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IN THE

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T. C. MENDENHALL.

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[FROM THE REPORT OF THE COUNCIL OF THE AMERICAN ANTIQUARIAN SOCIETY,
PRESENTED AT THE ANNUAL MEETING HELD IN WORCESTER,
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BY T. C. MENDENHALL.
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Worcester, Mass., U. S. A.
PRESS OF CHARLES HAMILTON.
311 MAIN STREET.
1897.

TWENTY UNSETTLED MILES IN THE NORTHEAST BOUNDARY.

FOR nearly three hundred years, and almost without cessation, there has raged a conflict of jurisdiction over territory lying near to what is known as the Northeast Boundary of the United States. It has been generally assumed, however, that the Webster-Ashburton treaty of 1842, together with the Buchanan-Packenham treaty of 1846, settled all outstanding differences with Great Britain in the matter of boundaries, and few people are aware that there is an important failure in these and earlier treaties, to describe and define *all* of the line which extends from ocean to ocean and fixes the sovereignty of the adjacent territory. From the mouth of the St. Croix River to the ocean outside of West Quoddy Head is a distance of about twenty-one miles, if the most direct route through Lubec Channel be taken. Somewhere, from the middle of the river at its mouth to a point in the ocean about midway between the island of Campobello and Grand Menan, the boundary between Maine and New Brunswick must go, and, inferentially, for about one mile of this distance it is tolerably well fixed. But this is only an inference from the generally accepted principle that where two nations exercise jurisdiction on opposite sides of a narrow channel or stream of water, the boundary line must be found somewhere in that stream. That this has not been a universally accepted principle, however, will appear later. Throughout the remaining twenty miles, the territory under the jurisdiction of the United States is separated from that under the dominion of

Great Britain by a long, irregularly shaped estuary, almost everywhere more than a mile in width and over a large part of its length opening into Passamaquoddy Bay and other extensive arms of the sea. This large body of water, with an average depth of twenty-five fathoms and everywhere navigable for vessels of the largest size, flows with the alternations of the tides, the rise and fall of which is here eighteen to twenty feet, now north, now south, with a current in many places as swift as five and six miles per hour. Nothing like a distinct channel or "thread of stream" exists, and it can in no way be likened to or regarded as a river. When once the mouth of the St. Croix is reached, the boundary line is defined by the treaty of 1783 to be the middle of that river, up to its source, but literally, as well as figuratively, we are at sea as to its location from that point to the open ocean. It is the purpose of this paper to give some account of the circumstances which gave rise to such a curious omission; the incidents which led to a diplomatic correspondence and convention relating to the matter, in 1892, between the two governments interested; and the attempt which was made during the two or three years following the convention to determine and mark the missing boundary.

The present controversy really had its beginning nearly three hundred years ago. Up to the end of the 16th century, not much attention had been given by European colonists to the northeastern coast of America, although it had been visited by Cabot before the beginning of that century. The coast was tolerably well known, however, and it had been explored to some extent by both English and French, who were alive to the importance of the extensive fishing and other interests which it represented. In 1603, the King of France (Henry IV.) made the famous grant to De Monts of all the territory in America between the fortieth and forty-sixth degrees of north latitude, thus furnishing a beautiful example of the

definition of a most uncertain quantity in a most certain and exact manner, an example which later boundary-line makers might wisely have followed. The Atlantic coast-line covered by this extensive charter, extends from a point considerably below Long Island to another point on Cape Breton Island and includes all of Nova Scotia. In the spring of 1604, De Monts sailed for his new domain, to which the name Acadia had been given, carrying with him Champlain as pilot. After landing on the southern coast of what is now known as Nova Scotia, he sailed around Cape Sable to the northward, entered the Bay of Fundy, discovered and named the St. John River, and afterward entered Passamaquoddy Bay, and ascended a large river which came into the bay from the north. A little distance above its mouth, he found a small island, near the middle of the stream, which at that point is nearly a mile and a half wide. As this island appeared easy of defence against the natives, he determined to make a settlement there, and proceeded to the erection of buildings, fortifications, *etc.* A few miles above the island, the river was divided into two branches nearly at right angles to the main stream, and the whole so resembled a cross, that the name "St. Croix" was given to the new settlement, and the same name came, afterward, to be applied to the river. The subsequent unhappy fate of this first attempt to plant the civilization of Europe upon the northern coast of America is so well known that further reference is unnecessary. This most interesting spot is now partly occupied by the United States Government as a lighthouse reservation, about one-third of the island having been purchased for that purpose. The St. Croix River lighthouse, carrying a fixed white and 30-sec. white flash-light of the fifth order, now stands where in 1605 stood the stone house and palisade of the dying Frenchmen, who found in disease a worse enemy than the aborigines. The area of the whole is only a few acres, and it has apparently wasted away a good deal since the French

