerel against American mackerel, but it is British salted mackerel against every eatable thing in nature, that a man will take to rather than pay very high prices. And it is true that fresh fish are more valuable and more desirable than salt fish; that fresh fish are increasing in number; that they are brought into market in quantities, ten, twenty, a hundred per cent. larger than they ever were before, and that the value of the salted mackerel is steadily and uniformly decreasing.

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

to some of us; and they imagined that if they did not have the duty to pay, which they all based their answer upon, of course they would rather go back to free trade and exclusion, for in their minds it amounted to that. They had not the duty to pay, although one was laid; and of course with no duty to pay, they would rather go back to that old state of things, and have the exclusive right to fish within three miles. I think that illusion may be safely predicated of nearly all the witnesses brought upon the opposite side, by the counsel for the Crown.

A good deal of time was taken up on each side in presenting extracts from the speeches of politicians and parliamentarians, and men in Congress, as to what was the real value of free trade in fish, and the real value of the right to fish within three miles. Some extracts were read by the learned counsel for the Crown from speeches made by certain members of the American Congress, who had a point to carry; and some arguments, much stronger, were produced by us from members of the Dominion Government, who also had a point to carry. I do not attach the very highest importance to either of them. I hope I am guilty of no disrespect to the potentates and powers that be in saying that, because I have always observed that men in public life who have points to carry will usually find arguments by which to carry them, and that their position is not very different from that of counsel, not before this tribunal, but counsel in court, strictly speaking, who have a point to maintain, and who have a verdict to get, because, woe to the statesman whose argument results in a majority of negatives, because he and his whole party, under the Dominion system, go out of power. It is not so with us. Our members of Congress speak with less responsibility. They do not represent the government in the House, nor do they represent the opposition in such a sense that they are bound to take charge of the government the moment those in charge fail of retaining public approval. Our politicians, even in Congress, are a kind of "free-swimming fish." They are rather more like a horse in a pasture than like those horses that are carrying the old family coach behind them. They feel more at liberty. When we consider that the Dominion parliamentarians speak under this great responsibility, and meet an opposition face to face, who speak under equal responsibilities, when we consider that fact, and the number of them, and the strength of their declarations, all to the

effect that the Provinces could not survive our duties any longer, and that in giving up to us the right to fish within the three miles, much was not surrendered, I think your Honors, without reading it all over, or comparing these arguments, argument for argument, may say at once that whatever weight is to be attached to them, far more weight is to be attached to the utterances of the British officers than to the few American politicians who may have lifted up their voices on this subject, in their irresponsible way. Moreover, — your Honors cannot have forgotten it, — the fishermen of Provincetown and Gloucester remonstrated against this Treaty of 1871. They remonstrated against it as hostile to their interests. Be it so. They were good judges of their interests. They stated that taking off the duties would make the fish cheap. They thought so; and they did not consider that the right to fish (and they were fishermen, and knew their business) within the three miles was any compensation for that. And the remonstrance was made at the time, and it was earnest. The men went to Washington to enforce it. While men dealing in fish remonstrated against this concession, the officers of the British Crown, who were responsible, and whose constituents were fishermen and fish-owners, along a certain line of the Provinces, were contending earnestly for the Treaty, as beneficial, absolutely, to the Provinces.

Well, it has been said that they knew all the time that there was money to be paid. They knew no such thing. They knew there might or might not be money to be paid, because this tribunal does not sit here to determine only the *quantum* that the United States shall pay, but first and foremost to determine whether any thing shall be paid, and as to that, these officers of the British Crown could not pass any judgment. It certainly has abundantly appeared in this case, that the exportation of fish into the United States, and the value of the fish here, has risen and fallen steadily, and almost uniformly, with the right of free trade, or the obligation to pay the duty. From 1854 to 1866, when there was free trade in fish, and we had the right to fish where we pleased, and they had free trade, and sent their fish to the American markets, immediately their mackerel fishery increased in value. Their boat-fishing, instead of being a matter of daily supply for the neighborhood, developed into a large business. The boats were owned by merchants, large quantities were shipped from them, and the

business increased twofold, threefold, tenfold, as one of their own witnesses has stated, stimulated by the free American markets. I am reminded that the witness said it had increased an hundred-fold. Your Honors will perceive my moderation in all things. The witness to whom I refer is the fellow-citizen of our friend the Premier of the Island, Mr. John F. Campion, and I think he recognized him immediately upon his appearance on the stand:—

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

“Q. In quite the same ratio? A. Yes.

