

The message of peace and goodwill was received as sincerely and graciously as it was given, and it was no idle compliment of the mayor of Lima, who impressively and truly said in his address of welcome to Mr. Root:

You are an ambassador of peace, a messenger of goodwill, and the herald of doctrines which sustain America's autonomy and strengthen the faith in our future welfare.

The speeches incident to the visit of Secretary Root to South America have been published in a public document, and with the various addresses and responses before him the reader may forecast for himself the probable and far-reaching consequences of the visit of the Secretary of State to the South American republics during the months of July, August and September.

#### THE NEWFOUNDLAND FISHERIES

The fisheries question is as perennial and inexhaustible as the fish which the skippers of Gloucester would fain catch off the shores of Newfoundland. Could the fish be persuaded to haunt our coasts instead of throwing themselves away against the shores and bays of an inhospitable if not wholly unappreciative island; or could our fishermen be forced to read the fable—for it must surely be only a fable—of the fox and the grapes, and then persuaded to follow the wise moral of that tale, or if Newfoundland could be annexed to this country; or finally, if this country could be annexed in some way to or absorbed by Newfoundland, then and not till then can we hope to obtain a fair and satisfactory solution of the fisheries.

The question, difficult enough in itself, is complicated by patriotism and a strong and manly local sentiment which makes New England unwilling to yield a tittle of its just rights. Canada and Newfoundland were won jointly by British and Colonial bravery and devotion; the fisheries were enjoyed in common until the outbreak of the Revolution, and in the treaty of peace of September 3, 1783, by which the mother country recognized the independence of the headstrong if not erring colonies, the fisheries were partitioned as an empire would be divided.

ARTICLE III. It is agreed that the people of the United States shall continue to enjoy unmolested the right to take fish of every kind on the Grand Bank, and on all the other banks of Newfoundland; also in the Gulph of St. Lawrence, and at all other places in the sea where the inhabitants of both countries used at any time heretofore to fish. And also that the inhabitants of the United States shall have liberty to take fish of every kind on such part of the coast of Newfoundland as British fishermen shall use (but not to dry or cure the same on that island) and also on the coasts, bays and creeks of all other of His Britannic Majesty's dominions in America; and that the American fisherman shall have liberty to dry and cure fish in any of the

unsettled bays, harbours and creeks of Nova Scotia, Magdalen Islands, and Labrador, so long as the same shall remain unsettled; but so soon as the same or either of them shall be settled, it shall not be lawful for the said fishermen to dry or cure fish at such settlements, without a previous agreement for that purpose with the inhabitants, proprietors or possessors of the ground.

So matters stood, thanks to the insistence of Adams and Jay, through whose efforts the third article was incorporated into the treaty, until the unfortunate and indecisive war of 1812, by which fishing was interrupted, and was put an end to, by a treaty in which the rights of American fishermen found no place. Henry Clay had been rash enough in a burst of unprophetic enthusiasm to talk of dictating peace from the heights of Halifax, but on sober second thought and after two years of not over-successful war on land, despite some glorious victories on sea, he wisely sheathed the sword he never drew, and signed as negotiator the treaty of Ghent (December 24, 1814): a treaty in which the cause of the war—impressment of American seamen—was not mentioned and which left the fisheries unsettled and unmentioned. New Orleans, then unfought, was a glorious triumph but it did not then nor has it since yielded fish.

It is not meant so suggest that the American negotiators—among whom were the younger Adams, Bayard, Russell and Gallatin in addition to Clay—were unmindful of New England and its peculiar interests: they were unable to force a declaration that the fishing rights continued unaffected by the war and they were equally unwilling to consent to a renunciation of the right. The subject was therefore passed over in silence and left for future negotiation.

It was not to be supposed that the sailors of New England would forego the right of fishing in the waters of Newfoundland, merely because the treaty of Ghent was silent on the subject. The war put an end to the danger and the skipper put to the island as in times past. The Old Englander, however, was as set in his ways as the New Englander, and contended that, as the right to fish was gained by a treaty, it was lost by the termination of the treaty which gave rather than acknowledged the right. Indeed the ink had scarcely dried on the treaty before an incident occurred which drew forth in sharp contrast the opposing and irreconcilable views of the two countries. On the nineteenth day of June, 1815, the British sloop *Jaseur* warned an American fisherman, while still some forty-five miles from Cape Sable, not to come within sixty miles of the coast of Newfoundland. John Quincy Adams, then minister to Great Britain protested that the treaty of peace of 1783

was not, in its general provision, one of those which, by the common understanding and usage of civilized nations, is or can be considered as annulled by a subsequent war between the same parties.

He assimilated the treaty to a delimitation of boundaries which does not lapse by war, as it is intended to and does actually set up a permanent state of things.