settlement, relics of which are occasionally found even at this day. The island has borne various names, that first given having long since attached itself to the river. On modern Government charts, it is known as Dochet's Island, derived, doubtless, from Doucet's, one of its early names, but it is, perhaps, more generally known as Neutral Island. The significance of its discovery and settlement as affecting the question in hand, will appear later.

Very shortly after the grant of the French King in 1603, King James of England issued a charter to all of the territory in America extending from the Atlantic to the Pacific Ocean, included between the thirty-fourth and forty-sixth degrees of north latitude, covering and including the previous grant of the French King, and thus setting fairly in motion the game of giving away lands without consideration of the rights or even claims of others, in which the crowned heads of Europe delighted to indulge for a century or more. Colonization was attempted, and now one power, now another, was in the ascendant. Occasional treaties in Europe arrested petty warfare on this side, and out of it all came a general recognition of the St. Croix River as the boundary between the French possessions and those of the English. It is impossible and would be improper to go into these historical details, most of which are so generally known. It is only important to note that the province known as Nova Scotia by the one nation, as Acadia by the other, after various vicissitudes became the property of the English, and that it was assumed to be separated from the province of Massachusetts Bay by the river St. Croix.

While the latter province remained a colony, loyal to the King, and the former a dominion of the Crown, there was naturally no dispute over boundary lines. In the provisional peace treaty of 1782, between the United States and Great Britain, and in the definitive treaty of peace in 1783, it is declared that in order that "all disputes which might arise in future, on the subject of the

boundaries of the said United States may be prevented, it is hereby agreed and declared that the following are and shall be their boundaries," and in this embodiment of peaceful intent is to be found the origin of international controversies which lasted more than a half a century, and which were often provocative of much bitterness on both sides. The phrase in which reference is made to the line under consideration is as follows: "East by a line to be drawn along the middle of the river St. Croix, from its mouth in the Bay of Fundy to its source." During the last days of the Revolutionary War many who had been loyal to the King during its continuance fled from the Colonies to Nova Scotia, and naturally they were not much in favor among those who had risked all in the founding of a new republic. It was believed by them that the loyalists were encroaching on the territory rightfully belonging to the province of Massachusetts, and even before the definitive treaty of peace had been proclaimed, Congress had been appealed to to drive them away from their settlement and claim what was assumed to be the property of the United States of America. There at once developed what proved to be one of the most interesting controversies in the history of boundary lines. It was discovered that although the St. Croix River had long served as a boundary, "between nations and individuals," its actual identity was unknown. The treaty declared that the line of demarcation between the two countries should be "drawn along the middle of the river St. Croix from its mouth in the Bay of Fundy," but it was found that there were several rivers debouching into this bay and that several of them had been, at one time or another, known as the St. Croix. In accordance with time-honored diplomatic practice, the English were for taking the most westerly of all these, and the Americans contended with much vigor and no small amount of justice that it was the most easterly. The St. John, a large river emptying into the Bay of Fundy, had

been so long and so well known that it was out of the question. There remained three considerable streams, which, beginning with that farthest east, were known as the Magaguadavic, or popularly at the present day, the "Magadavy," the Passamaquoddy and the Cobscook, all pouring their waters into the Passamaquoddy Bay.