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

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

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

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

“Q. What reasons? A. A better class of fishermen. When we first started

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

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

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

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

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

There has been put into my hands what may be called an “account stated” on this subject of the balance between what is gained by the Provinces by the removal of the duties, and what we gain by the extension of our right to fish. The principle on which it is made up is most unfavorable to us. I do not think it is a sound one; but some persons may. At all events, it is the most unfavorable to us: —

GREAT BRITAIN,

To UNITED STATES, Dr.

To saving of duties on fish and fish-oil for 12 years, averaged from the returns of '74, '75, and '76, from Appendix O. . . . \$4,340,700 00

Cr.

By value of mackerel caught within 3 miles of coast for 12 years, at \$3.75 per barrel, allowing one-third to have been taken within 3 miles of the shore, and assuming the catch for each year as equal to that given in the Port Mulgrave returns for 1874 (63,078½ bbls.) \$046,177 50

Balance due United States \$3,394,522 50

We were obliged to take the Port Mulgrave returns for the year 1874, because, as your Honors will recollect, nothing could extract the returns for 1875 and 1876 from the hands of the British counsel. No words of advice, no supplication, no bended knees, — nothing could get from them those returns, so favorable to the United States; and we took the returns of 1874.

But, supposing it to be true that the exporter does not pay all the duties, — of course nobody believes that he pays nothing; but give him the fairest possible chance, supposing he pays one-quarter, and the consumer pays three-quarters; the result then is that against the \$946,177.50 credited to Great Britain, we put one-quarter of the United States duties remitted, \$1,085,175, and it leaves a balance of \$138,997.50 in favor of the United States.

So that, bringing this matter as far as statistics can bring it, getting the value of the fish in Prince Edward Island, irrespective of the labor put upon it afterwards, assuming one-third of the fish to be caught within the three miles, and to be of equal value with those caught outside, which certainly is not true; and supposing that of the duty of two dollars a barrel, only one-quarter is paid by the exporter, still the balance remains in favor of the United States. If, gentlemen of the Commission, such is to be the mode of treating this subject, by taking values, and balancing one against the other, that is the result.

I do not suppose, myself, it is possible to arrive at any satisfactory result by any such close use of statistics, on the other side or on ours. But a few general principles, a few general rules for our guidance, certainly are to be found in all this testimony and in all this reasoning. You have the United States able to put on what duties it pleased. You have its actual duties at two dollars per barrel, substantially prohibitory, which everybody said was prohibitory, except those deeply-instructed political economists who came here with the impression that some good friend paid the duties for them, to enable them to get into market on equal terms with everybody else. That you have with certainty. Against that, you have the most speculative opinion in the world; and that is as to the value to us of a franchise, or a faculty, or a privilege, or a liberty, to pursue the free-swimming fish of the ocean a little farther than we ordinarily pursue him, with every vessel of ours coming into competition with fishermen from boats, who

have every advantage over us, and to ascertain the value of that franchise, privilege, faculty, or whatever you may call it, irrespective of all the capital or industry that must be employed in its exercise.

Will your Honors, before I take my seat, allow me to recapitulate, at the risk of tediousness, so that there may finally be no misapprehension, the points upon which the United States expects a favorable decision from this tribunal? I mean, not merely a decision in favor of peace, which we all hope for, but, technically, I mean a decision of this sort: that, having before you a matter of clear money, and of the absolute right to lay duties without restriction, and a duty always laid of two dollars a barrel, from which the Dominion is now protected, and free admission to a market which is their only market, you cannot find in the value of this faculty or privilege, — taken in its historic view, taken with all its circumstances, its uncertainties, its expenses, the perils of exercising it, and all, — you cannot find in that an amount of money value which equals the money value which the Dominion certainly does receive.

Bringing it down, then, to a very few points, our position is this: We had, from the beginning down to 1818, a right to fish all over this region, without any geographical limitation; we held it as a common heritage with all British subjects; we helped to conquer it, to bring it into the possession of Great Britain; we always regarded it as common. When we had the war of the Revolution, we put that and every thing else at stake. I concede it. The war did not destroy it. War never does. It is not the declaration of war that transfers a city from you to your enemy: it is the result of the war. Every war puts at stake the whole territory. During the war, the boundaries of the two nations are the line of bayonets, and nothing more nor less. But when the war ends, if it is a conquest, the conquered party has no territory to bound; he depends on the will of the conqueror. If there is no conquest, and the treaty is made upon the principle of *uti possidetis*, then the line of bayonets when the war closed is the boundary. If peace is made upon a special arrangement, or on the principle of *in statu quo ante bellum*, then the powers are restored to their old rights. The peace which followed our Revolution was upon the latter principle. There was no conquest, — certainly none by Great Britain over us, — and peace was made