To this contention the Colonial Secretary, Lord Bathurst, replied at length, and as the view then expressed has continued to be the definite formulation of British policy in the matter of the fisheries, it is advisable to quote the material portions of this important state paper:

To a position of this novel nature Great Britain cannot accede. She knows of no exception to the rule, that all treaties are put an end to by a subsequent war between the same parties \* \* \* The treaty of 1783, like many others, contained provisions of different characters—some in their own nature irrevocable, and others of a temporary nature. \* \* \* The nature of the liberty to fish within British limits, or to use British territory, is essentially different from the right of independence, in all that may reasonably be supposed to regard its intended duration. \* \* \* In the third article [of the treaty of 1782–83], Great Britain acknowledges the *right* of the United States to take fish on the banks of Newfoundland and other places, from which Great Britain has no right to exclude an independent nation. But they are to have the *liberty* to cure and dry them in certain unsettled places within His Majesty's territory. If these liberties, thus granted, were to be as perpetual and independent as the rights previously recognized, it is difficult to conceive that the plenipotentiaries of the United States would have admitted a variation of language so adapted to produce a different impression; and, above all, that they should have admitted so strange a restriction of a perpetual and indefeasible right as that with which the article concludes, which leaves a right so practical and so beneficial as this is admitted to be, dependent on the will of British subjects, in their character of inhabitants, proprietors, or possessors of the soil, to prohibit its exercise altogether. It is surely obvious that the word *right* is, throughout the treaty, used as applicable to what the United States were to enjoy, in virtue of a recognized independence; and the word *liberty* to what they were to enjoy, as concessions strictly dependent on the treaty itself. (I Moore's International Law Digest, p. 771.)

Fish was, however, a local if not a national necessity, and what could not be got as a right must be got as a favor. Accordingly, the convention of 1818 was negotiated, by which American fishermen were accorded certain privileges and a modified participation in the Newfoundland fisheries in consideration of an express renunciation of the rights claimed and exercised under the treaty of 1783.

As this convention is at once the source and the measure of the present right of fishing within the territorial waters of Newfoundland, it is important to set out in full the provisions of Article I of this convention.

WHEREAS, differences have arisen respecting the liberty claimed by the United States for the inhabitants thereof, to take, dry and cure fish, on certain coasts, bays, harbours and creeks of His Britannic Majesty's dominions in America, it is agreed between the high contracting parties, that the inhabitants of the said United States

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

The various and succeeding agreements have long since been abrogated, namely, the reciprocity treaty of 1854, which was terminated March 17, 1866; the treaty of Washington of May 8, 1871, expired on July 1, 1885, in consequence of notice given by the United States and the fishing rights and privileges acquired under its various clauses came to an end; the elaborate treaty proposed and negotiated in 1888, during Mr. Cleveland's first administration, was not ratified by the Senate. The convention of 1818 is, therefore, in force, and as it was an unsatisfactory compromise in 1818 it is today unsatisfactory. The disputes between American fishermen and Newfoundland authorities are many and frequent, and of such a nature at times to ruffle the good feeling and friendly relations that should exist between English speaking communities.

It will be noted that in the convention of 1818 Americans were permitted to take fish within a marine league of certain specified portions of the coast; and that they were to enjoy the liberty "in common with the subjects of his Britannic majesty." What does the expression "in common" mean? Does it mean that the Americans are to enjoy the same rights of fishing subject to the same local regulations as the subjects of his Britannic majesty? Or does it mean a right to take fish under the treaty and solely according to the regulations prescribed by treaty? If this latter be the meaning, it is evident that the American, gaining

a right by treaty, could only lose the right or have it modified by a treaty to which the United States is a consenting party. If the American fishermen possess the right in common, that is no greater or no less of a right than the Briton, it follows that as the right of the Briton is affected by local statute or regulation, the right of the American can be so varied. If, on the contrary, the right of the American is a treaty right, it can only be modified by diplomatic not by local regulation.

If men and nations were perfect and if national and local jealousy did not exist, the origin of the right would make little or no difference because local regulations would be reasonable and framed solely in the interest of the fishermen and the fish.

If, however, local prejudice should exist, local ordinances could easily impose a regulation which, while seemingly equitable, would bear heavily on the American and discriminate against him. Local fishermen use Newfoundland as a basis; American fishermen cannot so use the island as a basis and must fish many miles from home. By forbidding the sale of bait; by compelling the use of certain kinds of fishing gear, by limiting the seasons arbitrarily within which fishing can be lawfully pursued; by forbidding Sunday fishing, and by preventing the recruiting or transshipment of crews within the three mile limit, or finally by forbidding Newfoundlanders from shipping on a foreign fishing vessel, the local authorities could place the American fishermen at such a disadvantage as materially to affect the profits of the calling.

If, on the other hand, the rights of American fishermen can only be varied by diplomatic agreement, it follows that local ordinance and regulation could only affect British subjects.

Newfoundland has consistently held that the right of fishing "in common" is subject to local regulation, and local legislation has attempted to discriminate against American competition by imposing one and all of the above so-called regulations. The United States adopts the treaty theory, namely, that American rights of fishing can only be controlled, regulated and modified by diplomatic negotiations between the United States and Great Britain.

To suspend the operation of oppressive local legislation, Mr. Root negotiated, on October 8, 1906, the *modus vivendi*, printed elsewhere, which will prevent if possible the occurrence of untoward incidents during the present season. It is to be hoped that a permanent *modus* may be reached by which the rights of American and Briton may be clearly defined and safeguarded in the future. It is not enough that we eat our fish in peace; the fisherman must be permitted to catch the fish with safety to his person and property.