In the Grenville-Jay Treaty of 1794, the settling of this dispute is provided for in an agreement to appoint three commissioners, one each to be named by the respective governments and the third to be selected and agreed upon by these two, whose duty it was to "decide what river is the river St. Croix intended by the treaty," and to declare the same, with particulars as to the latitude and longitude of its mouth and its source, and the decision of these commissioners was to be final. In a supplementary treaty of 1798, this commission was relieved from the duty of determining latitude and longitude, having, for some reason or other, found difficulties in the same, or, possibly, recognizing the absurdity of defining a boundary in two distinct and independent ways. It was not until 1798 that the commissioners made their report. As is usual, indeed, almost universal in diplomatic affairs, it represented a compromise. There seems to be little doubt that the river which was called St. Croix at the time of the negotiation of the treaty of peace in 1783 was really the most easterly river or the "Magadavy," this being the testimony of the commissioners, Adams, Jay and Franklin. But at the same time it cannot be denied that the stream finally accepted as the St. Croix was the real river of that name, referred to in the traditions and treaties of two centuries, and the discovery of the remains of the French settlement on Dochet's Island quieted all doubt in the matter. England gained a decided advantage by the not-unheard-of proceeding of adhering to the letter of the treaty rather than to its spirit.

But the report of the commission of 1798 fell far short

of terminating the boundary-line controversy. The identity of the St. Croix River was fixed and its mouth and source determined, but from the beginning of the line in the middle of the river there were still twenty miles before the open ocean was reached. Along this stretch of almost land-locked water were numerous islands, several of them large and valuable, and on some of them important settlements had already been made. The Commissioners of 1794 were urged to continue the line to the sea, thus settling the sovereignty of these islands and ending the dispute. They declined to do so, however, on account of a lack of jurisdiction, as they believed, and it was not then thought that these subordinate problems would be difficult of solution. As a matter of fact, Great Britain claimed dominion over all of these islands and exercised authority over most of them, except Moose Island, upon which was the vigorous American town of Eastport. A treaty was actually arranged in 1803 between Lord Hawkesbury and Rufus King in which the question of the extension of the boundary line to the open sea was agreed upon and in a most curious way. It was declared that the boundary line should proceed from the mouth of the St. Croix and through the middle of the channel between Deer Island and Moose Island (which was thus held by the United States) and Campobello Island on the west and south round the eastern part of Campobello to the Bay of Fundy. This would apparently give the island of Campobello to the United States; but it was especially declared that all islands to the north and east of said boundary, *together with the island of Campobello*, should be a part of the Province of New Brunswick. The curious feature of this treaty, providing that an island actually included on the American side of the boundary line should remain in the possession of Great Britain, resulted from a provision of the treaty of 1783, which declared that all islands heretofore under the jurisdiction of Nova Scotia should remain

the property of Great Britain. It is also an admission of the fact that the *natural* extension of the boundary line is around the eastern end of Campobello, as described above; and while this treaty was never ratified, it is of great significance as proving the admission on the part of the English, that the natural boundary would include the island of Campobello in American territory.

During the war of 1812 matters remained in *statu quo*, and Moose Island (Eastport) continued to be regarded as American, although Great Britain had yielded nothing of her claims. Finally, just as peace had been declared, an armed English force appeared before the town and compelled its surrender. This was undoubtedly to gain that possession, which is nine of the ten points, before the meeting of the Commission at Ghent; and in the discussion which afterward took place, the British Commissioners claimed absolute and complete ownership of Moose Island and others near by. To this the Americans would not yield; but they finally gave way to the extent of allowing continued possession until commissioners, to be appointed under the treaty, could investigate and decide the question. Thus the boundary line was thrown into the hands of another commission, which was again unfortunate in not being clothed with sufficient power to definitely fix it. Indeed, the importance and desirability of considering the extension of the boundary line to the sea does not seem to have been realized, the commissioners being restricted in their duties to the determination of the sovereignty of the several islands in Passamaquoddy Bay. The report of this commission was made in November, 1817. As this decision has a most important bearing on the matter under consideration, it will be well to quote its exact language. The Commissioners agreed "that Moose Island, Dudley Island and Frederick Island, in the Bay of Passamaquoddy, which is part of the Bay of Fundy, do and each of them does belong to the United States of America; and we have also decided, and