upon the principle *in statu quo ante bellum*, except that we arranged for convenience the boundary line a little different from what it was before the war. Every thing else stood as it stood before, on the principle *in statu quo ante bellum*. And so stood the fisheries, which were just as much our possession, our property, and always had been, as any thing else that we held. We held them under our charters, and we held them by right to the last, and the treaty was careful to say so, as pointed out by Lord Loughborough in the House of Lords, and by Lord North in the House of Commons, who was the instrument in the hands of the King in bringing about the unhappy war (no one, I think, considers it was "unhappy" now, on either side). They said, — This treaty does not *concede* the right to the Americans to fish within three miles; it *acknowledges* it as an existing right, as one that they always had, and it makes the usage to fish by the Americans the final proof in all disputed questions of geography, political or natural. And so it rested down to 1818. When the Treaty of Ghent was made, in December, 1814, at the close of our war, the parties came together. The Americans utterly refused to hear a word calling in question their right in common to the fisheries, or of geographical limits. Mr. Adams had his famous controversy with Earl Bathurst, in which that question was so fully argued, summarized in one portion of Mr. Wheaton's work on international law, which has been the study of statesmen ever since, and still more fully, perhaps, in Mr. Adams's book, which has been alluded to.

But in 1818, when Great Britain was at peace with all the world, and when the two nations stood face to face over this subject, Great Britain claiming largely, we did not know what, fifty miles, sixty miles, unlimited King's Chambers, when vessels were arrested sixty miles from the shore, on the ground that they were in the King's Chambers, when they claimed that the Gulf of St. Lawrence was the King's Chamber, where we had no right to fish, when the three-mile line was a new thing in international law, when each nation found it could not compel the other, and both were desirous of peace, both had seen enough of fighting to desire that there should be no more fighting between brethren, that they should not shed brothers' blood over any contestation in a mere matter of money or interest, and not so much a matter of honor, of sentiment, as it might have been at any moment, if any

blood had been shed, — then the two great powers came to a compromise, and Great Britain agreed, by implication, that she would not assert any claim of exclusion anywhere beyond the ordinary lines. Not a word was said on that subject. She never surrendered those extreme claims in terms, any more than she abandoned, in terms, the claim to board our ships, and take from them, at the discretion of the commander, any man whom the officer thought spoke the English tongue as an Englishman, and not as an American. The latter claim was never abandoned in terms, although we fought a war upon it; but no one believed it would ever be attempted again to be put in force. But, as to what was specifically done, it was a compromise. Great Britain was not to exclude us from the Magdalen Islands, within the three-mile line, or any geographical limit of the Magdalen Islands, or from Labrador, from Mount Joly northward indefinitely, or from certain large portions of the coast of Newfoundland; and, on the other hand, we agreed that England might exclude us, — it was a treaty agreement, — during the continuance of the treaty, from the rest of the Gulf of St. Lawrence, within three miles of the shore. Unquestionably, as the letters of Mr. Gallatin and Mr. Rush, who made the treaty, show, we thought we had gained all that was of value at that time. It was not until about the year 1830 that this great change in the fisheries themselves came in; when they ceased to be exclusively cod fisheries, and became mainly mackerel fisheries. Then the importance of landing upon the shores to dry our nets and cure our fish was reduced to nothing. I mean, practically nothing. We put it in the Treaty of 1871, but it has not been proved that we have made any use of that liberty or power since the Treaty.

The advent of the mackerel — one of those strange mutations which seem to govern those mysterious creatures of the sea, — the advent of the mackerel to this region, and to Massachusetts Bay, put a new countenance upon all this matter. It undoubtedly gave an advantage to the British side, and put us at once to somewhat of a disadvantage. Then came the demand of the islanders, and of the people of the Dominion, and others, to carry into effect this exclusive system, to drive our fishermen off, not only from the three-mile line, as we understand it, but from the three-mile line as any captain of a cruiser chose to understand it. Nobody knew what the three-mile line was. Was it to be drawn from headland

to headland? They so claimed. They made maps, and marked out a line running the whole length of Prince Edward Island, within three miles of which we must not go. They made other lines, so that the Bay of St. Lawrence, instead of being an open bay, an international bay, for the use of all, was cut up into preserves for fish, for the sole use of the inhabitants of the Dominion, by these arbitrary lines, drawn upon no international authority; and we never could know where we were, whether we were liable to seizure or not; and we could not predict what decisions the courts might make against us in case we were seized. It was a dangerous, a most unjust and unhappy state of things, the attempt to carry out the claim of exclusion at all; and nobody felt it more than Great Britain. She felt that it was, as one of the captains of the Royal Navy said upon the stand the other day, immensely expensive to Great Britain to keep up this armament and this watch along the coast by British ships, and more particularly by the small Provincial cruisers. It was perilous to confide to these men, the new-born officers of the Provincial cruisers, the right to decide questions of international law, questions of the construction of the treaty, at their discretion, upon the quarter-deck, with a deep interest to secure what they were in search of, that is, vessels that could be seized. Then there was a guard of police to be maintained along the shore, and information to be conveyed from point to point. The result was irritation, collision, honest difference of opinion; the American fisherman saying, "I am more than three miles from that coast, I know," and the British commander saying, with perhaps equal honesty, "You are less," and neither able to determine it; and the vessel is seized and carried into court, and nobody ever can determine where that vessel was when she was seized. And then we had pretty burdensome duties laid upon us by the Legislatures of these Provinces. The burden of proof was thrown upon every ship to prove that she was not subject to conviction, and she was liable to threefold costs if she failed; she could not litigate the question without bonds for costs, and it seems to have been left to the discretion of the captor when he should bring his captured ship into port, until we hear at last a Judge in one of the Provinces calling for an explanation why it was that an American ship, unjustly seized and discharged by him, had not been brought before him for months, until the voyage was destroyed, the men scattered, the cargo ruined, and the vessel

greatly deteriorated; and no answer was given, nor did their majesties, the commanders of the cutters, think it necessary to give any, and I do not suppose it was. The whole subject became a matter of most serious diplomatic correspondence, and, as I had the honor to suggest (and it was too painful a suggestion to repeat), a very little change in the line of a shot might have brought these two nations into war; because, when passion is roused, when pride is hurt, when sympathies are excited, it is hard to keep peace between even the best governments and most highly educated peoples. They feel the point of honor, they feel the sentiment, that the flag has been insulted, that blood has been shed. The whole subject became too perilous to allow it to stand any longer. Great Britain was also led into difficulties with her Provinces, by reason of their efforts to make the most of their three-mile exclusion, to which she was utterly indifferent. The Provinces saw fit to make their lines as they pleased; and when they could not bring their great capes or headlands of the bays near enough together to exclude us, then they increased the line of separation, which the law established. If "the mountain would not go to Mahomet, Mahomet must go to the mountain." If the bay persisted in being more than six miles wide, then the Provincials met it by a statute that it would do if it was ten miles wide; and they were telegraphed instantly from England, "That will not do; you must not treat the American people in that way. Go back to your six-mile line," and they obeyed at once. Then they attempted to reconcile the whole matter by the aid of a suggestion from Great Britain to give us licenses to fish within the three miles, upon a nominal rent. "They have always fished there," she said. "We cannot have peace unless they do. We have tried to exclude them, and it is in vain. We must give up this exclusion; but we do not want to give it up and surrender it for nothing. We do not care for their money, but let them pay us a nominal license fee as a recognition of our right to exclude." Very well; they put the fee at fifty cents a ton, and many Americans paid it; not, they said, because they considered the right to fish farther than they had fished to be worth that amount, but peace was worth it, security was worth it. To escape the claws of the cutters and local police, to avoid the uncertainty of a conflict of judicial opinions, such as I have had the honor to lay

before you, they did pay, to some extent, the charge for the license.