do decide, that all other islands and each and every one of them, in the said Bay of Passamaquoddy, which is a part of the Bay of Fundy, and the Island of Grand Menan in the said Bay of Fundy, do belong to his said Britannic Majesty, in conformity with the true intent of said second article of said treaty of one thousand seven hundred and eighty-three." A very superficial examination of this decision reveals the possibility of a decided advantage to Great Britain in consequence of its wording, an advantage doubtless foreseen and foresought by the more shrewd and accomplished diplomatists by whom that nation was represented in this instance, as in almost every other controversy with this country. Here is a group of scores of islands, lying in an inland sea, separating the two countries. It is true that the sovereignty of one or two of the most important is apparently determined by the treaty of 1783, but on this the arguments were almost equally strong on both sides. In any event it would have been easy, and infinitely better to have drawn a line through the Bay, from the mouth of the river to the open sea, and to have declared that all islands on one side of that line should belong to Great Britain and all on the other side to the United States. Had this been done, much subsequent dispute would have been avoided. With much ingenuity, however (as it seems to me), the American Commission was induced to accept three islands, definitely named and pointed out, as their share, while the Englishmen, with characteristic modesty, contented themselves with everything left. Of the sovereignty of Moose, Dudley and Frederick Islands, there was hardly room for discussion, notwithstanding the three or four years' occupancy of the town of Eastport by British troops after the War of 1812. Our being worsted in the matter, as we unquestionably were, is to be attributed to the general indifference of the great majority of our people to the future value of outlying territory, the resources of which have not yet been

explored. This unfortunate indifference is quite as general today as it was a century ago, and is in marked contrast with the policy of our English ancestors.

It is important to note that this partition of the islands in Passamaquoddy Bay, unfair as it unquestionably was, gave no definition of the boundary line from the mouth of the St. Croix to the sea, except inferentially. In the absence of description it must be inferred that the boundary is to be drawn so as to leave on one side all territory admitted to be American and on the other all admitted to be British. For a distance of about a half a mile the island of Campobello lies so close to the American shore that a channel, known as Lubec Channel, not more than a thousand feet in width, separates the two countries, and the thread, or deepest axis of this channel might well define the boundary. For the remaining score of miles, however, as has already been explained, the estuary is too wide, its depth too great and too uniform to afford any physical delimitation, except that based on equal division of water areas.

This ill-defined, or rather undefined boundary line has so remained for nearly eighty years. It is true that government chart-makers, both English and American, have often indicated by dotted lines their own ideas as to its whereabouts, but they have not been consistent, even with themselves, except as to making Lubec Channel a part of it, and they have had no authority except that of tradition. There has been no small amount of commercial activity among the settlements on both sides of the Bay, and a considerable proportion of the population have been, at one time or another, engaged in fishing. The customs laws of both countries, and especially the well-established fisheries regulations of the Canadians, and the activity of their fisheries police, have led to various assumptions as to the location of the boundary by one of the interested parties and to more or less tacit admission by the other. It happens that

the greater part of the best fishing-grounds in the immediate vicinity of the town of Eastport is distinctly within Canadian waters, so that most of the trespassing has been done by the Americans. This has resulted in a great development of Canadian police activity, which necessarily implies assumption as to the existence and whereabouts of the boundary. The continued readiness to claim that American fishermen were trespassers, accompanied occasionally by actual arrest and confiscation, naturally led to a gradual pushing of the assumed boundary towards the American side; and there is no doubt that during the past twenty-five years, the people on that side have acquiesced in an interpretation of the original treaty which was decidedly unfavorable to their own interests. On the other hand, from Lubec Channel to the sea, through Quoddy Roads, a condition of things just the reverse of this seems to have existed. Here certain fishing-rights and localities have been stubbornly contended for and successfully held by Americans, although the territory involved, is, to say the least, doubtful. In the matter of importation of dutiable foreign goods into the United States, there existed for many years an easy liberality among the people whose occupation at one time was largely that of smuggling, for which the locality offers so many facilities. It is plain that this condition of things would give rise to no great anxiety about the uncertainty of the boundary line, although in one or two instances the activity (no doubt thought pernicious) of the Customs officers resulted in disputes as to where the jurisdiction of one country ended and that of the other began; and in at least one notable case, to be referred to at some length later, this question was adjudicated upon by the United States courts.

The question was not seriously considered by the two governments, however, from the time of the treaty of Ghent to the year 1892. It is not an uncommon belief that this part of the boundary line was considered in the famous

Webster-Ashburton Treaty of 1842; and many people have unjustly held Webster responsible for the continued possession by Great Britain of the island of Campobello, which, by every rule of physiographic delimitation, ought to belong to the United States. But, as already recited, the sovereignty of this island was settled in 1817, and practically so in the original treaty of 1783. The Webster-Ashburton Treaty was apparently intended to settle the last outstanding differences between Great Britain and the United States in the matter of boundary lines, but disputes relating to them seem difficult to quiet. The treaty of 1842 carried the line only as far as the Rocky Mountains, and another in 1846 was necessary for its extension to the Pacific. Examining both of these in the light of today, there can be no doubt of the fact that the United States was seriously at fault in yielding, as she did, her rightful claims at both ends of the great trans-continental line. Enormous advantages would be hers today, if she had not so yielded; and her only excuse is that at the time of negotiation the territory involved did not seem of material value, at least when compared with her millions of acres then undeveloped.

In all of these controversies nothing was said of the little stretch of undefined boundary in Passamaquoddy Bay, and it is quite probable that those who had to do with such matters were quite unaware of its existence.

On July 16th, 1891, the Canadian cruiser, *Dream*, doing police duty in those waters, seized seven fishing-boats, owned and operated by citizens of the United States, while they were engaged in fishing at a point near what is known as Cochran's Ledge, in Passamaquoddy Bay, nearly opposite the city of Eastport, Maine. It was claimed by Canadian authorities that the crews of these boats were engaged in taking fish in Canadian waters. On the other hand, the owners of the boats seized contended that they were well within the jurisdiction of the United States at

the time of the seizure, and there was much interest in the controversy which followed. The matter was referred to the Department of State, where it became evident that future conflict of authority and jurisdiction could be avoided only by such a marking of the boundary line as would make the division of the waters of the Bay unmistakable.

Accordingly, in Article II. of the Convention between the United States and Great Britain, concluded at Washington, on July 22, 1892, it is agreed that each nation shall appoint a Commissioner, and that the two shall "determine upon a method of more accurately marking the boundary line between the two countries in the waters of Passamaquoddy Bay in front of and adjacent to Eastport in the State of Maine, and to place buoys and fix such other boundary marks as they may deem to be necessary." The phrasing of this Convention furnishes in itself, a most excellent example of how a thing ought not to be done. There is no doubt that a large majority of the boundary-line disputes the world over, are due to the use of faulty descriptions involving hasty and ill-considered phraseology. We are particularly liable to this sort of thing in the United States, by reason of the fact that most of our diplomatic affairs are too often conducted by men of little experience and no training, and who are unaccustomed to close criticism of the possible interpretation of phrases and sentences relating to geographical subjects. A treaty of this kind is usually satisfactory to both parties when entered into, and it is only at a later period, when it must be interpreted, that one or the other of them is likely to find that it is capable of a rendering and an application very different from what had been thought of at the time. Innumerable examples of this looseness of language might be given if necessary, but it is important to call attention to the inherent weakness of the document now under consideration. The first phrase, requiring the commissioners "to determine upon a method of

more accurately marking the boundary line" implies that it was already marked in some unsatisfactory manner, and it implies still further, that such a boundary line exists, neither of which assumptions is correct. As a consequence of this erroneous hypothesis, the description of the part of the line to be marked, namely, that in front of and adjacent to Eastport, is vague and inadequate, and, indeed, there is nowhere a hint of a recognition of the real facts.

Under this convention, Hon. W. F. King, of Ottawa, Canada, was appointed commissioner on the part of Great Britain, and the writer of this paper represented the United States.

The commissioners were immediately confronted with the fact that they were expected to mark a boundary line which really did not exist and never had existed; but by a liberal interpretation of that part of the convention in which it was agreed that they were "to place buoys or fix such other boundary marks as they may determine to be necessary," they found a basis on which to proceed to the consideration of the question. Evidently the just and fair principle according to which the boundary might be drawn, was that which, as far as was practicable, left equal water-areas on both sides. There was no other solution of the problem clearly indicated by the physics of the estuary or the topography of the shores. Furthermore, there is a precedent for adopting this principle, in the treaty of 1846, in which the extension of the boundary from the point of intersection of the forty-ninth parallel of north latitude with the middle of the channel between Vancouver Island and the Continent, to the Pacific Ocean, is along the middle of the Strait of Fuca. This was agreed to by both sides; and also, that the boundary line should consist, in the main, of straight lines, because of the impossibility of marking a curved line on the water, or indicating it clearly by shore signals; that the number of these straight lines should be