Then, as I have said, in that unaccountable and unaccounted-for manner, the license fee was increased from fifty cents to a dollar a ton, and from a dollar a ton to two dollars a ton, with the certain knowledge that as only a portion had paid the fifty cents, and a much smaller portion had paid the one dollar, probably none would pay the two dollars, and so substantially it turned out. Now, why did they do it? I do not know, as I said before. I charge nothing upon them. I only know the result was, that we could not afford to pay the license. It was no longer what the British Government intended it should be, a license fee of a merely nominal sum, as an acknowledgment of the right; but it put us, unlicensed, entirely in their power. Then they let loose upon us their cutters, and their marine police. Well, the two nations saw it would not do; that the thing must be given up; and we came first to the Treaty of 1854, and for twelve years we had the free scope of all these shores to fish where we liked, and there was peace, and certainly the Dominion people had free trade, and there was a profit to them, and I hope profit to us; and then we terminated that treaty, because we thought it operated unequally against us. We got very little from the extended right to fish, while they got almost every thing from the extended free trade. Then came back the old difficulties again. We returned to our duties, two dollars a barrel on mackerel, and one dollar a barrel on herring; and they returned to their system of exclusion, and their cutters, and their police, and their arrests, and their trials. It became more and more manifest that they could not use their inshore fisheries by their boats to profit, and we could not use them by our vessels to profit; and all things working together, also the great difficulty that lay between us and Great Britain with reference to the *Alabama* cases, led to this great triumph, gentlemen, because, I do not care which party got the best of it at this or that point, it was a triumph of humanity. It was a triumph of the doctrines of peace over the doctrines of war. It was a substitution of a tribunal like this for what is absurdly called the "arbitration of war."

And now, gentlemen, that being the history of the proceedings, we have laid before you, on behalf of the United States, the evidence of what Great Britain has gained in money value by our

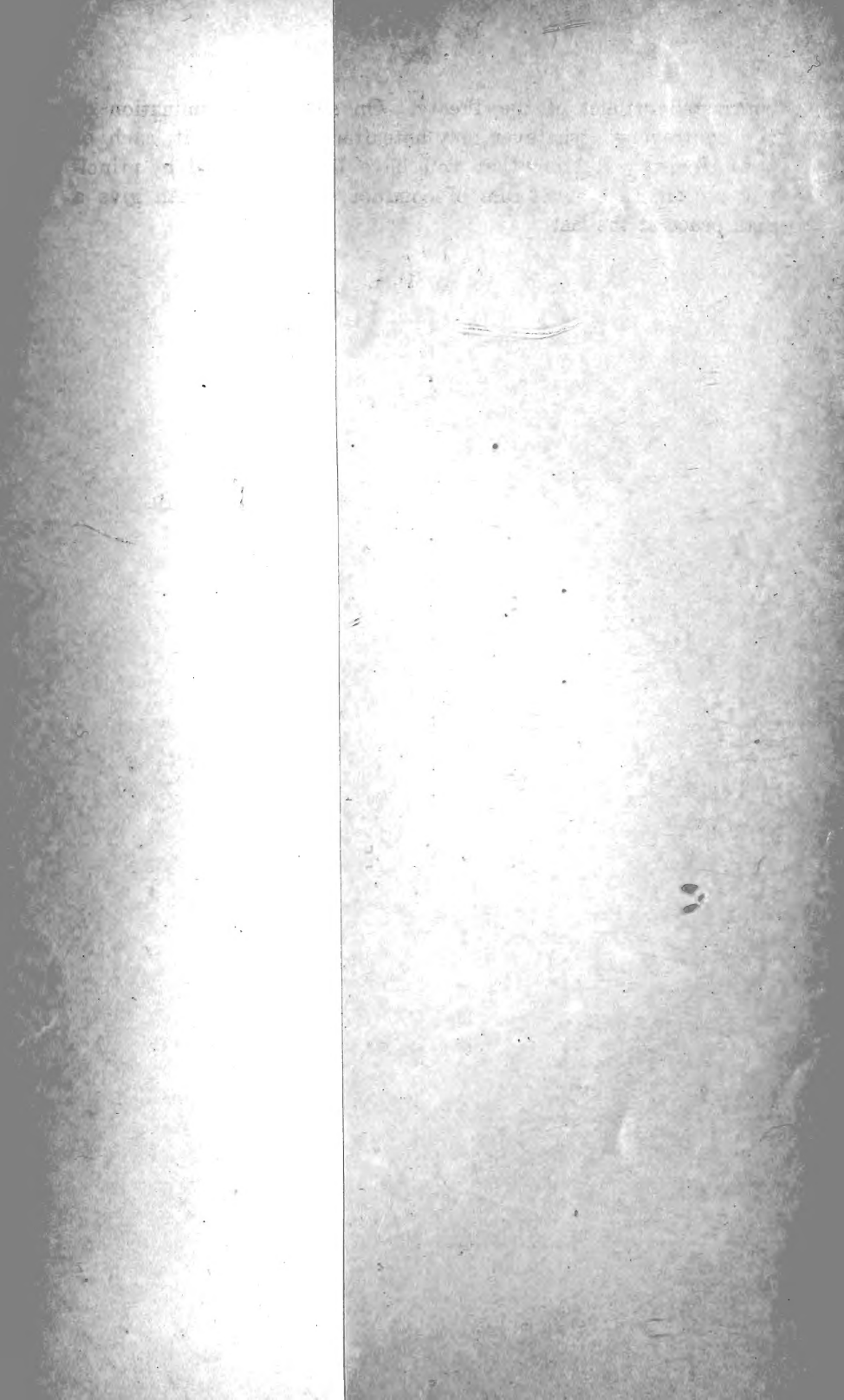
tying our hands from laying any duties whatever ; and she has laid before you the benefits she thinks we have gained by the right to extend our fisheries along certain islands and coasts ; and you are to determine whether the latter exceeds the former. Great Britain, I suppose, stimulated solely by the Dominion, called for a money equivalent, and we have agreed to submit that question ; therefore we have nothing further to say against it. We stand ready to pay it if you find it, and I hope with as little remark, with as little objection, as Great Britain paid the debt which was cast upon her by another tribunal. The opinion of counsel sitting here for seventy days in conducting the trial, and in making an argument on the side of his own country, is extremely liable to be biased ; and I therefore do not think that my opinion upon the subject ought to be laid before this tribunal as evidence, or as possessing any kind of authority. I came here with a belief much more favorable to the English cause, — I mean, as to what amount, if any, Great Britain should receive, — from that with which I leave the case. The state of things that was developed was a surprise to many ; the small value of the extension of the geographical line of fishing to our vessels, — I mean, to vessels such as we have to use, — to the people of the United States, and the certain value that attaches to the Provinces in getting rid of duties, has given this subject an entirely new aspect, and has brought my mind very decidedly to a certain opinion ; and I am not instructed by my government to present any case that I do not believe in, or to ask any thing that we do not think is perfectly right ; and the counsel for the United States are of one opinion, that when we ask this Commission to decide that there is no balance due to Great Britain, in our judgment, whatever that judgment may be worth, it is what justice requires the Commission should do.