as small as possible, consistent with an approximately equal division of the water area. In view of the great desirability of fixing the line for the whole distance, from the mouth of the St. Croix River to West Quoddy Head, the commissioners tentatively agreed to so interpret the words "adjacent to Eastport," as to include the entire twenty miles, thus hoping to definitely settle a controversy of a hundred years' standing. Proceeding on these principles, the whole line was actually laid down on a large scale chart of the region at a meeting of the commission, in Washington, in March, 1893, with the exception of a distance of a little over half a mile, extending north from a point in the middle of Lubec Channel. The omission of this part in the Washington agreement was due to the existence of a small island about a quarter of a mile from the entrance to the channel, now known as "Pope's Folly," but early in the century known as "Green" Island and also as "Mark" Island. The sovereignty of this island has been almost from the beginning a matter of local dispute. It contains barely an acre of ground, and except for possible military uses, it has practically no value. Its location is such, however, as to form a stumbling block in the way of drawing a boundary line, which, if laid down with a reasonable regard to the principles enunciated above, would certainly throw it on the side of the United States, while a line so drawn as to include it in Canadian waters would be unscientific and unnatural. It was agreed to postpone further consideration of this question until the meeting of the commissioners in the field for the purpose of actually establishing the line, which meeting occurred in July, 1893.

Nearly two months were occupied in the surveys necessary to the establishment of the ranges agreed upon and in the erection of the shore signals. It was agreed that the line should be marked by buoys at the turning-points, but as the strong tidal currents which there prevail promised to make it difficult, if not impossible, to hold these in their

places it was determined to mark each straight segment of the boundary by prominent and lasting range-signals so that it could be followed without regard to the buoys, and cross-ranges were also established by means of which the latter could be easily replaced if carried away. Permanent natural objects were in a few instances used as range signals, but for the most part they were stone monuments, conical in form, solidly built, from five feet to fifteen feet in height, and painted white whenever their visibility at long range was thus improved. At the close of the work, first-class can-buoys were placed at the principal turning-points, although with little hope of their remaining in place. As a matter of fact, it was found impossible to keep in place more than three of the six or seven put down, but, fortunately, these are at the most important points in the line. As already stated, the commissioners had failed to agree, in Washington, as to the direction of the line around Pope's Folly Island, and on further investigation of the facts they were not drawn together on this point. As the work in the field progressed, other important differences developed which finally prevented the full accomplishment of the work for which the commission had been appointed. A brief discussion of these differences will properly form a part of this paper.

As to jurisdiction over Pope's Folly Island, the claim of the British Commissioner is, at first blush, the strongest. It rests upon the report of the commissioners appointed under the treaty of Ghent for the partition of the islands in Passamaquoddy Bay. It will be remembered that in this report three, only, of these islands were declared to belong to the United States, and Pope's Folly was not one of them. As all others were to be the property of Great Britain it would seem that the sovereignty of this small island was hers beyond doubt. There is, however, very distinctly, another aspect of the question. In the first place, it is highly probable the Commissioners under

the treaty of Ghent restricted their consideration and action to those islands the domain of which was and had been actually in dispute. The language of the treaty distinctly implies this and the language of the report closely follows that of the treaty. It is true that reference is had to "the several islands in the Bay of Passamaquoddy, which is part of the Bay of Fundy," *etc.*, but it is further said that "said islands are claimed as belonging to His Britannic Majesty, as having been at the time of and previous to the aforesaid treaty of one thousand seven hundred and eighty-three, within the limits of the Province of Nova Scotia"; for by that treaty all of the important islands of the group would have come to the United States, had not exception been made of all then or previously belonging to this province. Obviously, then, the partition commissioners would consider only those for which such a claim could be set up. There is also good reason to believe that the island called Pope's Folly may not have been considered by the commission, on account of its trifling importance. It is a significant fact that there are many other small islands in the bay, some of them much larger and more important than this, of which no mention was made by the commission, yet Great Britain has never claimed or even suggested that they were rightfully British territory. Their sovereignty was probably not even thought of by the commission. In short, a literal interpretation of their report is not admissible and it has never been so claimed. Its phraseology is another example of hasty diplomatic composition, into the acceptance of which the Americans may have been led by their more skilful opponents.

At the time this question was under consideration, the region was sparsely settled, many of the islands having no inhabitants at all; and the whole dispute was thought, at least on our side, to be a matter of comparative little importance. It was natural, therefore, that in selecting those islands which were to belong to the United States,

only the most important would be thought of, it being understood that geographical relationship should determine jurisdiction over many small islands not named and doubtless not thought worthy of enumerating at that time. But if it could be shown that the island was at the time of the treaty of 1783, or had been previously, a dependency of the Province of Nova Scotia, the claim of the British Commissioner would be good. On this point I believe the evidence is entirely with us. It goes to show that so far as there has been any private ownership of the island it has been vested in American citizens. At the time of my investigation, in the summer of 1893, I had the pleasure of a long interview with the owner of this little island, Mr. Winslow Bates, who was born in the year 1808, in which year Pope's Folly was deeded to his father by one Zeba Pope. A copy of this deed I obtained from the records at Machias, but I was unable to find any trace of an earlier proprietor than Mr. Pope. It was deeded to Mr. Bates under the name of "Little Green Island"; but there is evidence that Pope had erected upon it a house and a wharf, the uselessness of which had suggested to his neighbors the name by which it is now known. Bates, the father of my informant, continued in peaceful possession of the island until the British forces came into control at Eastport at the close of the war of 1812. In August, 1814, David Owen, of Campobello, posted a placard proclamation in the town of Eastport, announcing his assertion of ownership of this island. It was hardly posted, however, before it was torn down by an indignant American patriot, probably Elias Bates himself, for it is now in the possession of Mr. Winslow Bates. It shows the holes made by the tacks by which it was originally held and is a curious and valuable relic of those troublesome days in the history of Eastport. Backed by the British army, Owen took forcible possession of the island and removed the buildings to Campobello. The American

owner, Bates, procured a writ for the arrest of Owen, claiming damages to the extent of \$2,000. The writ was never served, as Owen was careful never to come within the jurisdiction of the Court, after the withdrawal of the British troops. After this it was in the continued occupancy of Americans; Bates pastured sheep on it, and Canadians who had attempted to erect a weir at the east end of the island were prevented from doing so by a warning from Winslow Bates, and did not further assert their claim. The island was incorporated into the town of Eastport, and when that town was divided it was included in that part known as Lubec. As long ago as 1823, the sovereignty of the island was adjudicated upon by the American courts, on the occasion of the confiscation near its shore, of "sundry barrels of rum" by alert Customs officers. Judge Ware made an elaborate decision, in which the whole case was admirably presented.¹

His construction of the Report of the Commission was "that it assigns to each party a title according to its possession, as it was held in 1812," and he finds that the island is within the domain of the United States.

If further evidence were necessary, it could be found in the early cartography of this region.

In a map entitled "A Map of Campobello and other Islands in the Province of New Brunswick, the property of Will Owen, Esq., sole surviving grantee, *etc.*, drawn by John Wilkinson, Agt., to Wm. Owen Esq., Campobello, 30th September, 1830," there is drawn a broken straight line extending from the southern end of Deer Island to the eastern point of Lubec Neck, which line is designated "Filius Aquae" which must be interpreted as meaning water line or boundary. Pope's Folly is on the American side of this line. Moreover, it is an historical fact that English and American vessels formerly exchanged cargoes

¹ Ware's Reports, 1823.

on such a line, not far from Eastport, which was assumed to be the boundary line. A British Admiral's chart of that region, dated 1848, shows a dotted line intended to represent the boundary, which runs to the eastward of Pope's Folly. Moreover, the principal ship channel is between the island and Campobello.

In the light of all of this evidence, and more of a similar character, it seems unreasonable to suppose that the Commission under the treaty of 1814 ever intended this island to be included in the general declaration "all other islands shall belong to His Britannic Majesty." According to all recognized geographical principles, to traditional ownership and continued possession, and to early and authoritative maps and charts, it is a part of the State of Maine. To deflect the boundary line so as to bring the island under British control, would distort it to an unreasonable degree, and would result in greatly increased difficulty and confusion in the administration of customs laws and regulations. Against all of this the British Commission could only set up a literal interpretation of the report of the Commissioners under the treaty of Ghent, to which the representative of the United States felt compelled to refuse assent.