I have finished what is my argument within the time which I intended last night ; but, Mr. President and gentlemen, I cannot take leave of this occasion, and within a few days, as I must, of this tribunal, without a word more. We have been fortunate, as I have had the pleasure to say already, in all our circumstances. A vulgar and prejudiced mind might say that the Americans came down into the enemy's camp to try their case. Why, gentlemen, it could not have been tried more free from outside influence in favor of Great Britain, had it been tried in Switzerland or in Ger-

many. This city and all its neighborhood opened their arms, their hearts, to the Americans; and they have not, to our knowledge, uttered a word which could have any effect against the free, and full, and fair decision of our case. We have had the utmost freedom. We have felt the utmost kindness everywhere. The counsel on the other side have met us with a cordiality which has begun friendships that, I trust, will continue to the last. I can say, in respect to my associates in this case (leaving myself out), that America has no cause to complain that her case has not been thoroughly investigated by her agent and counsel, and fully and with great ability presented to the Court; and I am certain that Great Britain and the Dominion, represented here by an agent from the Foreign Office, devoted to the work before him, assisted by the constant presence of a member of the Dominion government, largely acquainted with this whole subject, and with five counsel, one from each Province of the Dominion, all capable, all indefatigable, with knowledge and skill, cannot complain that they have not been fully and ably represented. But, after all, the decision, the result, depends upon you three gentlemen who have undertaken, two of you at the request of your respective countries, and His Excellency at the request of both countries, to decide this question between us.

It has been said, I have heard it, that your decision will be made upon some general notion of what, on the whole, would be best for the interests of the two countries, without much reference to the evidence or to the reasoning. Mr. President and gentlemen, we repudiate any such aspersion upon the character of the Court. We know, and we say it in advance, not that we hope this tribunal will proceed judicially, and decide in accordance with the evidence and the weight of reasoning, but we cannot allow ourselves to doubt it. We may venture to congratulate your Honors and your Excellency in advance, that when this decision shall have gone out, whether it give pleasure or pain to the one side or the other, the question will have been decided upon those principles which it is manifest the Treaty determined it should be decided upon, not from some local or national view of policy for the present or future; not for the sake of what some persons hope may by-and-by result in something better than the present Treaty; but that you will have confined yourselves to exactly what the Treaty asks and empowers you to do, — to determine what is now the pecuniary result of the

contrasted articles of the Treaty. On such a determination of the controversy, whatever may hereafter follow from it, each of your Honors will know that you have been governed by principle, and by that strict rule of conduct which alone can give a man peace at the last.



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