Another difference of opinion, almost trivial in magnitude but suggestive in character, arose as soon as the range-marks defining the line as agreed upon in Washington had been actually located on the ground. Nearly opposite the city of Eastport there is rather a sharp change in the direction of this line, amounting to about $57^{\circ} 25'$. It was discovered that there was included in the angle at this point, on the side towards the United States, the better part of a shoal known as Cochran's Ledge, a locality much frequented by fishermen, and, indeed, the very spot on which the American fishermen had been arrested by the Canadian police in 1891. The result of this discovery was that the commissioner representing Canadian interests declared his

unwillingness to agree to the line as laid down at this point, and desired to introduce a new short line cutting off this angle so as to throw the ledge into Canadian waters.

In some measure growing out of this controversy was a third, relating to the line from Lubec Channel to the sea. For about half of this distance the channel now and for many years in use is a dredged channel, created and maintained at the expense of the United States. Through this it was proposed and agreed at Washington to run the boundary line. Previous to the making of this there was a more or less complete and satisfactory natural channel, through which all vessels passed. It was crooked, and was, for the most part, much nearer the Canadian shore than the present channel. It has now largely filled up and disappeared; the principal current having been diverted into the new channel. In running the boundary line through the latter a much more even and, in the judgment of the American Commissioner, a much more just division of the water area was secured, but it was discovered to have the locally serious disadvantage of throwing to the Canadian side certain fishing weirs which had been maintained practically in the same spot for many years and which were mostly owned and operated by American citizens, resident in the town of Lubec. It is true, as suggested in an earlier part of this paper, that their continued occupation had been stoutly resisted by the Canadians, and serious conflict had once or twice arisen. There was, of course, a certain amount of reason in demanding a line following the old channel, which undoubtedly was the only channel, when the original treaty was made. Adherence to the well-founded principle of equal division of water areas, however, was thought to be wiser and more just by the representative of the United States, even if it required the surrender of a few comparatively valueless fishing-privileges, the right to which was of very doubtful

origin. Those who thought they would suffer in this way made strong appeals to the Department of State and a claim for the old channel was afterwards embodied in the propositions made by the United States.

The differences between the Commissioners regarding the three points above referred to were the only differences that were at all serious, and these, it is believed, might have been removed had they enjoyed absolute freedom and full power of adjustment. Thus restricted, the Commissioners could not and did not come to an agreement. At their meeting on December 30th, 1894, the American Commissioner submitted three propositions, to any one of which he was willing to subscribe. The first proposed the entire line as originally laid down in Washington, with an additional section throwing Pope's Folly Island into the United States; the second suggested a literal interpretation of the Convention of July 22nd, 1892, restricting the marking to three lines "in front of and adjacent to Eastport"; the third recommended an agreement on portions of the line, with alternative propositions as to Pope's Folly and Lubec Channel, to be afterwards determined by such methods as the two governments might agree upon. None of these was acceptable to the British Commissioner and in turn he submitted five propositions, none of which was satisfactory to the representative of the United States. They all involved non-action as to Pope's Folly Island, but included action favorable to Canadian interests below Lubec.

At the last meeting, in April, 1895, it was finally agreed to disagree, and the preparation of a joint report, setting forth the principal lines of agreement and disagreement was undertaken. It was at last resolved, however, to report separately, and a full and detailed report of all operations was made by the American Commissioner and submitted to the Department of State.

What was actually accomplished by this joint Commission was the laying out in Washington of a rational



Sketch Map of Passamaquoddy Bay showing proposed Boundary with alternate lines below and above LUBEC.

boundary line, extending over the entire twenty miles of undetermined boundary, and the actual erection on the ground of range-signals and monuments indicating this line. These still remain and, as a matter of fact, are quite generally accepted as authoritative in the immediate vicinity, thus making it every day easier for a future convention to fix definitely the direction of the boundary and thus quiet a dispute which has already continued a century longer than was necessary.

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